

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: COUNTY OF YAKIMA, ET AL., Petitioners

V. CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA NATION;

and

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA
NATION, Petitioner V. COUNTY OF YAKIMA AND DALE

A. GRAY, YAKIMA COUNTY TREASURER

CASE NO: 90-408; 90-577

PLACE: Washington, D.C.

DATE: November 5, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COUNTY OF YAKIMA, ET AL., :

4 Petitioners, :

5 V. : No. 90-408

6 CONFEDERATED TRIBES AND BANDS :

7 OF THE YAKIMA NATION, :

8 and :

9 CONFEDERATED TRIBES AND BANDS OF :

10 THE YAKIMA NATION, :

11 Petitioner, :

12 V. : No. 90-577

13 COUNTY OF YAKIMA AND DALE A. :

14 GRAY, YAKIMA COUNTY TREASURER :

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16 Washington, D.C.

17 Tuesday, November 5, 1991

18 The above-entitled matter came on for oral

19 argument before the Supreme Court of the United States at

20 10:56 a.m.

21 APPEARANCES:

22 JEFFREY C. SULLIVAN, ESQ., Yakima, Washington; on behalf of

23 the Petitioners/Cross-Respondents.

24 ROBERT WAYNE BJUR, ESQ., Yakima, Washington; on behalf of

25 the Respondent/Cross-Petitioner.

1 EDWIN S. KNEEDLER, ESQ., Assistant Solicitor General,
2 Department of Justice; Washington, D.C.; on behalf of
3 the United States, as amicus curiae, supporting the
4 Respondent/Cross-Petitioner.

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

2 (10:56 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next
4 in No. 90-408, County of Yakima v. Confederate Tribes and
5 Bands of the Yakima Nation, and 90-577, vice versa.

6 Mr. Sullivan, you may proceed.

7 ORAL ARGUMENT OF JEFFREY C. SULLIVAN
8 ON BEHALF OF PETITIONERS/CROSS-RESPONDENTS

9 MR. SULLIVAN: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 Can Yakima County impose real estate property tax
12 on fee lands owned by tribal members and the Yakima Indian
13 Nation and collect its real estate excise tax on the sale
14 of those fee lands?

15 It is our position that this authority exists,
16 that Congress has reaffirmed that authority on a number of
17 occasions since its inception in 1887, that this Court has
18 uniformly held that the tax on fee lands is appropriate, and
19 that generally everybody agreed with that position,
20 including the Solicitor General and its staff until
21 1989 -- we say, and believe in response to the decision of
22 the district court in this case.

23 In 1887, the General Allotment Act was passed.
24 The General Allotment Act, for the purposes of this case,
25 provided a number of things. First, land was to be held in

1 trust for a 25-year period of time. At the end of that
2 trust period, the individual allottees were to receive fee
3 patents. With those fee patents went two things: (1)
4 citizenship, and (2) the responsibility of paying tax --
5 along with the rights of alienation of that property, and
6 the ability to sell and deal with it as any other citizen
7 would.

8 In 1906 the Congress reaffirmed and clarified, we
9 believe, its intent. In 1906 the Burke Act was passed. It
10 was passed in -- partly in response to one of this Court's
11 opinions in *In Re Heff*, to reaffirm that you didn't become
12 a citizen until the fee patent was issued. But when it was
13 issued, you became a citizen; and secondly, the 1906 act
14 shortened the trust period, or at least it allowed the
15 Secretary to shorten the trust period from 25 years into a
16 basically an individual decision of the Secretary.

17 QUESTION: Mr. Sullivan, on land within a
18 reservation, where a fee title is held by an Indian member
19 of the tribe, but it was patented and the title was issued;
20 and if that land is later transferred, does State law govern
21 what it takes to make a transfer and pass title?

22 MR. SULLIVAN: Yes.

23 QUESTION: And what about if the owner were to die
24 without leaving a will, what law would govern the passage
25 of that land?

1 MR. SULLIVAN: I believe that the -- if the -- if
2 it's a tribal member --

3 QUESTION: If the owner is a tribal member.

4 MR. SULLIVAN: I believe that the fee lands would
5 pass under the provisions of State law. The balance of his
6 estate would pass under the rights of inheritance as
7 established in the United States Code and rules of --

8 QUESTION: Have there been cases involving that,
9 to your knowledge?

10 MR. SULLIVAN: I don't believe it ever has been
11 raised, or any case in which it has been a problem, Your
12 Honor.

13 QUESTION: Thank you.

14 MR. SULLIVAN: In 1906, this Court was called
15 about in Goudy v. Meath to address this issue. Do tribal
16 members who own fee patent have to pay real estate property
17 tax?

18 This Court said, it requires a technical and
19 narrow construction to hold that involuntary alienation
20 continues to be forbidden, while the power of voluntary
21 alienation is granted. And it is disregarding the act of
22 Congress to hold that an Indian having property is not
23 subject to taxation when he is a subject to all the laws,
24 civil and criminal, of the State.

25 Subsequent to that -- particularly the 1906 act

1 and also this Court's decision in Goudy -- and I think,
2 parenthetic, it's important to understand because the
3 Government has raised it, but what about property that
4 doesn't follow exactly from the Allotment Act itself? The
5 property in Goudy came from a different act. Do you
6 remember the facts in Goudy? They talked about a 10-year
7 trust period that had already expired. It was not patented
8 under the General Allotment Act. And they talked from this
9 time forward in terms of fee patents and trust lands. Trust
10 lands were not subject to tax; fee lands were.

11 In the early twenties, as a result of this
12 particular statute, the Secretary began to issue patents.
13 Many of the Indians lost their land to tax sales, the type
14 of tax sale that generated the litigation in this case.

15 The Congress was called upon to address this
16 issue. And in 1927, the Congress did not -- which they
17 could have done -- say, you don't have to pay real estate
18 property tax any longer on your fee lands. The Congress'
19 choice, rather, was to say, you can't be forced to take one
20 of these patents unless you don't -- unless you want it.
21 You must consent. And the Government can't force it on you.

22 19 --

23 QUESTION: Mr. Sullivan, excuse me for
24 interrupting you again. But the statute in question,
25 section 349, refers to at the expiration of the trust

1 period. Now, when did the trust period expire here? Do we
2 know that?

3 MR. SULLIVAN: We don't know that. The record in
4 the stipulation would be that all of these lands were
5 patented under title -- excuse me, under this amendment 6
6 or section 6.

7 QUESTION: Well, were the patents issued during
8 the trust period or after the trust period? And does the
9 record tell us that?

10 MR. SULLIVAN: The record does not tell us that.
11 We submit that it makes no difference whether it was during
12 the trust period or whether it was after the trust period.

13 QUESTION: Well, it might make a difference if the
14 statute only applies to lands patented during the trust
15 period, or to lands patented at the expiration of the trust
16 period. At least there's language in that section that may
17 make it relevant.

