

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: OKLAHOMA TAX COMMISSION, Petitioner v. SAC  
AND FOX NATION

CASE NO: 92-259

PLACE: Washington, D.C.

DATE: Tuesday, March 23, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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OKLAHOMA TAX COMMISSION, :  
Petitioner :  
v. : No. 92-259  
SAC AND FOX NATION :  
- - - - - X

Washington, D.C.  
Tuesday, March 23, 1993

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

APPEARANCES:

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

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

G. WILLIAM RICE, ESQ., Attorney General of the Sac and Fox Nation, Cushing, Oklahoma; on behalf of the Respondent.

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

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 92-259, the Oklahoma Tax Commission v. the Sac  
5 and Fox Nation.

6 Mr. Miley.

7 ORAL ARGUMENT OF DAVID ALLEN MILEY

8 ON BEHALF OF THE PETITIONER

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

11 This case involves whether the State of Oklahoma  
12 may tax the income of a tribal member who is employed by  
13 the tribe, the Sac and Fox Nation, and whether Oklahoma  
14 may impose motor vehicle taxes on automobiles owned by  
15 tribal members of the Sac and Fox Nation.

16 The Sac and Fox Nation imposes its own income  
17 and motor vehicle taxes, as the State does.

18 The lower courts have enjoined the -- Oklahoma  
19 from collecting these taxes, and the State feels that this  
20 injunction is improper for two reasons. There is no  
21 Federal law which preempts State law in this area, and the  
22 State law --

23 QUESTION: But this involves State taxation of  
24 tribal members.

25 MR. MILEY: This involves State taxation of

1 tribal members, yes.

2 QUESTION: Who are living where?

3 MR. MILEY: Who -- some of the tribal members  
4 live on Indian country and some do not live on Indian  
5 country.

6 QUESTION: And the -- but it involves both --  
7 all of those members.

8 MR. MILEY: All tribal members. We were  
9 enjoined from taxing all tribal members who worked for the  
10 tribe or any tribal members who properly license their car  
11 with the tribe. And those tribal members, some live off  
12 the Indian country and some live on Indian country.

13 Of course, we have a situation where Indian  
14 country is scattered among several -- is scattered among  
15 small plots in an area that is otherwise under State  
16 jurisdiction.

17 QUESTION: What are you including in the term  
18 Indian country when you refer to it?

19 MR. MILEY: That would be trust land, that is,  
20 land that is held in trust by the United States of America  
21 for the benefit of the tribe itself or for the benefit of  
22 an Indian tribal --

23 QUESTION: An individual.

24 MR. MILEY: An individual person.

25 QUESTION: Are all of the so-called allotted

1 lands here lands that are held in trust by the Government  
2 for tribal members?

3 MR. MILEY: Yes, they would be or they'd be held  
4 under an allotment deed, but the allotment deeds are quite  
5 old. But mainly we're talking about trust land, but we  
6 are talking about allotted land also in this area.

7 QUESTION: If it's allotted, deeded, and not  
8 held in trust, do you count that as Indian country as  
9 well?

10 MR. MILEY: Yes. Under the Federal definition  
11 under the Federal statute, 18 U.S.C., section 1151(c),  
12 that land -- an Indian allotment is included in the term.

13 QUESTION: That's as long as the --

14 QUESTION: The Government holds title.

15 QUESTION: That is as long as the --

16 MR. MILEY: The Government.

17 QUESTION: Until they -- if it has been  
18 transferred to a non-Indian.

19 MR. MILEY: Now, that's true. It could be -- an  
20 original allottee may have transferred that or it may have  
21 been devised to a non-Indian --

22 QUESTION: So, that's not --

23 MR. MILEY: -- and BIA --

24 QUESTION: That's not Indian country there.

25 MR. MILEY: Correct. If the BIA --

1                   QUESTION: So, it still has to be in the hands  
2 of a member.

3                   MR. MILEY: Correct. And it has to be -- most  
4 land we're talking about is held in trust by the United  
5 States Government.

6                   QUESTION: What if the Government has conveyed  
7 the patent to the allottee, but the allottee is an Indian?  
8 Is that land still Indian country?

9                   MR. MILEY: Well, if the Indian tribal member  
10 owns deed land, just the fee title to the land, and there  
11 is no trust or restricted status to the land, then that  
12 would not be Indian country just because the Indian would  
13 own it.

14                   QUESTION: So, when you refer to Indian country,  
15 you are not referring to fee lands owned outright by  
16 individual Indians.

17                   MR. MILEY: Correct. And even fee lands that  
18 are owned by the tribe itself would not be Indian country.  
19 That land would have to be accepted into trust by the  
20 Bureau of Indian Affairs. Many times -- and tribes do in  
21 Oklahoma acquire parcels of land and hold it in fee. BIA  
22 has complete discretion whether to accept that land in the  
23 trust if the tribe requests it. Sometimes the BIA accepts  
24 it into trust, and sometimes the BIA does not. So, it  
25 must be held in trust to be Indian country.



1 QUESTION: Go ahead.

2 QUESTION: If you should lose with respect to  
3 Indians who are living on trust lands, should you also  
4 lose with respect to those who are not living on trust  
5 lands? And if the answer is no, why is the distinction  
6 important?

7 MR. MILEY: Well, I don't think the distinction  
8 -- we can make a distinction. But if I lose with respect  
9 to the Indians on the trust lands, that would have to be  
10 because they are within some sort of tribal jurisdiction  
11 that is exclusive of State jurisdiction so that outside of  
12 that territory on non-Indian country lands, then the State  
13 of Oklahoma would have complete jurisdiction over that  
14 individual. And we're talking about the taxation of an  
15 individual person, not the tribe.

