

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: OKLAHOMA TAX COMMISSION, Petitioner V.
CITIZEN BAND POTAWATOMI INDIAN TRIBE
OF OKLAHOMA

CASE NO: 89-1322

PLACE: Washington, D.C.

DATE: January 7, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 OKLAHOMA TAX COMMISSION, :

4 Petitioner :

5 v. : No. 89-1322

6 CITIZEN BAND POTAWATOMI :

7 INDIAN TRIBE OF OKLAHOMA :

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9 Washington, D.C.

10 Monday, January 7, 1991

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:58 a.m.

14 APPEARANCES:

15 DAVID ALLEN MILEY, ESQ., Assistant General Counsel, Oklahoma
16 Tax Commission, Oklahoma City, Oklahoma; on behalf of
17 the Petitioner.

18 EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor General,
19 Department of Justice, Washington, D.C.; on behalf of
20 the United States as amicus curiae.

21 MICHAEL MINNIS, ESQ., Oklahoma City, Oklahoma; on behalf of
22 the Respondent.

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1 against -- on sales to nontribal members.

2 QUESTION: Well, now, you don't assert any right
3 to collect taxes for sale to tribal members, I trust?

4 MR. MILEY: Yes, we do.

5 QUESTION: You assert that you can do that as
6 well?

7 QUESTION: Yes, I believe this case is on --

8 MR. MILEY: And what authority do you cite for
9 that proposition?

10 QUESTION: Well, I think this case is on point
11 with the Mescalero Apache Tribe v. Jones decision of 1973,
12 and there we had an off-reservation business operated by
13 the tribe that was found to be reliable for \$26,000 in gross
14 receipts taxes on its sales and that it -- and that that
15 tribe --

16 QUESTION: Well, if we think that this is on what
17 amounts to Indian land, do you take that position?

18 MR. MILEY: Well, I think the McClanahan case and
19 the Colville case find that the tribal members in those
20 cases were not taxable because they -- the sales occurred
21 on the reservation or, in the McClanahan case, the
22 individual earned her income on the reservation. And
23 because the State taxation would infringe upon the tribe's
24 right to govern itself within that reservation, those taxes
25 were not allowed.

1 Here we don't have a reservation situation, as
2 this Court has found in the Oklahoma Tax Commission v.
3 United States. The situation in Oklahoma is much different.
4 There are no reservations as such as are found in other
5 States. And the facts of this case show that in 1891 there
6 was a sum certain session agreement that this Court held in
7 the DeCoteau case -- found that those -- that -- this
8 specific session agreement which was mentioned in the case
9 did disestablish the reservations that were involved in that
10 agreement.

11 QUESTION: But the land on which this store is
12 located is held in trust by the United States for the tribe,
13 is that correct?

14 MR. MILEY: That is correct. The land -- the
15 particular land in this case was conveyed back to the --
16 from the United States in 1961 and 1964 to the tribe in
17 unrestricted status, in nontrust status, because the Federal
18 Government did not want to maintain any supervision over the
19 land because that would be too much trouble and expense for
20 the Federal Government. So they did not want to maintain
21 the land in any way.

22 In 1976, though, the tribe did want to build some
23 public buildings and a community center, and they wanted to
24 apply for loans. The Federal -- the Economic Development
25 Administration for their protection wanted this land to be

1 held in trust by the United States rather than in the
2 tribe's own name. So in 1975 that land was transferred in
3 trust under Section 501, but that section -- Title 25,
4 Section 501 of the United States code. But that section
5 doesn't set up any reservation status for the land, and it
6 is my position that the -- in order to create a reservation,
7 the Congress or the President of the United States must act
8 to do that, and I don't think that's been done in this case.

9 QUESTION: Well, doesn't our McGowan case say that
10 lands held in trust by the United States for the Indians
11 have much the same status as reservation lands?

12 MR. MILEY: Well, I think the -- there are cases
13 that hold that trust land in the -- for instance in the John
14 decision, the trust land is a -- has reservation status,
15 but I believe in those cases there was a resident tribal
16 population in those cases where the Government was
17 supervising that land.

18 QUESTION: Here there's no resident tribal
19 population?

20 MR. MILEY: Not -- these are lands that are for
21 the tribal headquarters and a golf course and public
22 buildings here.

23 But at any rate, even on a reservation the tax
24 laws of the State of Oklahoma would apply to the
25 transactions. And I think as we have seen in the population

1 statistics that were located in our brief, we can see the
2 assimilation of this tribe into the general community, and
3 it's safe to say that most of the sales from this tribal
4 store are not to tribal members.

5 But I think the cases of Moe and Colville clearly
6 stand for the State's rights. And I think the Mescalero
7 point -- the Mescalero case goes on to say that tribal
8 businesses that are located off the reservation are subject
9 to the same State laws as all other businesses. And I think
10 in that Mescalero case, in note 11, the Solicitor argued in
11 that case that that land was virtually held in trust for the
12 tribe in that situation, although it was a lease from the
13 Department of Interior I believe. However, it would have
14 been useless to transfer the land in that situation, so that
15 was in effect trust land in that case.

16 So I believe this case is on point when you look
17 at the cases of Oklahoma Tax Commission v. United States
18 along with the Mescalero case. I believe that the Federal
19 intent in Oklahoma was not to create this kind of situation,
20 and clearly Congress did not want to go back to the
21 reservation situation when they were passing the Indian
22 Reorganization Act. They wanted to exclude Oklahoma from
23 that and pass a separate act for Oklahoma because Oklahoma
24 has gone past the reservation system, and I think that was
25 -- yes?

1 QUESTION: I'm not sure what your -- I'm not sure
2 what your -- are you arguing there has to be a declaration
3 of reservation status before the Indian tribe would have
4 sovereign powers in the area?