18 MR. SULLIVAN: We believe -- I would -- I can't
19 disagree that that could be a reading given to the proviso.

20 QUESTION: Yeah.

21 MR. SULLIVAN: We submit, however, that that
22 clearly was not the intent, that the taxation of these lands
23 were meant to apply to all lands patented in any manner.
24 And I think that Goudy reiterates that, and this Court's
25 subsequent opinions would indicate that -- in which this

1 very specific issue has been addressed, i.e., should these
2 lands -- or the proceeds from these lands -- be taxed. And
3 that distinction has never been made.

4 The cases are replete; the statutes are replete;
5 the congressional record is replete, that the distinction
6 is between trust and allotted lands -- I mean, excuse
7 me -- trust and fee land. And the method by which -- the
8 technical method by which the fee is obtained is of no
9 consequences.

10 And I think in some respects, this is -- our
11 position is bolstered by the '79 opinion of the Solicitor
12 which we cite in our reply brief, in which the Solicitor in
13 that opinion says that, after acquired, a title appears in
14 his opinion, at least, at that time, is also covered. So
15 that the distinction for the county assessor and for the
16 -- tax collectors among the counties is is it fee land or
17 is it trust land. And if it's fee land, it is going to be
18 taxed because it is freely alienable.

19 To get involved in the very stilted, in our
20 opinion, interpretation of the proviso puts us in a
21 difficult position, and one that would not coincide, we
22 believe, with this Court's ruling in Goudy.

23 The tribe and the Government make a big deal, in
24 some respects, in terms of the Indian Reorganization Act.
25 We submit, again, the Indian Reorganization Act was adopted

1 partially because of, again, this similar problem. Lands
2 were being lost; the tax -- the land base of the tribe was
3 being diminished.

4 In the Indian Reorganization Act, the Congress,
5 again, addressed this issue and they did so by saying there
6 will be no more allotments. They extended the trust period
7 indefinitely and allowed for the Secretary to return some
8 of these lands to trust, to get them out of the tax base.
9 We submit that that -- and again, Congress could have
10 addressed the tax issue and chose not to, and allowed
11 section 349 of 25 U.S.C. to remain on the books.

12 In 1939, this Court in Board of Commissioners v.
13 Jackson County was dealing with the problem -- okay, because
14 by this time, the Court had decided that if you didn't
15 consent to the patent, then the taxes needed to be returned.

16 But the Court, in dealing with this as it
17 was -- as it directed -- or as it was -- what the
18 consequences of this were for the county said, in
19 consequence, Jackson County in 1919 began to subject the
20 land to its regular property taxes. It continued to --
21 subject -- excuse me -- it continued to do so as long as
22 this fee-simple patent was left -- undisturbed by the United
23 States.

24 Jackson County, in all innocence, acted in
25 reliance on a fee patent given under the hand of the

1 President of the United States. Here is a long, and
2 unexcused delay, referring to trying to get the money back
3 on behalf of the individual Indian, and the assertion of a
4 right for which Jackson County should not be penalized.

5 The lands of this Indian and the lands of other
6 Indians had become part of the economy of Jackson County,
7 which we believe, crucial and in part of this case.

8 QUESTION: When are you going to get to Moe?

9 MR. SULLIVAN: I'm almost there, Your Honor.

10 QUESTION: Yeah, yeah.

11 (Laughter.)

12 MR. SULLIVAN: I think it's important, and I think
13 Moe is important. I think we need to have the history up
14 to Moe, because the -- again, the tribe and the Government
15 say, well, it's sort of the eye --

16 QUESTION: I take it at the very minimum, you want
17 to limit Moe to its facts, I suppose.

18 MR. SULLIVAN: Well, we believe that Moe -- sure,
19 Moe --

20 QUESTION: There's a difference between the clause
21 that was relied on in Moe and the clause that you rely on
22 here, is there?

23 MR. SULLIVAN: Well, no, Your Honor. There is a
24 difference, but we rely on both parts of -- the clause
25 that -- what's been called the general laws clause of Moe,

1 which said the general, civil, and criminal laws of the
2 State, is exactly the same clause used in Goudy v. Meath.
3 We believe that we have a specific provision with respect
4 to tax and real estate. In Moe, I think it's significant
5 that in looking at the district court opinion, a number of
6 things happen.

7 The tribes in Moe could have asked the Court don't
8 impose real estate property tax, but they did not. The
9 issue in Moe was personal property tax. It was vendor
10 license fees and sales taxes. It did not deal with real
11 property tax.

12 And, in fact, it's clear from the record, if you
13 look again at a footnote, footnote 9 in the opinion of the
14 district court says -- and remember in that case the State
15 of Montana tried to make a big deal about how much money we
16 pay for services and all these great things we're doing for
17 the tribe and therefore, just do away with their laws, which
18 we feel was an overbroad approach.

19 But the trial court says --

20 QUESTION: Well, how do you -- in terms of the
21 rationale and the reasoning of -- in Moe, why is there a
22 difference between personal and real property owned by
23 Indians within a reservation?

24 MR. SULLIVAN: Well, in terms of -- the difference
25 is, in terms of the taxing authority of State and local

1 government. We have -- the Court, in Moe, you don't have
2 general authority to impose your personal property tax.
3 This Court has said that we are going to limit the State's
4 ability to tax Indians unless there is a specific provision.

5 QUESTION: You would say that the State may tax
6 Indian-held fee land on a reservation?

7 MR. SULLIVAN: Correct.

8 QUESTION: But if that same Indian had personal
9 property on that same piece of real estate, you accept Moe's
10 decision that the State may not tax?

11 MR. SULLIVAN: Absolutely, absolutely. And I
12 think it's because of the Court's requirement that the
13 taxing authority be specific; and that that authority has
14 been upheld by the Court since that period of time.

15 QUESTION: You accept it, but you don't really
16 agree with it.

17 (Laughter.)

18 MR. SULLIVAN: I think that the rules that have
19 been adopted with respect to the relations between State and
20 county and the Indian tribes could be more clear, yes. I
21 would agree.

22 I think -- example -- let me give an example that
23 I think's important to this analysis. The Government
24 concedes that the only way they can collect income tax,
25 Federal income tax, is because of this provision, section

1 6. This Court, in Squire v. Capoeman dealt with that issue.
2 It was a 1956 case. It was before Moe.

3 But the Court said, you can't -- the Government
4 was trying to tax the proceeds of a timber sale of allotted
5 land that was still held in trust. The Court said, you
6 can't do that. The Government said that provision -- that
7 provision for taxes only applies to State and local
8 government. It doesn't apply to the Federal Government.
9 This Court said no, it applies to Federal income tax also.

10 Without that authority, I submit, if the Court
11 were to say no, section 6 doesn't mean what it says, it
12 doesn't authorize tax on real property, that you also
13 eliminate the income tax ability of the Government to
14 collect the income tax that come from that land.

15 QUESTION: But your argument, as I understood -- I
16 was surprised to hear what you said earlier. I thought you
17 were just arguing that because of the proviso, the real
18 estate can be taxed. But you also say that for other
19 purposes, the real estate comes within the jurisdiction of
20 the State.