16 QUESTION: So, you're saying the criterion  
17 strictly is a territorial jurisdiction criterion, and  
18 therefore you would not have to lose with respect to those  
19 nontrust lands.

20 MR. MILEY: Correct, but --

21 QUESTION: Is there any other competing theory  
22 of jurisdiction?

23 MR. MILEY: Well, here the tribe does not have  
24 exclusive jurisdiction because I think we've got to look  
25 at the Federal statute, the relevant Federal statute, so

1 that in this case even on Indian country within Oklahoma,  
2 individuals living on Indian country are taxable by the  
3 State in Oklahoma.

4 Now, that is because the allotment agreement, if  
5 we -- which is the McClanahan case, set up the idea that  
6 -- that case dealt with the Navajo reservation in Arizona.  
7 And that Navajo reservation was set up exclusively for the  
8 tribe, and the tribe was allowed to exclude non-Indians or  
9 impose conditions on those that were allowed to enter.

10 Here the Sac and Fox Nation did have a  
11 reservation which was established about the same time, in  
12 the -- 1867, about the same time the Navajo reservation  
13 was established. However, in 1891, the Federal Government  
14 -- Congress passed the allotment agreement or enacted the  
15 allotment agreement which allotted all the lands of the  
16 reservation to the tribal members at that time.

17 QUESTION: Or the tribe.

18 MR. MILEY: The tribe got about 800 acres.

19 QUESTION: Yes, all right. Go ahead.

20 MR. MILEY: This is a fairly -- this was a  
21 fairly large reservation in central Oklahoma.

22 But even giving acreage to the tribe, even  
23 giving a quarter section to each tribal member, they had  
24 huge amounts of land left over, and they opened that up.  
25 President Harrison opened that up to the legendary land

1 runs and all people of all kinds came in and took the  
2 land. And the tribe was not allowed to exclude those or  
3 impose any conditions on them. And so, implicit in the  
4 terms of that allotment agreement, the relevant statute in  
5 this case, we find that the tribe has lost the autonomy  
6 that the Navajo Nation has.

7 QUESTION: So, you say this case only concerns  
8 Indians that are living on trust lands?

9 MR. MILEY: Well, it concerns --

10 QUESTION: In terms of what the State is -- you  
11 think that if they're living off the trust lands, the  
12 State may --

13 MR. MILEY: Well --

14 QUESTION: -- impose taxes?

15 MR. MILEY: Correct. These are tribal members  
16 who work for the tribe. Now, I think many tribal members  
17 don't work for the tribe.

18 QUESTION: Right.

19 MR. MILEY: They work for --

20 QUESTION: Right.

21 MR. MILEY: -- various places, and they -- there  
22 is no argument that they are taxable, but here we have  
23 tribal members --

24 QUESTION: Who are not living on trust lands who  
25 are working for the tribe.

1 MR. MILEY: Who are working for the tribe, and  
2 some --

3 QUESTION: And they are at issue here.

4 MR. MILEY: They are at issue because the lower  
5 courts held that if you -- if the Indian or the tribal  
6 member works for the tribe, they do not owe taxes.  
7 Period.

8 QUESTION: Now, what about tribal members who do  
9 not live on trust land, but who are working for the tribe?  
10 But does the same -- you run into the same problem about  
11 the automobile tax?

12 MR. MILEY: Right. That's correct.

13 QUESTION: You do.

14 MR. MILEY: That's correct. The way the tribal  
15 scheme is set up -- well, you don't even have to be a  
16 tribal member to get a tribal tag necessarily.

17 QUESTION: Well, I know. I know.

18 MR. MILEY: But the --

19 QUESTION: Unless you're a tribal member, the  
20 State has no barrier to insisting on their paying the  
21 excise tax.

22 MR. MILEY: Right. Yes, in terms of our own  
23 taxes, we feel that even though you pay tribal taxes in  
24 either instance, you owe the State taxes also. Now, so  
25 we're talking about the tribal members on Indian country

1 and off that are tagging their cars with the tribe.

2 QUESTION: What is the significance of -- as to  
3 the first tax, income tax, why is it significant that the  
4 Indian who is living on the trust land works for the  
5 tribe? What if the Indian doesn't work for the tribe,  
6 works for somebody else on the trust land? Is there any  
7 contention that that Indian does not owe income tax?

8 MR. MILEY: Well, I think this case started out  
9 much broader, and the tribe would argue that would be the  
10 case.

11 QUESTION: Yes, I thought they would.

12 MR. MILEY: I would argue that -- well, and the  
13 Tenth Circuit did not see it so broadly. They felt that  
14 in order -- in this circumstance, where we do not have  
15 this exclusive type statute, that the fact that they were  
16 working for the tribe was the deciding factor as to  
17 whether they were taxable or not because our tax somehow  
18 infringed on tribal self-government.

19 QUESTION: It seems to me that the theory of  
20 getting off is either a tribal self-government theory, in  
21 which case you ought to get off whether you're on or off  
22 trust land so long as you're working for the tribe, or  
23 else the theory is a territorial theory, in which case you  
24 ought to get off so long as you're living on trust land  
25 whether or not you're working for the tribe.

1           MR. MILEY: Okay, but this case does not fall  
2 very neatly into the on/off dichotomy because people are  
3 constantly going on and off the Indian country because you  
4 cannot conduct your daily affairs of life in Oklahoma on  
5 strictly Indian country. You have got to proceed outside  
6 of Indian country to do that because you've got 160 acres  
7 of Indian country here and 160 acres down the road. And  
8 so, if you're living on Indian country, you're necessarily  
9 going to have to go off to take care of any business. So,  
10 you have -- what we have here is a situation where Indians  
11 are going off Indian country to work and to shop.