5 MR. MILEY: Well --

6 QUESTION: Because I don't think our cases support
7 that. I think we've clearly said to the contrary. I think
8 we said in Johns that the test is simply whether the land
9 has been validly set apart for the use of the Indians as
10 such under the superintendence of the Government.

11 MR. MILEY: Correct and --

12 QUESTION: And we've held in other cases, haven't
13 we, that it doesn't have to be a formal declaration of
14 reservation status.

15 MR. MILEY: Correct. But I believe in this case
16 when -- the McClanahan case, specifically states, and also
17 in Williams v. Lee in a footnote, that when they were
18 talking about the Arizona situation, the Navaho reservation
19 and that situation, they say these notions of Indian
20 sovereignty are not applicable in cases such as where
21 Indians have left or never inhabited reservations, such as
22 Oklahoma Tax Commission v. United States. So --

23 QUESTION: Not applicable when Indians have left?
24 You mean when the tribe is not in residence? Is that the
25 key that you say makes the difference here?

1 MR. MILEY: Well, yes. Well, in the situation of
2 these Indians in this State, in Oklahoma, there is not that
3 reservation status as that status is recognized in other
4 States.

5 QUESTION: Why? Why? If the test is whether the
6 land has been validly set apart for the use of the Indians
7 as such under superintendence of the Government, that test
8 would certainly apply here.

9 MR. MILEY: Well, it would apply to a certain
10 extent, but it's not -- the land was transferred in trust
11 in 1975 in order for the tribe to qualify for loans. Before
12 that time the Federal Government has no interest in ever
13 supervising this piece of land. So I think there is a
14 difference in this case. But you are correct in other
15 situations this Court has held differently. But I don't
16 think we have these facts, and I don't think Congress really
17 intended for reservation status to be developed again in
18 Oklahoma because of the failure of that system in --
19 previously.

20 QUESTION: Well, the Solicitor General doesn't
21 agree with you on this point I take it?

22 MR. MILEY: I don't believe the Solicitor General
23 does.

24 QUESTION: No.

25 MR. MILEY: No. At any rate our position is that

1 whether it is a reservation or not, and even if it is held
2 to be a reservation, the sales are still taxable. However,
3 what we are experiencing in this case is that although this
4 Court has found that in 1976 in Moe, in 1980 in Colville,
5 in 1985 in the Chemehuevi decision out of California that
6 tribal stores just like this one should collect the State's
7 taxes --

8 QUESTION: On sales to nonmembers.

9 MR. MILEY: On sales to nonmembers which --

10 QUESTION: Now, would you claim they should
11 collect it on sales to members, too?

12 MR. MILEY: Well, yes, I do.

13 QUESTION: (Inaudible).

14 MR. MILEY: But if they collected sales against
15 nonmembers in this situation, they would be collecting taxes
16 on 99 percent of their sales. So --

17 QUESTION: But the SG says the court of appeals
18 was wrong in enjoining you from collecting the tax.

19 MR. MILEY: Collecting the tax.

20 QUESTION: To nonmembers.

21 MR. MILEY: Well, the Tenth Circuit --

22 QUESTION: No, the SG, the Solicitor General, says
23 that the court of appeals was in error in enjoining you from
24 collecting the tax.

25 MR. MILEY: Correct.

1 QUESTION: All right. Then how would -- let's
2 just assume that the SG is right that there was there that
3 that injunction should be vacated -- the injunction
4 enjoining you from collecting the tax. How would you
5 collect it?

6 MR. MILEY: Well, in this case we have issued an
7 assessment --

8 QUESTION: You can't -- you can't -- under the
9 SG's view the tribe is immune from suit. You couldn't sue
10 them. How would you collect it?

11 MR. MILEY: Well, that is the problem we are
12 faced. We cannot collect it unless the tribe cooperates.

13 QUESTION: Could you sue the store manager?

14 MR. MILEY: Well, we have --

15 QUESTION: To require the manager to set aside
16 the money and do what's necessary?

17 MR. MILEY: Well, under Oklahoma law the owner of
18 the store is responsible rather than employees. We could
19 not hold an employee liable even though it might be their
20 duty. We have to go against the owner, and the owner in
21 this case --

22 QUESTION: You don't think you would have
23 jurisdiction to go after the employee not to hold him liable
24 but to require by way of an injunction or other court order
25 that the employee set aside this money for the taxes?

1 MR. MILEY: Well, we have had in another case in
2 the Chickasaw Nation case that was up here a few years ago,
3 we did try to sue the manager of the store but the Tenth
4 Circuit opinion, which was vacated in that case, is now
5 before the Oklahoma Supreme Court. But the Tenth Circuit
6 had held in that case that we could not get around tribal
7 sovereign immunity by assessing tribal employees for the
8 tax.

9 QUESTION: Well, but this Court isn't bound by
10 any ruling of the Tenth Circuit --

11 MR. MILEY: Correct.

12 QUESTION: -- as witness to the fact we've got
13 this case here on certiorari.

14 MR. MILEY: Correct. That's correct. I was just
15 merely stating that we've been unsuccessful thus far in that
16 tact.

17 QUESTION: Could you require the wholesaler to
18 affix the stamps on 100 percent of the cigarettes and then
19 just rebate the tribe for those that were sold to Indians?