21 MR. SULLIVAN: That's correct. In the --

22 QUESTION: So for purposes of inheritance, and so
23 forth?

24 MR. SULLIVAN: Well, the State of Washington, at
25 this time, does not have an inheritance tax. But, for

1 example --

2 QUESTION: I'm not talking about taxes. I'm
3 talking about what happens to the property when the decedent
4 of the allotted land dies. As I understood your answer to
5 an earlier question, that the land would pass according to
6 State law. Is that right?

7 MR. SULLIVAN: That's correct.

8 QUESTION: Now how do you get that in the proviso?
9 The proviso doesn't say anything about that. It says sale,
10 encumbrance, and taxation.

11 MR. SULLIVAN: Well, part of that, I believe, Your
12 Honor, comes from Public Law 280, which does apply in the
13 Yakima reservation. Part of it is the problem of the
14 tax -- the real estate property records are kept at the
15 county courthouse, which would include all the fees.

16 QUESTION: Do we have to decide that? I
17 thought -- I -- frankly, I didn't realize this until you
18 said it. I thought we were just talking about the very
19 narrow question about whether the State can tax the land.
20 But --

21 MR. SULLIVAN: I think that's all we are talking
22 about.

23 QUESTION: And can I agree that the State can tax
24 the land without agreeing that the land passes according to
25 State law, that the State can do all sorts of other things

1 with respect to the land?

2 MR. SULLIVAN: Absolutely. We are -- our position
3 is, however --

4 QUESTION: As long as I get four of the votes.

5 (Laughter.)

6 MR. SULLIVAN: That's correct.

7 Our position is, with respect to the real estate
8 excise tax. The real estate excise tax that the Ninth
9 Circuit struck down says it's an excise tax. It's covered
10 by Moe.

11 Our position is the excise tax follows the sale
12 of the land. It's a 1 percent tax that every citizen of
13 the State pays when a piece of real property is sold.

14 QUESTION: Yes, but don't we have to follow the
15 Washington Supreme Court's interpretation of this, of its
16 own law in that regard? I mean, didn't State -- didn't they
17 just rely on what the State supreme -- how the State supreme
18 court described the excise tax?

19 MR. SULLIVAN: Well, correct. They called it an
20 excise tax, Your Honor, but just because it's an excise tax,
21 I don't believe it's covered by Moe, because it's more
22 analogous to income tax and inheritance tax, which this
23 Court has upheld as proper taxes.

24 In the Oklahoma Tax Commission case, this Court
25 said it's okay for the State of Oklahoma to collect

1 inheritance tax that is tied to fee lands.

2 QUESTION: Yeah, but the Washington Supreme Court
3 says that tax upon the sales of property is not a tax upon
4 the subject matter in that sale. So how can you say it's
5 a real estate tax? I mean, if it's a matter of State law,
6 I don't understand your --

7 MR. SULLIVAN: Well, it would be -- the analysis
8 is is that the income tax, the capital gains tax is a tax
9 on the increase in your wealth. And therefore it, it seems
10 to me is more analogous to the income tax -- it's a source
11 from which the money flows. In this case, it flows from the
12 State.

13 MR. SULLIVAN: Well, I think you're right. The
14 Washington Supreme Court might well have said that, but they
15 didn't. Aren't we bound by what the Washington Supreme
16 Court -- how the Washington Supreme Court characterized it
17 in that phase of the case?

18 MR. SULLIVAN: We -- I agree, this Court has -- is
19 agreed that it's bound in terms of -- by the Washington
20 State court -- the supreme court's ruling in interpretation
21 of its own --

22 QUESTION: What about a sales tax on the sale of
23 personal property that, itself, can't be taxed?

24 MR. SULLIVAN: We submit that Moe has answered
25 that question.

1 QUESTION: What, that no -- the State could
2 not --

3 MR. SULLIVAN: The State could not tax that; that
4 the statute --

5 QUESTION: What about a timber severance tax on
6 fee land?

7 MR. SULLIVAN: If the fee land is owned by tribal
8 members, our position would be that that could be
9 taxed -- just like the income tax, just like the inheritance
10 tax. If it comes from fee land.

11 The distinction in the law, the distinction that
12 was made by the Allotment Act, by the Congress in subsequent
13 actions with respect to it, have continually reiterated that
14 point: that there will be this basic distinction between
15 trust land and fee land.

16 The fact is, that if you are a member of the
17 tribe, or the tribe itself, and you don't want to be taxed,
18 all you have to do is put your land in trust. You know, we
19 believe -- it's that simple. The Court has said that
20 alienability, if --

21 QUESTION: Well, it's not quite that -- so you
22 don't have to do that to have the advantage of Moe.

23 MR. SULLIVAN: I agree, but Moe did not deal with
24 real property. The tribe could have raised that issue.
25 They chose not to, as I say. In fact, the district court

1 relied on the fact that those taxes were being paid, and
2 pointed it out, that the real estate taxes were be paid --
3 were being paid.

4 And we get to this very narrow construction, I
5 suppose. In Yakima County, as the other counties, for
6 100 and -- up until the injunction was issued in this case,
7 almost 100 years or a little over 100 years, collected these
8 taxes. And they did it based upon the statute.

9 Congres enacted the statute. The Government --
10 excuse me --

11 QUESTION: Mr. Sullivan, what does the last
12 proviso of this statute mean, where it says: and provided
13 further, that the provisions of this act shall not extend
14 to any Indians in the former Indian territory.

15 What's that?

16 MR. SULLIVAN: We -- I believe, Your Honor, that
17 that was to make specific reference to the area essentially
18 in the State of Oklahoma that was the -- the land owned by
19 the five civilized tribes, so-called, that was -- had been
20 treated differently by the various statutes. And that that
21 was the reason for that proviso, to clarify that the General
22 Allotment Act would not apply to that group of American
23 Indians.

24 QUESTION: Mr. Sullivan, as I understand your
25 response to Justice Stevens' question, do I understand it

1 correctly that you say it doesn't matter whether it's a tax
2 on the land or not, that any tax that is what -- that is
3 related to the land? I suppose you would say that the State
4 could impose a sales tax on the land, too; impose a tax upon
5 real estate sales with respect to this land?

6 MR. SULLIVAN: That's, in essence, what the 1
7 percent real estate excise tax is, Your Honor. And
8 yes -- all I'm relating to is that this Court, in *Squire v.*
9 *Capoeman*, said that if it's owned in fee, and there's free
10 alienability, that the tribal member, who may not otherwise
11 have to pay income tax, is going to have to pay it.

12 In the Oklahoma Tax Commission case, when Oklahoma
13 wanted to collect a million-and-some dollars worth of
14 inheritance tax said no, you can't collect all of it,
15 because some of it is not related to fee lands. That part,
16 the part that's related to trust lands, you can't collect.

17 The part that's related, the income you've earned
18 from the fee lands can be taxed by the State of Oklahoma --
19 not by the Federal Government -- by the State of Oklahoma.

20 We are just relating that it seems to us, that
21 these cases require that, in fact, the tax be collected, if
22 it's owned in fee. And that the Congress has said --

23 QUESTION: You're trying to distinguish this
24 situation from *Moe*. And the device you're using is the
25 proviso, as I understand it. Without the proviso there's

1 no basis for distinguishing this from Moe.