12           And what the tribe is saying in this instance  
13 is, well, if they work for us, they don't owe any taxes,  
14 and if they happen to buy something that they're going to  
15 take back to Indian country like a car, then they don't  
16 owe taxes either. Well, that --

17           QUESTION: What does the tribe say about people  
18 who don't work for the tribe, but who live on Indian  
19 country and go off and buy an automobile?

20           MR. MILEY: Well, they would say that just  
21 because they live on Indian country, they're within the  
22 tribal jurisdiction, you see, and that they would not be  
23 responsible for --

24           QUESTION: Well, how about on income tax?

25           MR. MILEY: On income tax --

1           QUESTION: Do they claim that Indians who live  
2 on trust lands, but who don't work for the tribe, and --  
3 but live off of trust lands, away from trust lands -- do  
4 they claim that the State may not tax those Indians --  
5 income tax those Indians?

6           MR. MILEY: Okay, now, income for a person who  
7 -- a tribal member who lives off of Indian country?

8           QUESTION: Who lives on the trust lands --

9           MR. MILEY: Who lives on.

10          QUESTION: -- but works off of trust lands.

11          MR. MILEY: Works off of trust lands.

12          QUESTION: And not for the tribe.

13          MR. MILEY: Not for the tribe. Okay. They  
14 would argue that because the person lives on Indian  
15 country, that that would be exempt from State taxation.

16          QUESTION: Is that issue in -- is that at issue  
17 in this case --

18          MR. MILEY: Well, no. The Tenth Circuit --

19          QUESTION: -- among other things?

20          MR. MILEY: The Tenth Circuit did not -- the  
21 Tenth Circuit ruled that only those tribal members who  
22 work for the tribe were eligible for this exemption in  
23 this case because I believe they were having a little  
24 trouble with the fact that we can't find an existing  
25 reservation here.

1           For instance, in the McClanahan case, the tribal  
2 member did not work for the tribe in that case. She lived  
3 on the reservation. She worked on the reservation. She  
4 earned all her income on the reservation, and because the  
5 Federal Government, in their statute that created the  
6 Navajo reservation, granted the tribe the exclusive  
7 jurisdiction over that land --

8           QUESTION: Sure.

9           MR. MILEY: -- the State was not allowed to come  
10 in and tax her.

11           Well, the Tenth Circuit couldn't quite get there  
12 with that case because we have the situation of the  
13 allotment agreement.

14           QUESTION: Well, under McClanahan, what if that  
15 person who lived on the reservation, the Navajo  
16 reservation, earned his or her income off the reservation?

17           MR. MILEY: Off the reservation, they -- I  
18 believe it's -- in Arizona they would pay the State income  
19 taxes.

20           QUESTION: Well, is there -- did McClanahan rule  
21 that or another case?

22           MR. MILEY: McClanahan did not --

23           QUESTION: Yes.

24           MR. MILEY: -- did not hold that.

25           QUESTION: Did some other case? If some other



1 case did, I would think it would control --

2 MR. MILEY: No, I --

3 QUESTION: -- control the issue in this case of  
4 Indians who lived on trust land, but who were earned their  
5 income off trust land.

6 MR. MILEY: Well, I can't think of a case right  
7 offhand that --

8 QUESTION: Yes, all right.

9 MR. MILEY: -- does that.

10 QUESTION: Go ahead. Go ahead.

11 MR. MILEY: But in terms of the income tax here,  
12 I believe this Court has already ruled -- well, the  
13 Supreme Court has ruled in the 1930's that -- in the case  
14 of Leahy v. State Treasurer, which relied on Choteau v.  
15 Burnet, where you had the situation of an Indian, an Osage  
16 Indian, who lived on Indian country and earned income from  
17 the tribal mineral resources, and he was taxable on the  
18 income that he earned on those tribal mineral resources in  
19 that case because there was not this type of reservation  
20 that you have in the Navajo cases.

21 And then coming a few years later in Oklahoma  
22 Tax Commission v. U.S., the Supreme Court also ruled that  
23 members of the five civilized tribes would owe Oklahoma  
24 estate taxes on their estates which included Indian  
25 country, where they lived, their homestead allotments.

1           QUESTION: Just one more question on this  
2 preliminary part of your argument. If we rule for you --  
3 pardon me. If we rule against you on your point, does  
4 the case still have to go back to determine whether or not  
5 you have jurisdiction to tax people that are in Indian  
6 country, or do we have to -- we can remand for that, can't  
7 we?

8           MR. MILEY: Well, I don't --

9           QUESTION: I mean, because if you don't have  
10 civil or criminal jurisdiction over Indian country --

11          MR. MILEY: Yes.

12          QUESTION: -- which I take it you don't, and  
13 McClanahan says that's that the key for taxation, and if  
14 the Tenth Circuit didn't reach that, we don't necessarily  
15 have to reach that issue in this case, do we? We can  
16 remand.

17          MR. MILEY: Well, I don't think I agree with  
18 your reasoning that you've got to have civil and criminal  
19 jurisdiction. I think the whole basis of the McClanahan  
20 case was that the Navajo treaty preempted State law. And  
21 so, in this case, we have an allotment agreement that did  
22 away with that exclusive treaty and implies that State law  
23 now applies, and we have cases, Supreme Court cases, that  
24 suggest -- that I believe are applicable to this  
25 situation, that conclude that State law, State tax law,

1 does apply for an individual's income.