20 MR. MILEY: Well, that's what -- we do require
21 the wholesaler to do that, however, when the tribes in
22 Oklahoma purchased their cigarettes from as far away as
23 Tennessee or Nebraska from wholesalers who have no nexus
24 with the State of Oklahoma, they will then ship those in on
25 common carrier or otherwise, basically bootleg them into

1 the State and --

2 QUESTION: They're not doing business in the State
3 of Oklahoma by the end sale?

4 MR. MILEY: No, no. If they don't have a presence
5 within the State -- if they merely ship on common carrier
6 to a certain location, they have -- there's no sufficient
7 nexus if they don't have any trucks or warehouse or anything
8 in Oklahoma, we can't make those other wholesalers pay the
9 tax.

10 So, at that point, although it is perfectly fine
11 for someone to buy cigarettes from an out-of-state
12 wholesaler -- that's not disallowed, but at that point the
13 retailer is then obligated to purchase the stamps because
14 the retailer is located in Oklahoma. We do have
15 jurisdiction over the retailer. And in that case the
16 retailer would be responsible. If those taxes were not
17 properly paid, then the retailer would be responsible for
18 the delinquent liabilities. And that puts us back facing
19 the tribe again, and the only other way to enforce that
20 would be seizures of the shiploads of cigarettes coming in.
21 And that is --

22 QUESTION: We can pursue it some other time. But
23 I don't see how you would have authority to seize and not
24 authority to require that the tax stamp be affixed.

25 MR. MILEY: Well, we do not have the authority

1 for -- to require a wholesaler in another State to comply
2 with our laws. If they are not themselves coming into this
3 State to make the deliveries or if we do not have any
4 evidence that they are coming into this State to make those
5 deliveries. And so we kind of have to catch them in the act
6 and then we would have to hold their property, like a truck,
7 in order to enforce that.

8 So we have trouble enforcing the laws across State
9 lines. That's why we look to the people that are located
10 in Oklahoma to enforce this law against. And so that brings
11 us to the examination of tribal sovereign immunity and of
12 course, as this Court has held in the United States Fidelity
13 and Guaranty case in 1932 and again in the Puyallup case in
14 1977, this tribe is immune from suit.

15 However, it is my position that circumstances have
16 changed such that this doctrine should be reexamined. Back
17 in 1932 that case involved a lawsuit by the United States
18 to protect tribal coal royalties that were owed to the tribe
19 and the tribe was held to be immune from a counterclaim in
20 that suit because the United States Government was trying
21 to protect the fragile existence of the tribal ward, and it
22 was necessary in that circumstance. I think, however, the
23 scope of the tribal entity has increased greatly from those
24 days and they are not reaching into the community of the
25 State where State laws do apply.

1 I think this is quite a drastic change and
2 requires us to look again at the sovereign immunity
3 doctrine. Now I'm not saying that sovereign immunity of an
4 Indian tribe should be abandoned for all purposes or that
5 it would be -- should be absolutely abrogated in any way.
6 I'm just trying to accommodate the interest of the State and
7 the interest in collecting the taxes from the State citizens
8 who are properly taxable.

9 The sovereign immunity, I believe, is a limited
10 sovereign immunity for an Indian tribe which should be
11 limited to, properly, the tribal courts and the internal and
12 social relations of the tribe certainly, and in the tribe's
13 commercial area, where they are dealing with people who
14 stand on maybe a different footing in the State of Oklahoma,
15 I can see where they could assert sovereign immunity in that
16 case.

17 But here we don't -- we aren't dealing with a
18 consensual relationship as such and we are faced with a
19 situation where we are trying to get the tribe to cooperate
20 with the tax laws of Oklahoma, which we feel, under previous
21 decisions of this Court, that we have a right to have them
22 administer on our behalf.

23 I think this Court has found that that
24 administration is such a burden on the tribe that it would
25 infringe tribal self-government, and we certainly recognize

1 the government of the tribe. But I believe that the
2 sovereign immunity of this tribe does not go so far as to
3 displace these valid State laws. And I believe that that's
4 what the tribe, as differentiated from how the sovereign
5 immunity doctrine has been used in the past, this tribe is
6 using the sovereign immunity doctrine to evade valid law
7 enforcement.

8 I will reserve the balance of my time.

9 QUESTION: Very well, Mr. Miley.

10 Mr. Kneedler, we'll hear now from you.

11 ORAL ARGUMENT OF EDWIN S. KNEEDLER

12 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

13 MR. KNEEDLER: Thank you, Mr. Chief Justice, and
14 may it please the Court:

15 It is the position of the United States in this
16 case that the Court may dispose of the case by application
17 of three settled principles. First that Federal law affords
18 Indian tribes immunity from all suits except where Congress
19 has expressly consented to such suits or the tribe waives
20 its immunity. Second, that States may not tax sales of
21 goods on an Indian reservation to members of a tribe. And
22 third, that States may tax non-Indians who purchase goods
23 from an Indian tribe or member of a tribe on an Indian
24 reservation.

25 The first of these points arises in connection

1 with the Tax Commission's counterclaim against the tribe in
2 this case. The tribe concedes that that counterclaim is
3 barred under existing law, under the existing rule of
4 Federal sovereign immunity. But it urges the Court to
5 modify that rule or to abandon that rule in the context of
6 this case.

7 But this Court has said on several occasions that
8 it is up to Congress to modify -- excuse me -- tribal
9 sovereign immunity where Congress believes that that is
10 wise. And it is Congress that could best take into account
11 the various competing considerations: the infringements on
12 tribal sovereign that might be implicated, the economic
13 consequences for a tribe in exposing it to not only the cost
14 of litigation but adverse judgments.