2 The proviso, however, doesn't say taxes relating
3 to such land, but it says taxation of said land. It says
4 taxation of said land. So you have to be taxing the land
5 to come within the proviso, don't you?

6 MR. SULLIVAN: Well, Squire v. Capoeman
7 specifically analyzed the proviso and said that if it's
8 trust, it's not going to be taxed; if it's fee, it will be
9 taxed. So that, it seems to me, that to the extent that
10 both provisions -- and I say both provisions, because the
11 general laws clause was upheld in Goudy, and I think you can
12 distinguish Moe on the basis of personalty, as opposed to
13 real property.

14 And I think it's a valid distinction. It's one
15 that the Congress made early on.

16 QUESTION: I mean, you can distinguish it on that
17 ground. But there's no basis in the law for distinguishing
18 it on that ground, that the basis in the law that you give
19 us, that you entice is with, is the proviso. And the
20 proviso says, taxation of said land.

21 QUESTION: But you rely on both provisos I take
22 it.

23 MR. SULLIVAN: That's correct.

24 QUESTION: Including the one that was at issue in
25 Moe.

1 MR. SULLIVAN: That's correct -- as interpreted
2 by Goudy.

3 QUESTION: And you think you should win even if
4 the last proviso -- if the tax proviso wasn't even there?

5 MR. SULLIVAN: That's correct. That's correct.
6 And again, the opinion of the Solicitor is -- written in
7 1979, was of the same, indicating that the intent of
8 Congress was that if lands are held in fee, they would be
9 taxed. If they weren't held in fee, if they were held in
10 trust, that they would not.

11 The cases are --

12 QUESTION: When did -- you said the Congress has
13 made the distinction between personalty and realty? When
14 did it do that?

15 MR. SULLIVAN: I think that it made that
16 distinction when it said that the fee lands would be taxed;
17 and has never passed a specific statute authorizing the tax
18 on personalty. I mean, because that's -- at least from a
19 State and local government perspective, that's how we've
20 addressed these --

21 QUESTION: So there you are -- there you really
22 are relying on your tax proviso?

23 MR. SULLIVAN: Correct. We can't -- we can't --

24 QUESTION: Otherwise, you wouldn't win under just
25 the other proviso, on that basis.

1 MR. SULLIVAN: Not based on this Court's having
2 ruled in Moe, that's correct.

3 QUESTION: So you must get to the other proviso.

4 MR. SULLIVAN: Well, yes, if you don't limit Moe
5 to its facts, and say that you don't -- that that applies
6 to all taxes -- I think that, again, there are a number of
7 people who would say that the general, criminal, and civil
8 laws of this State would include taxes. But, as I say, the
9 Court has taken that away from us.

10 QUESTION: Can I ask you one question on another
11 subject before you sit down?

12 Your first question in your cert. petition
13 referred to Brendale and the problem with deciding whether
14 something's in the closed area or the open area. I didn't
15 understand that issue to be raised by the court of appeals'
16 opinion. Could you help me out? To what extent is there
17 a Brendale issue in this case?

18 MR. SULLIVAN: Well, we believe there should not
19 be, and that if the court of appeals missed --

20 QUESTION: Do you think the court of appeals did
21 inject the Brendale issue?

22 MR. SULLIVAN: Yes, but we believe so by its
23 opinion saying it will return this back to the trial court,
24 and the trial court will weigh these things and decide
25 whether a tax should be imposed.

1 Our position is, is the Court here has established
2 a per se rule for taxes. It's the only workable kind of
3 rule for taxes.

4 QUESTION: Well, I understand your position, but
5 I didn't -- couldn't -- you -- I'm just not sure I
6 understood the disposition of the court of appeals, which
7 was, in your view, they in effect said if it's in the closed
8 area, it cannot be taxed, but if it's in the open area it
9 can be, or what --

10 MR. SULLIVAN: No, we interpreted the circuit
11 court's opinion to say that we're going to send it back, and
12 we're going to do an analysis of the entire reservation, and
13 maybe parcel by parcel to decide whether the taxes should
14 be imposed.

15 And I think that's why both the Government and the
16 tribe and ourselves are saying we need a per se rule,
17 either --

18 QUESTION: (Inaudible) wants that. I didn't
19 really understand them to have (inaudible) that. But that's
20 what -- I see.

21 MR. SULLIVAN: That's how we understood it.

22 Thank you.

23 QUESTION: Thank you, Mr. Sullivan.

24 Mr. Bjur, we'll hear from you.

25 ORAL ARGUMENT OF ROBERT WAYNE BJUR

1 ON BEHALF OF RESPONDENT/CROSS-PETITIONER

2 MR. BJUR: Thank you, Mr. Chief Justice, and may
3 it please the Court:

4 The first thing that I would like to do is address
5 an argument made by Mr. Sullivan in response to questioning
6 from this Court.

7 Mr. Sullivan asserts that fee land owned by a
8 Yakima member on the reservation would be subject to State
9 law in the event that tribal member was to pass away.
10 That's not the case on the Yakima Reservation. And on
11 behalf of the Yakima Nation, I strongly disagree with that
12 assertion.

13 It was less than 2 short years passed, when Mr.
14 Sullivan stood before this Court and conceded, in oral
15 argument, that Yakima County had no authority to zone land
16 owned by fee members on the Yakima Indian Reservation. Now
17 how Mr. Sullivan can jump to the conclusion that Yakima
18 County now has authority to provide for the descent and
19 distribution of that land just simply doesn't make sense.

20 QUESTION: I think he said that we really don't
21 have to decide that in order to decide this case.

22 MR. BJUR: That's true, but it's --

23 QUESTION: And relieved at but.

24 (Laughter.)

25 QUESTION: What about the sale or to transfer

1 title? Whose law would apply?

2 MR. BJUR: Well, on the Yakima Reservation, tribal
3 law and State law is concurrent. I'm not aware of a
4 conflict between tribal law and State law on the laws on --
5 effecting a sale. The only provision that -- of State law
6 that would not apply would be the real estate excise tax.

7 QUESTION: Has the tribe restricted the
8 transferability of lands owned in fee by tribal members?

9 MR. BJUR: No, that's not part of the tribal law
10 and order code. The tribe doesn't restrict those sales.
11 However, the tribe does restrict its own sales of fee land.
12 That is done in accordance with policies and procedures
13 agreed upon with the United States Government, the Bureau
14 of Indian Affairs.

15 QUESTION: In Washington, are stamps required on
16 a deed when it's recorded?

17 MR. BJUR: They used to be but they're not now.
18 All you have to do is show that the excise tax has been
19 accounted for, one way or another.

20 QUESTION: Are the deeds routinely recorded in the
21 office of the Yakima County Recorder?

22 MR. BJUR: Yes, deeds are recorded.

23 QUESTION: And I take it that the State recording
24 statutes apply? There's not a parallel set of tribal rules
25 on recording, are there?