2 QUESTION: All right. So, we think we should  
3 resolve that issue here in this case.

4 MR. MILEY: Yes, I do.

5 QUESTION: All right.

6 MR. MILEY: So, I think, though, that one of the  
7 things that the lower courts did not -- declined to do was  
8 resolve the reservation issue of whether what -- to what  
9 extent the reservation exists, and I believe that is a  
10 necessary part of a finding in this case. I believe that  
11 in order to reach the conclusion, if in fact State law  
12 infringes on tribal self-government, you've got to find  
13 the reservation where it is acting on, and I think you'd  
14 have to have an exclusive reservation in order to -- if in  
15 fact the State law will be an infringement on the tribal  
16 government in this case.

17 And I don't think that was what Congress  
18 intended when they passed the allotment agreement. I  
19 think we've got to give the allotment agreement as broad a  
20 sweep as the Congress intended that passed the act, and in  
21 that case, they were terminating the reservations in the  
22 State of Oklahoma to, in fact, create the State. And I  
23 think it -- in reading in the accounts in the case of the  
24 case that I cited, Woodward v. DeGraffenried --

25 QUESTION: -- Mescalero case? Mescalero held

1 that if a tribe sets up a business off the reservation,  
2 it's subject to the State gross receipts tax.

3 MR. MILEY: Correct. In that case --

4 QUESTION: Do you suppose that would cover --  
5 that would control a case of an individual Indian working  
6 off the reservation earning income?

7 MR. MILEY: Well, that's correct. It would.  
8 And I think that case did rely on the earlier Oklahoma  
9 cases to some extent. I -- the Mescalero case, however,  
10 dealt with a tribe off of a reservation --

11 QUESTION: Yes, well, I'm talking about --

12 MR. MILEY: -- and an individual --

13 QUESTION: -- an individual Indian, and  
14 certainly the tribe is located on the reservation.

15 MR. MILEY: On the reservation.

16 QUESTION: An individual Indian living on the  
17 reservation goes off the reservation that's his -- and his  
18 regular work place, where he earns income, is not on the  
19 reservation.

20 MR. MILEY: Correct. So, in that case, that  
21 case, as well as earlier cases, like Ward v. Racehorse,  
22 hold that when Indians leave Indian country, they're  
23 subject to State law as all other persons are.

24 QUESTION: What does it mean if working for the  
25 tribe is a -- was a big factor in the decision below,

1 which you think it was --

2 MR. MILEY: Yes.

3 QUESTION: What does it mean working for the  
4 tribe in terms of residence? To work for the tribe, do  
5 you -- does it -- do they have to work on Indian country?

6 MR. MILEY: Well, in this case, the headquarters  
7 building is on Indian country.

8 QUESTION: Well, I know that, but are those the  
9 only people who can be said to be working for the tribe?

10 MR. MILEY: I believe some employees would  
11 probably perform some duties off of Indian country in this  
12 case. So, I -- yes, there could a situation where you  
13 would have an employee that would be working off of Indian  
14 country for the tribe. Most definitely.

15 QUESTION: What do you understand the Leahy case  
16 to stand for?

17 MR. MILEY: Well, in that case, I believe it  
18 stands for the fact that when Indians within Oklahoma --  
19 the tribes do not have the autonomy that reservation  
20 tribes in other States do. I think the Court in that case  
21 was recognizing the fact that Indian governments do exist  
22 in Oklahoma. Indian country does exist in Oklahoma, but  
23 that's not the determining factor. That's not what we're  
24 trying to determine here. We're trying to determine what  
25 -- how Congress treated these tribes. They did not give

1 these tribes the exclusive autonomous situation that they  
2 gave the Navajos.

3 QUESTION: Did you cite Leahy to the Tenth  
4 Circuit?

5 MR. MILEY: Yes, I did.

6 QUESTION: And did they deal with it at all in  
7 their opinion?

8 MR. MILEY: They did not deal with it in their  
9 opinion. I believe it is fairly much squarely opposed to  
10 their opinion in my view. So, they instead relied on the  
11 later case of McClanahan to support their position.

12 But I think the problem with, you know, relying  
13 on the McClanahan case is that they quoted the language in  
14 McClanahan that said the Federal statute requires that the  
15 State law be excluded in this area, and the Tenth Circuit  
16 did not point to any Federal statute that excludes law for  
17 Oklahoma in regards to the Sac and Fox Nation. I think  
18 that relevant statute is the allotment agreement and it  
19 does -- nothing in that allotment agreement would presume  
20 to exclude State law. I think it was the intent of that  
21 agreement to terminate the reservations and to include  
22 State law.

23 QUESTION: Well, don't you think the tribe on  
24 the 800 acres that it was allotted -- and it's held in  
25 trust by the United States?

1 MR. MILEY: Yes.

2 QUESTION: Don't you think the tribe can control  
3 who is permitted to enter that piece of trust land?

4 MR. MILEY: As much as any private landowner  
5 would, yes.

6 QUESTION: Well, that's pretty big, isn't it?

7 MR. MILEY: Uh-huh.

8 QUESTION: You could -- they can put of a fence  
9 around the whole thing, can't they?

10 MR. MILEY: Right.

11 QUESTION: And so, isn't it dedicated to their  
12 exclusive use?

13 MR. MILEY: Yes, it is, but --

14 QUESTION: So, how does that differ from the  
15 notion that some person who lives and works and earns  
16 money on the Navajo reservation is not subject to State  
17 income tax?

18 MR. MILEY: Well, the Federal statute that  
19 allotted the land to the tribe in this case did not  
20 provide that there would be any type of exclusive  
21 jurisdiction for this tribe.