15 QUESTION: Mr. Kneedler --

16 QUESTION: Well, Mr. Kneedler, it's a pretty empty
17 right to be able to tax the sales if there's no way for the
18 State to enforce it. What can the State do --

19 MR. KNEEDLER: Well, there are --

20 QUESTION: -- really as a practical matter?

21 MR. KNEEDLER: Well, there are a number of --

22 QUESTION: Can they sue and get some kind of
23 affirmative injunction against the manager of the store to
24 require the taxes to be --

25 MR. KNEEDLER: There are several possible

1 remedies. Now, the Court made clear in Santa Clara Pueblo
2 v. Martinez that tribal sovereign immunity extends only to
3 the tribe. It does not protect -- under a rational
4 analogous to Ex parte Young, does not protect tribal
5 officers from suit. So in this case the manager of the
6 tribal store or other persons responsible for operating it
7 would not be protected by sovereign immunity. Now there
8 may be a question as to what forum such a suit could be
9 brought in. But as the -- as we read the tribal code, the
10 tribal court, for example, would be available. But in any
11 event the Tax Commission has not tried that.

12 Also, although the Tax Commission argues here that
13 it has no ability to enforce its law against wholesalers
14 shipped from out of State even though it concedes it's
15 coming from instate, that just happens to be the arrangement
16 of Oklahoma law at the present time. It's possible that
17 Oklahoma may be able to amend its law to impose a duty on
18 wholesalers who ship from out of State or consign shipments
19 to shippers who bring them into State to impose the tax
20 stamps on the cigarettes in the same manner that it
21 currently requires of wholesalers who have a place of
22 business in the State.

23 QUESTION: Mr. Kneedler, it might -- in your view
24 should this Court be deciding that anyway?

25 MR. KNEEDLER: No, it should not. In our view

1 the proper course for the Court to follow would be to affirm
2 the tribe's own immunity from suit and to vacate that -- and
3 therefore affirm the dismissal of the counterclaim. But
4 with respect to the tribe's suit for affirmative injunctive
5 relief, we think that all the Court really needs to do here
6 is to vacate the injunction that the court of appeals
7 ordered, premised on the view that it's a substantive
8 matter. The tribe did not have to collect the tax on the
9 sales to non-Indians or Indians.

10 As we explained in our brief the court sought to
11 distinguish this Court's holdings in Moe, Colville, and
12 Chemehuevi that the State may collect taxes on the sales to
13 the non-Indians on the ground that Oklahoma has not accepted
14 jurisdiction under Public Law 280.

15 As we explained in our brief, however, Bryan v.
16 Itasca County held that Public Law 280 does not confer
17 taxing jurisdiction on States that accept jurisdiction under
18 that law. We think it follows that Oklahoma's refusal to
19 accept jurisdiction under Public Law 280 does not withhold
20 taxing jurisdiction from the State. In other words, Public
21 Law 280 is simply put to one side on the question of the
22 State's authority to tax.

23 QUESTION: So the administrative court of appeals
24 erred in entering the injunction against collecting the
25 sales -- sales tax on sales to nonmembers?

1 MR. KNEEDLER: Right. And for that reason we
2 think the Court should vacate the injunction that the court
3 of appeals -- or vacate the judgment below to the extent the
4 court ordered that --

5 QUESTION: I guess we left the States in that same
6 position before.

7 MR. KNEEDLER: That's correct. In both Chemehuevi
8 and in Colville there was a sovereign immunity claim against
9 counter claims by tribes in essentially identical situations
10 as this. And in Chemehuevi, although the court granted
11 review and summarily reversed on the substantive tax
12 question, it left standing the lower court's ruling on the
13 sovereign immunity question. This is an arrangement that
14 has been in existence for sometime, that the State has the
15 substantive right to tax but cannot sue the tribe.

16 QUESTION: Mr. Kneedler, even before the passage
17 of the Foreign Sovereign Immunities Act my recollection is
18 that at least some courts had adopted what most -- what has
19 been adopted internationally in exception to sovereign
20 immunity in the case where the supposed sovereign is not
21 acting in a governmental capacity but in a commercial
22 capacity. Now if one applied the commercial exception to
23 sovereign immunity here, would the result be different?

24 MR. KNEEDLER: The result might be different, but
25 we think that would not be within the Court's authority and

1 even prior to the Foreign Sovereign Immunities Act, the
2 Court did not take it upon itself to modify that rule. At
3 that point --

4 QUESTION: With respect to foreign countries,
5 hadn't some of the courts of appeals done so in --

6 MR. KNEEDLER: I believe not until the Tate letter
7 of 1953. In other words, it was -- whichever political
8 branch was responsible in the area of foreign sovereign
9 immunity, the executive branch, prior to the Foreign
10 Sovereign Immunities Act, made sovereign immunity
11 determinations with respect to foreign countries. The court
12 did not, in other words, take it upon itself.

13 With respect to this aspect of travel sovereign
14 immunity like all others, this Court has said that the
15 occasions for when a tribe should be brought out from under
16 the usual Federal rules that that's the responsibility of
17 the political branches, because there is a political
18 judgment.

19 QUESTION: But it was this Court that first
20 created tribal sovereign immunity, wasn't it? It wasn't an
21 act of Congress.

22 MR. KNEEDLER: It was not an act of Congress, but
23 I don't think it's entirely fair to say that the Court
24 created. I think the Court recognized it, looking to the
25 status of Indian tribes within the constitutional scheme.

1 The Constitution refers to Indian nations under the Commerce
2 Clause and gives to Congress the authority to regulate
3 commerce with the Indians. That's exactly -- with the
4 Indian nations, which is exactly what we have here:
5 commerce with an Indian nation.

6 QUESTION: Mr. Kneedler, what is your
7 understanding of the source of the Indian tribal immunity?
8 Where did it come from?