1 MR. BJUR: No, there's no conflict between tribal
2 law and State law with regard to recording requirements.

3 QUESTION: Well, it's one thing to say no
4 conflict. It's another thing to say that Washington would
5 have the right to regulate the terms of sale of fee lands
6 in certain respects -- to the exclusion of the tribe, with
7 respect to documentation, the signatures that's required on
8 a deed, recording requirements, et cetera.

9 MR. BJUR: Well, that question hasn't come up.
10 I would disagree. If the tribe did take a position and
11 passed laws regulating the transfer of fee property by a
12 tribal member within the boundaries of the Yakima Indian
13 Reservation, the tribal law would control, for the fee --
14 for the tribal members.

15 One thing that needs to be remembered in this
16 proceeding is what -- what's at stake here. This action was
17 instituted by the Yakima Nation in response to the
18 foreclosure and the pending tax sales of the lands and homes
19 of 31 members of the tribe.

20 The court of appeals acknowledged that these taxes
21 were -- demonstrably serious, impacting upon the tribe's
22 political integrity, the economic security, and health and
23 welfare.

24 Also, this issue is very, very important to the
25 Yakima Nation because of its conflict and its threat to the

1 treaty with the Yakimas. The treaty with the Yakimas, which
2 we've addressed in our brief, provides that the lands of the
3 Yakima Indian Reservation are for the exclusive use and
4 benefit of the Yakima Nation and its members.

5 This is a treaty provision that remains intact.
6 It has not been abrogated. These taxes, the efforts by
7 Yakima County to impose real estate property taxes on the
8 fee lands of Yakima members conflicts directly with the
9 treaty. It -- they cannot be permitted. They're invalid
10 in my --

11 QUESTION: Well, if -- if the -- if the act of
12 Congress -- if we were to find an act of Congress that
13 authorized the imposition of these real property taxes, and
14 it was after the treaty, then if your -- your construction
15 of the treaty would be abrogated to that effect, would it
16 not?

17 MR. BJUR: Well --

18 QUESTION: A treaty doesn't govern over a later
19 statute.

20 MR. BJUR: In order to abrogate the treaty, it is
21 my understanding of this Court's decisions on that, the
22 abrogation has to be clear and specific. Section 34 -- 25
23 U.S.C. 349, section 6 of the Allotment Act does not provide
24 clear and unambiguous intent by Congress to abrogate these
25 treaty rights.

1 QUESTION: Do you agree that if it did provide
2 unambiguously for State taxation, the treaty would be
3 abrogated? It doesn't have to mention the treaty, sir.

4 MR. BJUR: No, I agree that that's the status of
5 the law. If it was clear and unambiguous that abrogation
6 was intended, this Court has issued opinions that would
7 permit it.

8 QUESTION: Well, how much clearer can you be than
9 to say that -- that under certain circumstances the -- any
10 restrictions on the taxation of land shall expire?

11 MR. BJUR: Well, I believe that that's not clear.
12 What the proviso says --

13 QUESTION: Well, how would you make it clearer?

14 MR. BJUR: Well, I would make it clearer by
15 saying, and --

16 QUESTION: I would just say it again, and I really
17 mean it?

18 (Laughter.)

19 MR. BJUR: No, when the fee patent is issued, this
20 land shall be subject to State taxation. That's not what's
21 said.

22 QUESTION: Well, shall be removed. It says, all
23 restrictions to sale encumbrance or taxation of said land
24 shall be removed.

25 MR. BJUR: But that statute was passed -- or the

1 proviso was passed in 1906 at the height of the assimilation
2 and allotment era. This Court in Moe has --

3 QUESTION: Well, I know, but now you're getting
4 into something else.

5 What would you say if Moe had never been decided?
6 How clear would that be in --

7 MR. BJUR: If Moe -- to me, Moe is the logical
8 extension of McClanahan, Mescalero, the Kansas Indians,
9 Bryan v. Itasca County -- all those cases that I've
10 mentioned would support the position that we bring to this
11 Court today.

12 Moe is very helpful, no doubt. Moe is the
13 basis --

14 QUESTION: Well, you think the -- you think
15 the -- the later statutes really repeal the General
16 Allotment Act, and for all intents and purposes -- or this
17 part of -- at least this part of section 349?

18 MR. BJUR: Well --

19 QUESTION: Did it or didn't it?

20 MR. BJUR: I don't use the word repeal. I prefer
21 to use the words repudiated, as the Court used in Moe.

22 QUESTION: Well, you can't have two statutes
23 existing -- regulating the same subject in a contradictory
24 way. Isn't one of them going to cover it, and the other
25 one, if it doesn't cover it, it's been repealed.

1 MR. BJUR: Well, what the Court -- what this Court
2 has done, particularly in Moe, is looked to the policies
3 behind the allotment and assimilation legislation. Those
4 policies no longer exist. They've been completely replaced
5 and totally repudiated.

6 QUESTION: But ordinarily -- ordinarily, simply
7 a change of direction on the part of Congress, so that
8 Congress is doing things differently in the area of Indian
9 relations now than it did earlier doesn't repeal an express
10 statute.

11 MR. BJUR: Well, this is the enactment of the
12 Indian Reorganization Act and legislation thereafter wasn't
13 a change in direction. It was a 180-degree opposite
14 situation. Instead of assimilating and ending --

15 QUESTION: Well, what about the rule against
16 implied repeals? Can you point to something in the Indian
17 Reorganization Act that -- that is squarely inconsistent
18 with the proviso?

19 MR. BJUR: No, I can't.

20 QUESTION: Well, doesn't the rule against implied
21 repeals govern?

22 MR. BJUR: No, ah --

23 QUESTION: Why not?

24 MR. BJUR: Because I can't point to anything in
25 the Indian Reorganization Act that says directly repeals or

1 contradicts the main provision of 25 U.S.C. 349 which
2 provides that on the issuance of a patent in fee, the
3 allottee shall be subject to the general criminal and civil
4 jurisdiction in the State in which that allottee resides.
5 And yet Moe teaches us that that has been -- that's
6 inconsistent. That is no longer appropriate. It's invalid.

7 So the same logic applies to this issue.

8 QUESTION: Is it necessarily inconsistent to say
9 that both the Indian tribe could tax the land as well as the
10 State and county? I mean, we often have parallel systems
11 of taxation out there. Is there anything necessarily
12 consistent with that?

13 MR. BJUR: No, the tribe would have authority to
14 impose its taxes on fee lands. But the tribe has chosen not
15 to tax any of the lands owned by tribal members.

16 QUESTION: Well, and even if the tribe did choose
17 to tax, it wouldn't be -- it wouldn't mean that there
18 couldn't be another taxing jurisdiction that also had that
19 power.

20 MR. BJUR: Except this Court has said, to give
21 States taxing jurisdiction over Indian tribes and their
22 people require -- requires a clear and unambiguous intent
23 on Congress' part to effect -- effectually --

24 QUESTION: Well, I guess this Court in that early
25 Goudy case thought it was clear enough.

1 MR. BJUR: Well, what Goudy held --

2 QUESTION: Section 349.

3 MR. BJUR: That's true. In 1906 at the height of
4 the allotment and assimilation period, this Court held that
5 taxing jurisdiction was one of the general civil
6 jurisdictions that the allottee became subject to when he
7 received his patent.