22 QUESTION: Well, it may not, but you just said  
23 that it -- you just said that the tribe has complete  
24 control of this land and can keep people off of it.

25 MR. MILEY: Well --

1 QUESTION: So, where did that come from?

2 MR. MILEY: Well --

3 QUESTION: It doesn't come from State law  
4 apparently.

5 MR. MILEY: No. It came from --

6 QUESTION: It comes from Federal law.

7 MR. MILEY: -- Federal law. Yes.

8 QUESTION: Well, then maybe the allotment act  
9 didn't expressly provide for it, but somewhere under the  
10 atmosphere, you say Federal law gives the tribe complete  
11 control of that land, that 800 acres.

12 MR. MILEY: Yes, that 800 acres, subject to the  
13 -- you know, BIA's oversight.

14 QUESTION: Well, I thought you said it had --  
15 the tribe had the same rights as a private property owner  
16 would have --

17 MR. MILEY: Correct.

18 QUESTION: -- to exclude. Well that would  
19 suggest State law, wouldn't it?

20 MR. MILEY: No. Well, this -- under -- with  
21 this Indian country, they would be subject to the BIA's  
22 oversight as far as what they want to do with the land.  
23 Certainly they would have to get approval for those types  
24 of things. So, it is kind of -- in that sense that it  
25 would be under more Federal jurisdiction I believe.



1 QUESTION: Well, the only difference between the  
2 Navajo reservation example I just gave you and this is  
3 that it's very likely that most of the Indians, or is it  
4 -- very likely that most of the Indians who work for the  
5 tribe on their 800 acres do not live on the 800 acres?

6 MR. MILEY: Most likely they do not.

7 QUESTION: They do not.

8 MR. MILEY: Thank you.

9 QUESTION: Thank you, Mr. Miley.  
10 We'll hear now from you, Mr. Kneedler.

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 There are two possible theories of immunity from  
16 State taxation at issue in this case, and they were the  
17 ones identified --

18 QUESTION: Well, could I ask you just at the  
19 outset --

20 MR. KNEEDLER: Yes.

21 QUESTION: -- do you support and defend the  
22 decision of the Tenth Circuit?

23 MR. KNEEDLER: Not in its entirety, Justice  
24 White.

25 QUESTION: I didn't think so.

1 MR. KNEEDLER: No.

2 QUESTION: So, go ahead.

3 MR. KNEEDLER: Yes.

4 We -- there are two possible theories. Under  
5 one of them, the territorial theory, essentially the  
6 principles synthesized by this Court in McClanahan, we  
7 think the court was mistaken. The court of appeals seemed  
8 to believe that it was sufficient if the Indian earns his  
9 income within Indian country irrespective of where he  
10 resides. In McClanahan itself, however, the Indian both  
11 lived and worked on the Indian reservation.

12 It's common for States -- and Oklahoma is one of  
13 these States -- to tax income on the basis of either where  
14 the individual resides or works, and as long as that  
15 statute is applied in an evenhanded manner, the  
16 territorial principles, McClanahan would not bar the tax  
17 if the individual either resided or worked off the  
18 reservation.

19 We do think it's significant, however, that  
20 Oklahoma affords a credit to a resident who works in  
21 another State, but does not afford a comparable credit to  
22 a resident who works for the Indian tribe. So, in the  
23 example of someone who -- an Indian who lives off the  
24 reservation, but works on the reservation, we would think  
25 a parallel to Oklahoma's own State taxing scheme would

1 suggest that a credit might be given. And that's -- that  
2 is we think something that could be decided on remand.

3 But because the court of appeals --

4 QUESTION: Is that -- Mr. Kneedler, is that  
5 something that has been ruled upon or is that just  
6 practice that you're referring to?

7 MR. KNEEDLER: It's -- Oklahoma's own tax code  
8 provides that, and the amicus brief filed in this case by  
9 a number of States identifies that as a common practice.

10 QUESTION: But it's never -- you don't know of  
11 any case that says that Oklahoma automatically does that  
12 for the person who is taxed by an Indian tribe.

13 MR. KNEEDLER: Oklahoma does not do that for an  
14 Indian tribe.

15 And we think this case should be remanded  
16 because the -- a necessary aspect of the McClanahan  
17 analysis is where the individual resides and works. We  
18 think the case should be remanded insofar as the  
19 McClanahan analysis is concerned to determine exactly  
20 where the tribal employees do live and work. We assume  
21 that most of the tribal employees work in Indian country,  
22 but it's --

23 QUESTION: What's your view if they don't?

24 MR. KNEEDLER: If they --

25 QUESTION: If they don't live on the -- they

1 work for the tribe on Indian country, but they live off of  
2 it. What's your view?

3 MR. KNEEDLER: In that event, we believe the  
4 State could tax them, although we think on remand, the  
5 court could examine this question of whether a credit  
6 should be given for the income tax paid --

7 QUESTION: Exactly.

8 MR. KNEEDLER: -- to the tribe.

9 QUESTION: On what basis? Equal protection? Is  
10 that it or what?

11 MR. KNEEDLER: I would -- I think general Indian  
12 law principles in the Indian commerce clause. I think  
13 there's a relative balancing of the State tribal interests  
14 in a situation like this, and in a situation like this  
15 where -- particularly where the individuals are employed  
16 by the tribe itself.

17 QUESTION: It seems to me, Mr. Kneedler, in that  
18 case the tribe could tax them 100 percent, and then get a  
19 100 percent deduction from their -- because they all work  
20 for the tribe. So, the income is paid by the tribe to  
21 them. Then take some of it back in the form of taxes.  
22 Could they just tax 100 percent and then say that we want  
23 a credit from the State income for that amount?