9 MR. KNEEDLER: It derives from the status of
10 Indian nations as sovereign entities that predate the
11 Constitution in fact and that are recognized in the
12 Constitution. Just like the Federal rule barring sale of
13 Indian lands without the consent of the Federal Government,
14 it stems from --

15 QUESTION: Well, that's statutory.

16 MR. KNEEDLER: Well, but it predated the
17 Constitution and, you know, neither the Court recognized it
18 as a common law rule in addition to a statutory rule.
19 But in any event as to both rules, the Court said that until
20 Congress consents, the established rule, in that case
21 against alienation of land and in this case against
22 sovereign immunity, prevails until Congress creates an
23 exception. And Congress has in fact acted on that
24 assumption in numerous occasions, as we pointed out in our
25 brief.

1 QUESTION: Mr. Kneedler, your brief says the
2 question of what remedies the State might have should be
3 left in the first instance to the court of appeals.

4 MR. KNEEDLER: If necessary. I mean, I --

5 QUESTION: Well, how would that ever be -- how
6 would the question of remedy ever be up in the courtroom?

7 MR. KNEEDLER: Well, it depends --

8 QUESTION: They would be passing on -- the tribe
9 brought the suit, wanted the injunction, and you say, well,
10 they shouldn't have gotten an injunction.

11 MR. KNEEDLER: Well, they shouldn't have gotten
12 --

13 QUESTION: Is that the end of the case?

14 MR. KNEEDLER: Well, they shouldn't have gotten
15 as broad an injunction as they did. The injunction the
16 court of appeals held applied even to sales to nonmembers.

17 QUESTION: (Inaudible) set aside that injunction.

18 MR. KNEEDLER: Right. First of all if the tribe,
19 recognizing that this Court will have held that it must
20 collect taxes on sales to nonmembers, we think that the
21 tribe should be given an opportunity to do so and that we
22 should not assume that once the tribe and the court of
23 appeals are disabused of the notion that Moe and Colville
24 don't apply, perhaps the tribe will voluntarily proceed.
25 But then there's the other possibility of a suit and also

1 the possibility of seizing cigarettes.

2 QUESTION: Well, but the court of appeals wouldn't
3 necessarily get into anything about remedy.

4 MR. KNEEDLER: No, what we --

5 QUESTION: They would leave the State exactly
6 where we put them before, wouldn't they?

7 MR. KNEEDLER: Well, more completely I think the
8 court of appeals could address that if necessary. We think
9 that this is something best left to the tribe and the State
10 to work out on remand.

11 QUESTION: Mr. Kneedler, why is there difficulty
12 in suing the tribal store manager in an Oklahoma State
13 court? Just because they can't physically get the
14 jurisdiction?

15 MR. KNEEDLER: No, because Oklahoma has not
16 accepted jurisdiction under Public Law 280, civil
17 adjudicatory jurisdiction at least with respect to an Indian
18 on -- in Indian country in Oklahoma would not reside in the
19 State courts. But that simply follows from Oklahoma's
20 decision not to assume jurisdiction under Public Law 280.

21 With respect to the reservation status of this
22 land, I'd like to point out that the Tenth Circuit's
23 decision in this case follows not only from John and
24 McGowan, where the Court said that a formal designation of
25 reservation status is not necessary. But also decisions of

1 the Fifth, Ninth, and Tenth Circuits, other circuits with
2 Indian -- considerable Indian country which have also held
3 that tribal trust land such as this enjoys reservation
4 status. And most recently Congress has affirmed that
5 principle in the Indian Gaming statute which basically
6 codifies the preemption principles this Court applied in
7 Cabazon and specifically held that those preemption
8 principles apply to tribal trust land, not just formal --
9 formally designated reservation and specifically with
10 respect to Oklahoma. And in fact this tribe has a bingo
11 parlor on this very parcel of land and is protected by
12 similar immunities.

13 Thank you.

14 QUESTION: Thank you, Mr. Kneedler.

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

16 ORAL ARGUMENT OF MICHAEL MINNIS

17 ON BEHALF OF THE RESPONDENT

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

20 The tribe has an entirely fundamentally different
21 perspective on this case and how it arose. This case did
22 not arise under any fact similarities to Moe v. Colville or
23 any of the other cases. This case was a simple case in the
24 court below, at least it began that way. It was a proposed
25 tax assessment. This is not a case of collection. It's a

1 case of a direct, proposed tax assessment against the tribe.
2 The tribe sought -- in filing suit sought one remedy and one
3 remedy only and that was to enjoin that proposed tax
4 assessment.

5 And to this date, and we haven't heard it here
6 today because they've been all talking about Moe v.
7 Colville. We have no authority for the proposition that the
8 State may tax an Indian tribe and they have no authority
9 then what they were proposing to do was to take an action
10 that was clearly illegal.

11 QUESTION: I know, but the assessment was for
12 sales tax that should have been withheld and wasn't.

13 MR. MINNIS: Your Honor, I don't think that makes
14 any different. If you're immune from tax, it doesn't make
15 any difference whether or not --

16 QUESTION: No. Well, you think we haven't held
17 that the State may insist on the tribe withholding sales tax
18 on sales to nonmembers?

19 MR. MINNIS: Yes, sir, you have held in certain
20 cases that in certain States that the State may require
21 Indian tribes to cooperate, and if they don't cooperate
22 they're not entitled to injunctive relief. But you have
23 never held, at least as far as I can tell, that an Indian
24 tribe can be directly taxed by the State. In this case,
25 there was no evidence of any prior collection or what have

1 you. It was simply a raw, direct tax assessment, \$2.6
2 million, that would have had to have been paid by the tribe,
3 not from any precollection or any prior -- arrangement.

4 QUESTION: What does the -- what do you mean an
5 assessment? All they did was write them a letter, didn't
6 they? What did they do?