8 QUESTION: It said that by virtue of the language
9 to that effect in section 349.

10 MR. BJUR: That's right. The Goudy decision was
11 made before the adoption of the Burke Act proviso. So the
12 Court in Goudy did not have the benefit of that other
13 language. It relied on the general jurisdictional grant
14 contained in the main text of the statute.

15 QUESTION: Moe never explicitly distinguished
16 between fee lands and other lands, did it?

17 MR. BJUR: Yes, it did, in my opinion.

18 QUESTION: Well, correct me if I'm wrong. It does
19 make that explicit distinction?

20 MR. BJUR: The --

21 QUESTION: The issue was -- in Moe was the general
22 policy -- general powers to tax.

23 MR. BJUR: But the opinion in Moe provides that
24 even on fee lands, the general taxing authority for personal
25 property taxes in the State of Montana does not exist.

1 QUESTION: Well, as to personal property tax. But
2 it never addressed a tax that was specifically directed to
3 fee lands only, on those lands.

4 MR. BJUR: No, it did not address that in Moe.
5 But the logic of Moe applies. If the ability to tax a car
6 that an Indian person owns on fee lands reduces the size of
7 the Flathead Reservation, surely the ability to impose the
8 property tax takes away the size of the reservation to the
9 Yakima people.

10 The Yakima Indian Reservation is the homeland of
11 the Yakima people. And I believe that Congress has dictated
12 that all of the reservation lands should be home to these
13 people -- including the fee lands, which brings into play
14 Congress adopting the Indian country definition at 18 U.S.C.
15 1151.

16 The Yakima Nation believes that this statute is
17 significant because it clarified that Indian country was to
18 include fee lands. This was in doubt on many reservations
19 before Congress did this.

20 I believe that this particular statute was
21 important to the Court's decision in Moe.

22 QUESTION: But in Moe, if we had found the
23 personal property -- a personal property tax
24 could -- should -- could be imposed, we would have had to
25 find that the entirety of the State -- of the State's law

1 would also apply. There was no basis for distinguishing
2 personal property taxes from the remainder of State
3 jurisdiction.

4 And in that situation, the checkerboard problem
5 we were concerned about in Moe is a serious problem, as the
6 Federal Assimilative Crime Act demonstrates. The Federal
7 Government, which owns real estate all around, doesn't try
8 to, you know, have separate laws, in a checkerboard fashion
9 within the various States.

10 So that was a real concern in Moe. But gee,
11 running a checkerboard system of real estate is not very
12 difficult. Don't we have that same situation with respect
13 to Federal lands owned within the States? The States can
14 tax other lands, but they can't tax the Federal lands. So
15 what's the big deal about checkerboarding as far as real
16 estate taxation is concerned?

17 MR. BJUR: Well, it's significant because why
18 should one Yakima member have to pay taxes to a jurisdiction
19 that he pays no other taxes to, on one parcel of land, while
20 the other Yakima member not have to pay taxes?

21 QUESTION: Well, 'cause the statute says so. But
22 I mean, there's no serious implementation problem, as there
23 is when you have -- when you have people in one relatively
24 small area all subject to different criminal and civil laws
25 on the basis of which parcel of land they happen to be on.

1 And that would be very strange.

2 But I don't see anything so strange about allowing
3 a State to tax some parcels and not to tax others.

4 MR. BJUR: Well, that's true, but that same
5 distinction could have been made in Moe.

6 QUESTION: No, I don't think so. I mean, they
7 didn't have the proviso. I mean, if you said personal
8 property taxes could be imposed on as a checkerboard-
9 pattern basis, I think you'd have to say all laws, quote,
10 "both civil and criminal" would be applicable on the same
11 checkerboard basis. And that would have been a real -- a
12 real problem, I think.

13 MR. BJUR: Well, I would argue that the proviso
14 wasn't intended to be that dramatic. The proviso was
15 something that Congress passed, and still fell within the
16 limits of the general jurisdictional grant contained at the
17 beginning of 349.

18 I would like to point out -- I'm running out of
19 time -- but point out to this Court to consider the argument
20 that we've made on the State disclaimer statute. The court
21 of appeals found that the disclaimer language had been
22 waived by Congress, or Congress had consented to it by 349.

23 Again, Congress did not contemplate, when it
24 adopted 349 that Indian tribes would be flourishing, and
25 that the reservation system would continue to exist at the

1 end of the 25-year trust period.

2 And I would also like this Court to affirm the
3 decision in the court of appeals on the excise tax. There's
4 no reason to distinguish that excise tax from the taxes that
5 this Court has struck down in the other cases that have come
6 before this Court.

7 Thank you.

8 QUESTION: Can I ask you one question before you
9 sit down?

10 MR. BJUR: Sure.

11 QUESTION: At the beginning you said you were
12 relying on the provisions of the treaty with the Yakima
13 Nation. Are the provisions you've relied on set forth in
14 your brief? I didn't find them.

15 MR. BJUR: Well, the -- my brief --

16 QUESTION: Quotes from the --

17 MR. BJUR: -- quotes those provisions. The
18 treaty is 12 Stat. 951, where it describes the 10.8 million
19 acres that the tribe gave up and provided basically the tax
20 base for the rest of central Washington.

21 The next section goes on to provide
22 that -- describe the lands that would be in the reservation,
23 and it says these lands shall be for the exclusive use and
24 benefit of the Yakima Nation.

25 QUESTION: That's what I thought you said. But

1 that would mean they couldn't have even conveyed them to
2 non-Indians. And they did. And there's a big question
3 about that.

4 MR. BJUR: Well, the General Allotment Act was the
5 beginning of an effort to abrogate that. But the General
6 Allotment Act did not go to fruition. Congress saw the
7 error of that in -- and halted allotment and assimilation
8 before it became finalized.

9 The treaty provision was not abrogated. It still
10 remains in force.

11 QUESTION: Thank you, Mr. Bjur.

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

13 ORAL ARGUMENT OF EDWIN S. KNEEDLER

14 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

15 SUPPORTING THE RESPONDENT/CROSS-PETITIONER

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

18 There's no disagreement between the parties as to
19 the general principles of preemption in Indian law that
20 govern this case. Those principles, which are rooted in
21 both ancient treaties and current Federal statutes, provide
22 that State taxation of Indian activities and property on a
23 reservation is preempted, unless Congress carves out an
24 exception to that rule in unmistakably clear terms.

25 We submit that on the question in which the

1 parties are in a disagreement -- whether section 6 of the
2 General Allotment Act permits the taxation here -- this
3 Court's unanimous decision in Moe controls.

4 In Moe, the Court found untenable the argument
5 that section 6 of the General Allotment Act allowed the
6 State of Montana to tax activities with respect to Indians
7 who had received fee allotments as contemplated in section
8 6 -- including personal property --

9 QUESTION: But not real property..

10 MR. KNEEDLER: -- but not real property. In our
11 view, Mr. Chief Justice, though, it follows a fortiori for
12 several reasons from that conclusion, and that construction
13 of section 6.