24 MR. KNEEDLER: Well, I think the -- I think  
25 there may be some resistance on the part of the Indian --

1 QUESTION: Well, maybe 50 --

2 MR. KNEEDLER: The political process within the  
3 tribe I think would limit the amount of tax on that.

4 QUESTION: But you wouldn't say the State had to  
5 give that kind of a credit under Federal law. It just so  
6 happens they --

7 MR. KNEEDLER: I think there's a substantial  
8 argument that it should, given its tax structure with  
9 respect to off reservation, but I think one of the things  
10 the Court should examine is the extent to which the  
11 failure to give that credit would interfere with the --  
12 with tribal self-government.

13 QUESTION: In any of our recent cases, have we  
14 said there was kind of a dormant Indian commerce clause?  
15 No.

16 MR. KNEEDLER: The Court has not relied on the  
17 Indian commerce clause.

18 QUESTION: Well, why should we here?

19 MR. KNEEDLER: It's not really necessary to  
20 because we think it's sufficient to look both to the  
21 Indian country status of the land at issue -- and it is  
22 Indian country status, not reservation status that we  
23 think is the starting point of analysis in this case --  
24 and look at the question of whether the tribe is --  
25 whether there's tribal self-government actually working

1 in the area, whether there is a government-to-government  
2 relationship between the United States and the Indian  
3 tribe.

4 QUESTION: Mr. Kneedler, you said there were two  
5 theories. You've given -- you've gone over the --

6 MR. KNEEDLER: Right.

7 QUESTION: -- property theory.

8 MR. KNEEDLER: Right, the territorial based one.

9 QUESTION: Yes, territorial, and what's --

10 MR. KNEEDLER: And the second one --

11 QUESTION: Except your last remarks didn't sound  
12 like territorial based. Your last remarks sounded like -

13 - QUESTION: Well, he was getting to it.

14 QUESTION: Was he getting to the next one?

15 QUESTION: He was getting to it.

16 QUESTION: I thought he was mixing the two up.

17 MR. KNEEDLER: The -- on the credit point, I was  
18 simply saying that that's a common accommodation of  
19 States, both of who have some territorial jurisdiction.  
20 I'm -- that's what I was suggesting on the credit.

21 On the interference with tribe self-government  
22 point, because the individuals here are actually employed  
23 by the tribe itself --

24 QUESTION: This is your second theory?

25 MR. KNEEDLER: This is the second theory.

1           Because the individuals here are actually  
2 employed by the tribe, there is a substantial argument we  
3 think that the income tax would be preempted irrespective  
4 of where the individuals live because any taxes paid by  
5 the tribal officers and employees to the State necessarily  
6 has an impact on the amount of money --

7           QUESTION: Well, I thought you just said a while  
8 ago if the tribal member is living off of -- is not living  
9 on the trust land, the State could tax him.

10          MR. KNEEDLER: Under the McClanahan territorial  
11 theory.

12          QUESTION: Right.

13          MR. KNEEDLER: What I was suggesting is there  
14 may be a separate theory that we think should also be  
15 examined on remand in -- because here the individuals are  
16 actually employees of the tribe itself.

17          QUESTION: Mr. Kneedler, would that theory apply  
18 equally to a nonmember employed by the tribe?

19          MR. KNEEDLER: It might, but we think that the  
20 interference with -- that question is not before because  
21 the Tenth Circuit rejected that, but the interference with  
22 tribal self-government we think would be much more  
23 pronounced --

24          QUESTION: Well, how does it interfere with  
25 tribal self-government to have them pay an income tax?

1 QUESTION: To the State.

2 MR. KNEEDLER: Well, because just as a matter of  
3 economics, we think that in order to compete in the labor  
4 market, if the individuals whom the tribe employs have to  
5 pay both a State tax and on top of that a tribal tax, the  
6 tribe's ability to operate a government in the same way  
7 that a local government or a State government would be  
8 operated outside the reservation, they would be  
9 competitively disadvantaged.

10 QUESTION: So, ruling for the tribe here would  
11 enable them to keep a kind of a cheap labor source.

12 MR. KNEEDLER: Well, no. They would be -- it's  
13 simply a question of when the tribe employs its own  
14 members, which we think is at the core of tribal self-  
15 government.

16 QUESTION: This business of interference with  
17 tribal self-government is sort of common law, isn't it?

18 MR. KNEEDLER: Yes, it is.

19 QUESTION: The courts have been making it up,  
20 including --

21 MR. KNEEDLER: No. It's a common law against  
22 the backdrop of 200 years of this Nation's history.

23 QUESTION: Well, I know, but the courts have  
24 been -- I don't -- do you read it in some statute?

25 MR. KNEEDLER: No, but the --



1 QUESTION: Well, then it's common law and the  
2 courts have been making it up.

3 MR. KNEEDLER: Well, but it goes all the way  
4 back to Worcester v. Georgia.

5 QUESTION: Well, it may be, but that was a court  
6 decision.

7 MR. KNEEDLER: Yes, but again, when the Indian  
8 activity takes place in Indian country, that is the  
9 historic touchstone, not reservation. Indian country is  
10 the historic touchstone all the way back to the  
11 nonintercourse acts of 1790 and 1834 where Federal and  
12 State law applies and where -- excuse me -- the Federal  
13 and tribal law applies and State law does not. And in  
14 Worcester v. Georgia, the Court said as long as there's a  
15 distinct community occupying its own territory -- and that  
16 here would include the allotments or dependent Indian  
17 communities, as well as the trust --

18 QUESTION: Do you think this second theory would  
19 touch upon the automobile excise tax?

20 MR. KNEEDLER: No. The automobile excise tax is  
21 just the first territorial theory.

22 QUESTION: So, it would just be territorial, but  
23 you would say that the State may not put the excise tax on  
24 Indians who are living in what kind of a community did you  
25 say?