7 MR. MINNIS: Your Honor, the writing of that
8 letter is a very critical --

9 QUESTION: Well, I know, but I hear you say an
10 assessment --

11 MR. MINNIS: I proposed assessment.

12 QUESTION: -- they just said, please pay us this
13 tax.

14 MR. MINNIS: And in 30 days if we had not filed
15 a protest with the State, the tax would have been filed.

16 QUESTION: Well, and then what would have
17 happened?

18 MR. MINNIS: Then they would have done whatever
19 else it was that they could have done.

20 QUESTION: Well, I know, but they -- what would
21 they have -- what would -- wouldn't have -- if your tribe
22 is immune, I don't know how they could have sued them or do
23 anything else. But come on the land and attach the store
24 or what?

25 MR. MINNIS: Well, it's a little bit hypothetical

1 to talk about what we might have done had they directly
2 proposed assessment against the tribe. This case arose when
3 they proposed the \$2.6 million assessment against the tribal
4 chairman who, in 30 days, he would have been personally
5 liable. And given that situation, we felt that they had --
6 we had no -- we had no -- we had to take action to protect
7 this individual or he personally would have been liable for
8 the \$2.6 million. It was after we filed suit that the Tax
9 Commission then said that they were proposing their
10 assessment against the tribe.

11 QUESTION: Well, I'm not sure it's an assessment
12 against the tribe, that the State's taking a position that
13 they're taxing a transaction and the transaction is taxable.

14 MR. MINNIS: Yes, Your Honor, that's what they're
15 contending, but what I'm saying is that's not related to the
16 action that they took. They did not take action to try and
17 get us to collect it. They never came to us and said you
18 ought to be licensed. They never came to us and said start
19 collecting this. One day after we'd been doing -- had been
20 selling on the tribe's land for centuries -- not centuries,
21 however long we've been there -- suddenly we get a \$2.6
22 million letter.

23 QUESTION: You know -- the tribe knows what the
24 law is about what the sales tax law is and you've never been
25 withholding and returning the tax.

1 MR. MINNIS: Well, I'm not sure --

2 QUESTION: Isn't that right?

3 MR. MINNIS: I'm not sure it would be fair to say
4 the tribe knows what the law is.

5 Well, Your Honor, whether they do or not, I think
6 this Court has said many times that you're bound by whether
7 you know about it or not. I mean, I'm just saying I don't
8 think it's necessarily true that they knew what the law was.

9 QUESTION: Well, Mr. Minnis, let's say that we
10 follow the Colville case and the Solicitor General's
11 position and that we agree that Oklahoma is entitled to tax
12 the transaction of sale of cigarettes to nonmembers of the
13 tribe -- that that's a taxable event and the tribe -- the
14 State can require the tribe collect the tax and pay it over.
15 Now is the tribe willing to do that?

16 MR. MINNIS: I can't speak for the tribe in the
17 sense that I'm not their business committee, but I would
18 suggest that they have acted with -- I think that they have
19 acted consistent with what they perceive the law to be, even
20 -- Justice White asked me about whether or not -- surely
21 they knew what the law was. But we have taken the position
22 in response to Moe v. Colville analogy that Oklahoma and
23 this particular tribe is in a different situation than the
24 tribes were in Colville and that different situation arises
25 from the fact that the specific land that was involved here

1 is land that the United States Government promised would
2 never be part of the jurisdiction of any State, and we
3 contend that that promise was codified in the Constitution.

4 QUESTION: Well, I asked though suppose we take
5 the view that the Solicitor General has urged here that
6 these transactions, at least as to sales to nonmembers, are
7 taxable.

8 MR. MINNIS: Yes.

9 QUESTION: Where does that leave us?

10 MR. MINNIS: Well --

11 QUESTION: There have been sales to nonmembers,
12 apparently substantial sales to nonmembers and that
13 continues to this day I understand.

14 MR. MINNIS: That's correct.

15 QUESTION: Now let's say that we think those are
16 perfectly taxable.

17 MR. MINNIS: Well, then I would --

18 QUESTION: What's to be done?

19 MR. MINNIS: -- and I'm just assuming because it's
20 a hypothetical --

21 QUESTION: Well, it's not very hypothetical.

22 MR. MINNIS: -- that they would either quit
23 selling cigarettes or they would collect the tax.

24 QUESTION: But your contention is that neither
25 this Court nor the courts that have heard the case

1 previously has the authority to make that decision in this
2 case because it's not an issue of this property before us?

3 MR. MINNIS: That's correct, Your Honor.

4 QUESTION: As we view the case, the case is simply
5 an assessment case. We're being assessed for failure to
6 collect for a period of time from 1981, I think, to 1986.

7 QUESTION: But they reversed the district court.
8 The district court prospectively indicated that the tribe
9 should collect the sales tax.

10 MR. MINNIS: In response to the counterclaim by
11 the State.

12 QUESTION: Well, I know, but the court of appeals
13 reversed them.

14 MR. MINNIS: They reversed them on the basis that
15 the tribe had sovereign immunity and that the court, the
16 district court, should never have heard the case.

17 QUESTION: Well -- it couldn't even tax sales to
18 nonmembers and if we say they were wrong in that, I suppose
19 we would reverse them.

20 MR. MINNIS: The relief that the Tenth Circuit
21 granted was simply a reverse remanded for entry of order as
22 prayed for, and the order that was prayed for by the tribe
23 was simply an injunction against the proposed assessment.

24 QUESTION: But the court of appeals in its opinion
25 certainly went further --

1 MR. MINNIS: Yes, Your Honor.

2 QUESTION: -- and said the injunction should cover
3 not merely the sale of cigarettes to tribal members but to
4 nonmembers because of its analysis of Public Law 280.