14 QUESTION: Well, when did the Solicitor General
15 or the Justice Department adopt that view of Moe?

16 MR. KNEEDLER: Insofar as the Solicitor General's
17 Office is concerned, the first time I'm aware that we looked
18 at it is the first time that we were asked to look at it,
19 which was in connection with filing the court of -- an
20 amicus brief in the court of appeals in this case.

21 QUESTION: So the Government is -- the Government
22 has maintained the same position since it first
23 addressed --

24 MR. KNEEDLER: There was -- there was a -- an
25 opinion by the Solicitor of the Interior Department which

1 has since been repudiated -- I think it's the use of the
2 word solicitor, that it wasn't clear -- it was an opinion
3 of the Solicitor of the Interior Department in 1979 that did
4 not give that construction to Moe with respect to real
5 property taxes. But the Interior Department has now over-
6 ruled that decision.

7 There are several reasons why we believe
8 that -- ah -- Moe controls in this case. But first let
9 me -- let me explain the two -- there are two separate
10 theories, or bases for an immunity from taxation that are
11 at issue here, and it's important to keep them distinct.
12 Under section 5 of the General Allotment Act, allotments
13 made to individual Indians were held in trust. Although
14 section 5 did not expressly say so, this Court's decision
15 in Rickert held that a State could not tax the allotment
16 while it was held in trust.

17 The principle was, that the trust allotment was
18 an instrumentality of the United States Government, in
19 furtherance of the policy of carrying-out the allotment of
20 lands under the Allotment Act. It was designed to protect
21 only the individual Indian, to give him a period of
22 preparation, at the conclusion of which he would be fully
23 assimilated into the larger society.

24 The rule of preemption, which is what is at issue
25 here, is something quite different. It turns on the

1 statutes and treaties governing the reservation and tribal
2 affairs. It does not turn on the tax immunity of an
3 individual Indian. And the Court drew that very distinction
4 in Moe, itself, where it said -- in the jurisdictional part
5 of the Court's holding -- that the tax immunity at issue
6 here is one of preemption, based on treaties and statutes,
7 not based on the Federal instrumentality doctrine which has
8 since been repudiated.

9 With that in mind, it becomes quite clear the way
10 section 6 of the General Allotment Act operates. The
11 principal clause of section 6 that was at issue in this
12 Court's decision in Moe, affirmatively declared that when
13 an Indian received a fee patent, at the conclusion of the
14 trust period, he shall have the benefit and be subject to
15 all provisions of State law. In Goudy v. Meath, the Court
16 held that that included State tax law.

17 And that, of course, was consistent with the
18 design of the General Allotment Act, which was that
19 individual Indians would receive their own allotment and be
20 assimilated into the larger society, and therefore be
21 subject to State law.

22 But in Moe, this Court held that section 6 did
23 not have the present effect of allowing the taxation of
24 personal property on Indian reservations, that that was
25 untenable in light of subsequent developments: the

1 enactment of the Indian Reorganization Act which repudiated
2 the allotment policy, and its goals of breaking up tribes
3 and tribal relations. It was inconsistent with the
4 enactment of 18 U.S.C. 1151 and the definition of "Indian
5 country" in 1948 and was inconsistent with the regulation
6 -- the comprehensive regulation of adjudicatory jurisdiction
7 in Public Law 280.

8 QUESTION: Do you think Moe really just overruled
9 Goudy?

10 MR. KNEEDLER: It did not -- it did not, because,
11 again, let me -- because of the distinction I was drawing.

12 Goudy and the first clause of section 6 of the
13 General Allotment Act had the effect of removing the
14 instrumentality doctoring immunity, by virtue of the fact
15 that it was the United States holding the land in trust.
16 It was an immunity that really derived from the United
17 States' interest in the individual allotment.

18 Moe, however, discussed the preemption rationale.
19 And if we look at that tax -- or the proviso to section 6,
20 it becomes clear, looking at the language of it, why this
21 does not carve out an exception to the rule of preemption.

22 What the proviso says is that the Secretary may
23 accelerate the time, essentially, to grant a fee patent, if
24 he concludes that the individual Indian is capable of
25 managing his own affairs.

1 Well, the premise obviously is removing the
2 Federal protection instrumentality rationale for the tax
3 exemption. Then it says all restrictions as to sale,
4 encumbrance, or taxation of said land shall be removed.

5 Now, first of all, the word "restrictions"
6 connotes restrictions attached to the particular parcel, and
7 it obviously refers to the restrictions that derive from
8 section 5 of the General Allotment Act by virtue of the land
9 being held in trust.

10 Furthermore, the use of the word "remove"
11 indicates that what the statute was speaking to were those
12 restrictions that were in place at the time -- those that
13 were already attached to the land. When lifted, the Indian
14 would become part of the Indian community -- of the non-
15 Indian community.

16 So in those respects, all that section 6's proviso
17 does when a patent issues at an accelerated rate, is to
18 subject -- is to remove whatever restrictions are in the
19 General Allotment Act, itself, to taxation. But it does not
20 speak to the broader question of preemption of State tax --

21 QUESTION: But it doesn't say that. It doesn't
22 say -- it doesn't say and thereafter, all restrictions
23 imposed hereunder as to sale, encumbrance, or taxation shall
24 be removed. It says all restrictions.

25 MR. KNEEDLER: But a rule of preemption, under

1 this Court's cases derived from statutes and treaties is not
2 commonly -- the word restrictions is not commonly used to
3 describe that.

4 QUESTION: Well, it -- it seems very strange to
5 say that the section 349 said all these restrictions would
6 be removed and the States may tax land, but you say they
7 can't because there's another restriction that hasn't been
8 removed -- preemption.

9 MR. KNEEDLER: But that's exactly the rationale
10 the Court adopted in Moe. And that is that Moe --

11 QUESTION: Well, I certainly -- I wrote Moe, and
12 I certainly don't agree with --

13 (Laughter.)

14 QUESTION: -- with that interpretation of it.

15 MR. KNEEDLER: No -- what the -- not with respect
16 to separate tax immunities as such. But what the Court said
17 in Moe was notwithstanding the fact that Goudy had said
18 State tax laws are part of the laws to which the
19 Indian -- the allottee become subject, the Court said that
20 does not apply. It's not an applied repeal. Section 6
21 remains in effect. And if you have an off-reservation
22 allotment, the -- section 6 has the effect of subjecting
23 that allotment to State tax law --

24 QUESTION: Well, they certainly did --

25 QUESTION: That's a very strange reading of Moe.

1 QUESTION: -- they certainly wasted a lot of
2 effort writing that statute. It's just a meaningless
3 statute.

4 MR. KNEEDLER: No, it's not -- with all respect,
5 Justice White, it's not. Because at the time it was
6 written, it was part of the allotment policy during which
7 individual allotments were to pass into the broader society.
8 As this Court said in Moe, that was repudiated by the
9 General Allotment Act -- not just the allotment policy, but
10 the -- excuse me -- by the IRA. The IRA's purpose was to
11 reestablish the tribes, and therefore to reinstate the
12 premise of the Kansas Indian --

13 QUESTION: So you're really saying there later
14 arose a preemption policy --

15 MR. KNEEDLER: Right.

16 QUESTION: -- which intervened.

17 MR. KNEEDLER: Precisely, Justice White, and was
18 not -- it was the reinstatement of the prior regime, prior
19 to the General Allotment Act. It reinvoked the rule of the
20 Kansas Indians, which this Court reiterated in Montana v.
21 Blackfeet Tribe, which is once the tribe is recognized by
22 the political departments as separate and self-
23 governing -- as this one is -- and set-aside on its own
24 land, it's a tribe, and its members are immune from
25 taxation.