1 MR. KNEEDLER: A dependent Indian community.

2 It's one of --

3 QUESTION: What is that?

4 MR. KNEEDLER: It's one of the three definitions  
5 of Indian country under 1151. It covers situations, for  
6 example, where there's a housing authority or something  
7 set aside by the Federal Government or by the tribe under  
8 Federal auspices where Indians reside, but it may not  
9 actually be trust land. It may not be on a true  
10 reservation. It's a definition that's developed from this  
11 Court's decision in McGowan and Sandoval.

12 QUESTION: Mr. Kneedler, why wouldn't your first  
13 theory, your territorial theory -- why wouldn't that apply  
14 to someone who's not employed by the tribe?

15 MR. KNEEDLER: It would. The territorial -- in  
16 McClanahan, the individual does not --

17 QUESTION: Okay. So, you --

18 MR. KNEEDLER: No, that does not --

19 QUESTION: So, you're free from income tax  
20 whether you're employed by the tribe or not.

21 MR. KNEEDLER: Under McClanahan.

22 We think it's significant that in DeCoteau, for  
23 example, where this Court held the reservation was  
24 disestablished, the Court was at some pains we think to  
25 show that that would not adversely affect the Indians

1 themselves on Indian country outside the reservation. It  
2 said even within Indian country, which the Court pointed  
3 out specifically included allotments, a State may have  
4 jurisdiction over some persons or types of conduct, but  
5 this jurisdiction is quite limited. And the Court  
6 specifically cited McClanahan after that recitation,  
7 indicating that the immunity from State taxation should  
8 apply even though the reservation was disestablished  
9 wherever you have Indian country and, thus, we think  
10 wherever the individual is residing and working within  
11 Indian country, as long as there is a functioning tribal  
12 government with jurisdiction over that particular land.

13 Here we think that the compact of tribal self-  
14 government entered into between the Sac and Fox Nation and  
15 the United States demonstrates the tribal self-government,  
16 contrary to the view of the State of Oklahoma, is alive  
17 and well in the State.

18 QUESTION: Thank you, Mr. Kneedler.

19 Mr. Rice, we'll hear now from you.

20 ORAL ARGUMENT OF G. WILLIAM RICE

21 ON BEHALF OF THE RESPONDENT

22 MR. RICE: Mr. Chief Justice, and may it please  
23 the Court:

24 We believe that this case can be resolved by  
25 straightforward application of this Court's per se rule

1 and the rules of stare decisis. The Court has ruled  
2 previously in several cases, in which the Court did not  
3 recognize that there was an existing Indian reservation,  
4 that State taxes, at least as to tribal members within  
5 Indian country were not applicable. Those cases include  
6 Rickert, the Kansas Indians, the New York Indians, several  
7 other cases cited in the brief.

8 Now, the State would have you believe that the  
9 tribe here is totally subject to State law, that the  
10 Indian reservation of the Sac and Fox Nation was abolished  
11 back in 1891, and that the tribe is not a tribe in the  
12 normal sense of the word. I don't believe that any of  
13 those are true.

14 Now, the per se rule that this Court has  
15 developed has been applied in the early cases I just  
16 mentioned. In Montana v. Blackfeet, the State -- the  
17 Court said that the States may tax Indians only when  
18 Congress has manifested clearly its consent.

19 That is clearly a different analysis, a  
20 different type of rule, than the State would bring forward  
21 here where they say the question is not has Congress said  
22 they -- Oklahoma can tax the tribe. They're trying to  
23 advance the theory that the State may tax unless Congress  
24 has said they cannot, and as that court has simply said --  
25 --as the Court has simply said that's --

1 QUESTION: Are there some other -- are there  
2 prior cases covering the situation about a State trying to  
3 tax a member of a tribe who does not live in Indian  
4 country, but works in Indian country?

5 MR. RICE: Your Honor, I don't believe there's  
6 anything exactly on point.

7 QUESTION: What is your position on that?

8 MR. RICE: My position on that is that the line,  
9 if you will, or the bright line rule that should be  
10 applicable here, is the Indian country line. What we have  
11 is --

12 QUESTION: Well, Indian country. You mean if  
13 he's working in Indian country --

14 MR. RICE: Yes, sir.

15 QUESTION: -- or if he's living in Indian  
16 country?

17 MR. RICE: If he's working in Indian country.  
18 The action of the Indian inside the Indian country should  
19 be the determining question. It's basically the opposite  
20 of Mescalero Apache Tribe v. Jones.

21 QUESTION: Well, does that cover the automobiles  
22 too?

23 MR. RICE: It covers the individual, for  
24 instance, who would go to a automobile dealership and have  
25 a car delivered to him and title transferred within the

1 Indian country. That's Central Machinery v. Arizona Tax  
2 Commission. That exact thing happened in that case, only  
3 it was a tractor dealership who was being taxed on a gross  
4 receipts tax, which is kind of an income tax.

5 QUESTION: What if the Indian in this particular  
6 case lived on nontribal land, went to an automobile dealer  
7 that was on nontribal land, not Indian country, bought an  
8 automobile, and said I'll take delivery of it at the 800-  
9 acre reservation?