5 MR. MINNIS: I don't think that they said that
6 the injunction that would be entered after remand was
7 supposed to be broad enough to cover that. I think what
8 they said in dicta was we say that the Colville case is not
9 -- we noticed that the Colville case took place in a Public
10 Law 280 State, and hence the arguments being made by the
11 State are not valid. But when you get to the end of the
12 opinion, all they say in the opinion is not to enter an
13 injunction consistent with what we've said, but rather with
14 the prayer.

15 QUESTION: I take, then, it wouldn't bother you
16 if we said there is no existing injunction against the State
17 from collecting sales tax? That's what you say. The court
18 of appeals didn't enjoin the State from collecting sales tax
19 on sales to nonmembers.

20 MR. MINNIS: That's correct. All that we're
21 suggesting is that the relief we've sought is all we're
22 asking for is to enjoin them from assessing this tax against
23 the tribe. That's the only relief we ask for.

24 QUESTION: From assessing the tax on sales to
25 nonmembers or to members or to both?

1 MR. MINNIS: In this case assessing the tribe,
2 the proposed assessment against the tribe. We didn't ask
3 them to future -- to tell us that we could in the future
4 not have to collect it. We didn't ask that we be given a
5 declaratory --

6 QUESTION: Well, we're playing with words to a
7 certain extent. Do you agree on behalf of your client with
8 the court of appeals position that Public Law 280 means that
9 the Colville and Moe cases and their doctrines do not apply
10 in this situation?

11 MR. MINNIS: Yes, Your Honor, we're arguing that
12 as an alternative in response to their counterclaim, that
13 their counterclaim was not valid because in Oklahoma there's
14 a situation that's different from Montana, Washington, and
15 California, which were Public Law 286.

16 QUESTION: Well, when you invoke the jurisdiction
17 of the Court to ask for its equitable powers to be exercised
18 on your behalf in a situation as complex as this, why isn't
19 appropriate for the Court to make an announcement that
20 perhaps the tribe cannot be assessed directly but that the
21 tribe has the duty and the responsibility to remit the taxes
22 to the State?

23 MR. MINNIS: Well, for one thing I think that
24 there's no factual foundation for that in the sense that
25 the factual dispute that caused the filing of the lawsuit

1 in the first place. They've never asked us to collect this.
2 They've never attempted to license us or what have you. The
3 only thing that precipitated this lawsuit and the only fact
4 that's in the case in this -- in the case below is simply
5 the proposed tax letter.

6 In fact there's not even any factual dispute.
7 Because of an anomaly there's really not any facts in the
8 record concerning the counterclaim, because at the time that
9 the matter was submitted to the court on briefs, the
10 stipulations all went to the tribe's part of the action,
11 because the parties erroneously thought that the motion to
12 dismiss the counterclaim was still pending and it wasn't.
13 It had already been ruled on. And it was only later that
14 they found out that the counterclaim -- the motion to
15 dismiss the counterclaim had been overruled, so there's no
16 factual record even on the counterclaim part of it.

17 But that brings me to the second issue which I
18 think is before the Court. The first issue is whether or
19 not the tax assessment is proper, and the second is the
20 counterclaim. And I would suggest that there is not a
21 particularized reason now for doing away with the sovereign
22 immunity and certainly not in this case.

23 If, as we've argued, the proposed tax assessment
24 is unlawful, then what this Court would be condoning would
25 be condoning the State taking clearly unlawful action and

1 using it as a way to bootstrap themselves to litigate issues
2 that concern them. If the State was truly concerned about
3 litigating the issue of collection, there are other ways
4 that they could have brought this issue to court besides the
5 issue of direct tax assessment for which they have yet to
6 survive -- provide this Court with any authority to what
7 action that they took.

8 If they wanted the Moe case or the Colville case,
9 they could have taken actions that this Court has recognized
10 in those cases that they could take since it's seizing
11 cigarettes bound for the tribal reservation or what have
12 you. And then they would have had the factual foundation
13 to raise all the issues they would have raised had the tribe
14 then gone in and sought relief. But here they went a route
15 that I think has been at least implicitly indicated -- even
16 all those cases is not the proper route to take, which is
17 to assess the tribe of the tax.

18 QUESTION: May I ask you on that, supposing the
19 State had seized a shipment of cigarettes destined for the
20 tribe and presumably owned by the tribe, because they would
21 shipped by a common carrier and -- the property would
22 presumably pass at the time of shipment. And the tribe
23 brought suit and said, give us back our cigarettes. We have
24 sovereign immunity and, therefore, our property is immune
25 from seizure of this kind. How would you decide that case?

1 MR. MINNIS: In favor of the tribe.

2 QUESTION: Well, then what remedy does the State
3 have? How can they collect their tax? I thought you said
4 they could seize cigarettes, but now you say they can't.

5 MR. MINNIS: Well, I -- no, I'm suggesting that
6 if they wanted to raise the issue of the propriety of
7 seizing the cigarettes that that's the way they should have
8 proceeded.

9 QUESTION: But they'll still lose is that what's
10 you're saying.

11 MR. MINNIS: Well, we'd still defend that lawsuit.
12 We wouldn't be defending another lawsuit.

13 QUESTION: Yes.

14 MR. MINNIS: That's the argument we're making here
15 is that we're being asked to defend the lawsuit that they
16 didn't bring that they could have brought and the one that
17 they have brought is whether or not -- the one that they
18 solely define by the actions they took was the tax
19 assessment. That's the way they brought this law -- I mean,
20 that's what caused this lawsuit to be brought, not some of
21 these other things that perhaps they could have done.

22 QUESTION: But they could have done with the same
23 result is the problem I suppose.

24 MR. MINNIS: But we would argue -- we would argue
25 this -- the same result. In this case, of course, they

1 did, as we later learned, they did assess the wholesaler
2 for the same taxes that they are attempting to collect from
3 us.