1 QUESTION: Well, let's just assume there was a
2 time between the General Allotment Act and preemption, where
3 there wasn't any preemption.

4 MR. KNEEDLER: That's correct; there was.

5 QUESTION: All right, and -- in that period of
6 time, States were permitted to tax by virtue of the General
7 Allotment Act.

8 MR. KNEEDLER: Right -- and even after the IRA,
9 with respect to lands outside of reservations.

10 QUESTION: Yes, yes, yes.

11 MR. KNEEDLER: They may continue to do so. That's
12 why it's --

13 QUESTION: So what you're saying is that this
14 preemption policy, wherever it came from, in effect
15 overturned the State's authority to tax pursuant to section
16 6.

17 MR. KNEEDLER: Exactly, which is what the Court
18 held in Moe. And it's not just a change in direction by
19 the --

20 QUESTION: Well that -- so you don't say that
21 repealed it.

22 MR. KNEEDLER: No, it did not repeal it. Because
23 the individual -- because all the section 6 spoke to was the
24 instrumentality doctrine tax immunity, which was individual.
25 But as this Court said in Moe, the tax immunity here is for

1 the benefit of the self-governing tribe, including its
2 members.

3 And it's not just a -- a change in policy. There
4 were specific statutes, later enacted, that had this
5 effect -- including the IRA, including the redefinition of
6 "Indian country" in 1948.

7 QUESTION: Your time has expired, Mr. Kneedler.

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

9 QUESTION: Mr. Sullivan, do you have rebuttal?
10 You have 4 minutes remaining.

11 REBUTTAL ARGUMENT OF JEFFREY C. SULLIVAN

12 ON BEHALF OF THE PETITIONERS/CROSS-RESPONDENTS

13 MR. SULLIVAN: Mr. Chief Justice, and may it
14 please the Court:

15 Mr. Bjur indicated that he believed that section
16 6 was adopted after Goudy. Our reading of that is -- is
17 different. That section 6 was, in fact, adopted -- the
18 amendment to section 6 was adopted in May of 1906, and Goudy
19 was decided in November. The Court in Goudy could have
20 relied on the second proviso but chose not to -- in fact,
21 relied on the general laws provision which we think gives
22 it a stronger meaning.

23 Additionally, I think one of the questions that
24 the Chief Justice asked points out the problem that this
25 case addresses: when was the statute repealed?

1 Policy of Congress has gone from one side to
2 another. After the IRA, after the so-called repudiation of
3 the assimilation policy, the Congress of the United States
4 passed Public Law 280. On the day that that law was passed,
5 Public Law 280, the Congress adopted a resolution that
6 stated, in part, the policy of Congress -- this is a
7 quotation now -- as rapidly as possible to make Indians
8 within territorial limits of the United States subject to
9 the same laws, entitled to the same privilege and
10 responsibilities as are applicable to other citizens of the
11 United States, and to end their status as wards of the
12 United States and to grant them all of the rights and
13 prerogatives pertaining to American citizenship.

14 We submit that that was a policy change. Granted,
15 that policy has now been changed again.

16 QUESTION: When was Public Law 280 passed?

17 MR. SULLIVAN: It was passed in 1953. I don't have
18 the exact date. But it was passed some 19 years after the
19 Indian Reorganization Act. That is the problem. The policy
20 of Congress has gone from one side to the other, and back
21 and forth.

22 But as that policy has changed, this statute,
23 providing specifically for taxing of fee lands, has never
24 changed. It has remained the same.

25 This issue should be addressed to the Congress.

1 The Congress should decide -- all of the counties, many of
2 the counties are like Jackson County, Kansas, which was
3 raised in that 1939 case. These taxes have become a part
4 of the economy of those jurisdictions.

5 The Congress -- if it wants to say, fee lands will
6 no longer be taxed, then they should look at it in terms of
7 testimony and determine that we're going to replace those
8 taxes, much as they've done with school districts. Pass an
9 in lieu tax. What kind of an impact is this going to have?

10 There's an -- in the materials that were
11 submitted, in one of the briefs, with respect to an
12 individual county, one of the counties in South Dakota,
13 these taxes make up 10 percent of the county's total taxing
14 jurisdiction.

15 To end up with a situation that the tribes and the
16 Government are asking you for is to say that an individual
17 Indian on a reservation can own his land; he can mortgage
18 his land; he cannot pay the mortgage and his land could be
19 sold at a sale, at a sheriff's --

20 QUESTION: Do you agree with the Government when
21 it says -- when they say that you do agree with the
22 preemption submission in the sense that you can't tax unless
23 Congress says so, specifically?

24 MR. SULLIVAN: Yes, we agree.

25 QUESTION: When did that -- has that always been

1 the rule, forever and ever?

2 MR. SULLIVAN: In terms of this Court's analysis
3 of the --

4 QUESTION: The Government says that after the
5 General Allotment Act, some preemption principle suddenly
6 arose. Did it?

7 MR. SULLIVAN: Well, through this Court's rulings,
8 by saying that, in fact, the general -- I think it was clear
9 to the Congress in 1906, myself, that they were going to be
10 subject to all taxes, and that the Court has since -- since
11 that time, an attempt to balance and interpret the way
12 Congress has gone back and forth in what we are left with
13 on our reservation. If the Court has said we're not going
14 to allow taxation on these reservations, by State and local
15 government without specific authority -- and in this case,
16 it extended even to the --

17 QUESTION: When was that the -- when was
18 that -- when did this Court first say that?

19 MR. SULLIVAN: I believe in McClanahan. I think
20 it was in McClanahan was the first time that the Court
21 indicated that, in looking at Arizona's income tax, that
22 they were a State income tax that they were attempting to
23 impose.

24 Thank you.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sullivan.

1 The case is submitted.

2 (Whereupon at 11:56 a.m., the case in the above-
3 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 90-408 - COUNTY OF YAKIMA, ET AL., Petitioners V. _____

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION;

and

NO. 90-577 - CONFEDERATED TRIBES AND BANDS OF THE _____
YAKIMA NATION, Petitioner V. COUNTY OF YAKIMA AND DALE
A. GRAY, YAKIMA COUNTY TREASURER _____

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

BY *Lona M. May*

(REPORTER)

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