4 QUESTION: Well, let's assume that we hold that
5 the State is entitled to collect sales taxes on the sales
6 by nonmembers and that the tribe should have been
7 withholding those taxes and, of course, if they -- and if
8 they -- of course, if they should from now on withhold, they
9 should have withheld it in past. Now what's wrong with the
10 State saying, writing a letter and saying, look you should
11 be withholding and you haven't been withholding. Now pay
12 us what you haven't withheld. Is that so insulting?

13 MR. MINNIS: Well, I would think -- well, if you
14 -- it is insulting if you contend that you are a sovereign
15 and that you are immune from suit and you're immune from
16 tax. The idea that they would have to directly renew**,
17 yes.

18 QUESTION: No, but the State says, your immunity
19 doesn't cover sales to nonmembers and cites these cases.
20 Just because it's called a tax assessment doesn't -- it may
21 be a demand to pay, because you haven't been withholding.
22 That's all it was, wasn't it?

23 MR. MINNIS: Well, yes, Your Honor, but I mean,
24 it's not as if they said, start collecting taxes --

25 QUESTION: Well, the tribe owns the store. The

1 tribe's the one that should have been withholding taxes, and
2 they didn't withhold.

3 MR. MINNIS: Yes, Your Honor, but you still end
4 up with who pays the money and the money would be paid by
5 the tribe under a direct tax assessment.

6 QUESTION: Well, but perhaps the tribe is liable.
7 If it should have been collecting a sales tax on sales to
8 nonmembers.

9 MR. MINNIS: Your Honor, that would presuppose
10 that the Oklahoma State tax laws are applicable to the
11 tribe, and if they are applicable to the tribe, are just
12 those laws or are all State laws?

13 QUESTION: Well, certainly Moe and Colville said
14 that Montana and Washington State tax laws were applicable
15 to the tribes who were involved in those lawsuits.

16 MR. MINNIS: In those cases the Court was clear
17 to point out that the incidence of the tax was not on a
18 tribe as it is in this case and that the collection of the
19 tax was something that the tribe -- those cases arose when
20 the tribe sought declaratory and injunctive relief, and what
21 this Court did was say, you're not entitled to the
22 injunctive relief because you should have been collecting
23 the tax and since you didn't collect the tax we're not going
24 to give you the injunctive relief you've asked for to stop
25 the trucks from coming into your reservation.

1 For the reasons that have been expressed here and
2 are further articulated in our brief, we would urge this
3 Court to affirm the decision of the Tenth Circuit Court of
4 Appeals.

5 Thank you.

6 QUESTION: Thank you, Mr. Minnis.

7 Mr. Miley, you have 3 minutes remaining.

8 REBUTTAL ARGUMENT OF DAVID ALLEN MILEY

9 ON BEHALF OF THE PETITIONER

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

11 I would just like to conclude by staying that
12 first of all the State has the authority under State law to
13 require this taxation. The tax assessment was made to
14 enforce this tax collection. We -- under the Moe and
15 Colville decision, we believe we have the right to these
16 taxes. We found no other way to enforce these taxes than
17 by tax assessment in this case.

18 It is my position that you cannot properly
19 separate the collection of a tax from the enforcement of the
20 tax, because as we have seen in this case the tribe will
21 not collect if the only consequences of that is getting away
22 with it. So they have operated for many years without
23 collecting with our -- likewise with the State's inability
24 to ever enforce those laws.

25 QUESTION: Has the State of Oklahoma or any other

1 State as far as you know requested Congress to waive tribal
2 sovereign immunity where the tribe has refused to pay -- to
3 collect sales taxes and to turn them over --

4 MR. MILEY: No, we have not requested Congress to
5 do that. I think Congress is not in a position to do that,
6 and I think --

7 QUESTION: What do you mean it isn't in a position
8 to do that?

9 MR. MILEY: Well, I believe Congress could do that
10 if it wanted to. It just doesn't want to. They are not
11 properly the tax collection agents for the State of
12 Oklahoma. They are not concerned with collecting Oklahoma
13 taxes, so the Congressmen don't --

14 QUESTION: But they're concerned with the status
15 of Indian tribes.

16 MR. MILEY: That's correct, and they would be
17 concerned and they have passed several laws like the bingo
18 laws to encourage economic development, but I think what we
19 have here is an area where we do not need to go to Congress
20 to ask Congress if the State of Oklahoma can collect its
21 taxes. I believe we have --

22 QUESTION: It's an area where that's exactly what
23 you ought to do. I think it's amazing that the States
24 haven't gone to Congress and said, look, we have a problem
25 collecting these taxes. We're entitled to get them, no we

1 need relief from you to waive sovereign immunity to that
2 extent. I would suggest that that's a perfectly valid
3 position for the States.

4 MR. MILEY: We could take that position, although
5 Congress -- that would be a political decision that I don't
6 think many Congressmen want to be put in a position faced
7 with constituents who maybe feel differently about the issue
8 than the State does.

9 Thank you. That is all I have.

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

11 The case is submitted.

12 (Whereupon, at 11:50 a.m., the case in the above-
13 entitled matter was submitted.)
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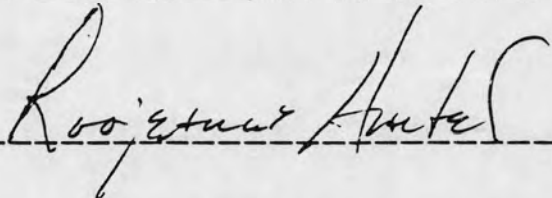
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NO. 89-1322 - OKLAHOMA TAX COMMISSION, Petitioner V. CITIZEN

BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

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