10 MR. RICE: I think the answer to that is when he  
11 brings that automobile from the reservation or from his  
12 allotment back out, let's say, to Norman outside the  
13 Indian reservation, outside the Indian country, at that  
14 point, since he's a resident there, he becomes obligated  
15 to pay the State tax there.

16 If he bought that piece of property to leave it  
17 in the Indian country and, you know, to operate it there  
18 -- and the good example, the classic example, is the  
19 individual who spends the summers in Colorado and works  
20 back home during the school year as an educator, for  
21 instance. If he leaves all his furniture, his car, et  
22 cetera on his allotment within the Sac and Fox Indian  
23 country during the school year, that's between him and the  
24 tribe. That's what is set aside by the whole Indian  
25 country concept to the tribe and the Federal Government.

1                   On the other hand, when it comes May and he gets  
2 out of school and he flies up to Colorado and picks up  
3 that car, now he owes State taxes on that car.

4                   QUESTION: But he could drive his own car up  
5 there without being taxed by a State.

6                   MR. RICE: He could, sir.

7                   QUESTION: Yes.

8                   QUESTION: But the key in your view is where the  
9 person works, not where the person lives?

10                  MR. RICE: The key -- excuse me -- the key is  
11 the conduct of the Indian in the Indian country. The  
12 Indian country has always been defined by Congress by  
13 court decision as that area that's set aside for tribal  
14 self-government for Indian occupancy and Indian use. That  
15 has been the theory behind the concept of Indian country  
16 from the beginning days --

17                  QUESTION: But we have no -- but you've got no  
18 -- we haven't got any square cases on that, living off the  
19 reservation, but working on. A while ago you said --

20                  MR. RICE: Not to my knowledge.

21                  QUESTION: Yes. The cases you mentioned, the  
22 Kansas case and who did you mention?

23                  MR. RICE: It's the converse of Mescalero v.  
24 Jones.

25                  QUESTION: Who did you mention? The Kansas case

1 and the --

2 MR. RICE: The Kansas Indians and the New York  
3 Indians. Now, if you say the Indian --

4 QUESTION: They were living on and working on.

5 MR. RICE: What we had there was a situation  
6 where the tribe's reservations had been abolished.

7 QUESTION: Right.

8 MR. RICE: And the claim made there was  
9 basically the same claim that's being made here. These  
10 Indians are assimilated into the State community and you  
11 can't tell the difference and so forth. The Court came  
12 back and said no. As long as the political branches of  
13 the government, as long as the Congress and the executive  
14 recognize these as a people with the tribal government,  
15 having the right to make and enforce their own laws and  
16 maintaining a governmental relationship with the United  
17 States, they're outside the authority of the State to levy  
18 taxes even though their reservation had been abolished --

19

20 QUESTION: But they were living in Indian  
21 country.

22 MR. RICE: I believe that they were.

23 QUESTION: Yes.

24 MR. RICE: I mean, that's the outgrowth of those  
25 cases. And that's why I said I don't know -- excuse me -



1 - offhand of a clear case where an Indian was outside the  
2 Indian country and came in and went to work in the Indian  
3 country.

4 QUESTION: And stayed and continued to live off  
5 of it.

6 MR. RICE: That's correct.

7 QUESTION: But your position is that the same  
8 rule ought to apply.

9 MR. RICE: My position is the same rule of  
10 McClanahan should apply because what McClanahan, when you  
11 get back to page 179 and 180 of the opinion down at the  
12 bottom, basically says that this person was an Indian and  
13 the income they earned came from the Indian reservation.  
14 And I think those are really the two penultimate issues in  
15 McClanahan, is the person an Indian, and did they earn it  
16 in the Indian country.

17 QUESTION: Yes. And the territorial rationale  
18 doesn't exactly work out, but I suppose you would argue  
19 with the Federal Government that perhaps it's an  
20 interference with tribal self-government.

21 MR. RICE: Insofar as --

22 QUESTION: Taxing --

23 MR. RICE: -- the use of a tax could be used to  
24 regulate conduct, I believe yes, it is.

25 QUESTION: Are you -- you're claiming this

1 exemption not just for income received from the tribe, but  
2 any income?

3 MR. RICE: I believe that any income that an  
4 Indian earns in the Indian country is exempt from State  
5 taxation.

6 QUESTION: And with respect to the car, I'm not  
7 sure whether you said the car -- the Indian has to reside  
8 on -- in Indian country and also the car has to be garaged  
9 there, both?

10 MR. RICE: The position is that the property has  
11 to be garaged, located in the Indian country.

12 QUESTION: Okay. So, what if the Indian lives  
13 off of the Indian country, but he garages his car in the  
14 Indian country. Is that car exempt from the taxes here?

15 MR. RICE: I believe it would be -- could be.

16 QUESTION: Could you give us a citation of the  
17 Kansas and New York Indians?

18 MR. RICE: The Kansas Indians, Your Honor, is 72  
19 U.S 667, and the New York Indians follows that  
20 immediately.

21 QUESTION: It was 72, 767?

22 MR. RICE: 72 United States 667.

23 As previously indicated, the Court has adopted a  
24 per se rule against the taxation of Indians in the Indian  
25 country. I think simple straightforward application of

1 that rule resolves this case.

2 The per se rule, as it was stated last term in  
3 County of Yakima v. Yakima -- and this has been stated in  
4 California v. Cabazon and Montana v. Blackfeet -- is  
5 really a penultimate outgrowth of the preemption rule of  
6 Federal preemption.

7 The problem here is that we're trying to apply  
8 the allotment agreement in a vacuum. It's as if the first  
9 time there's a relationship between the Sac and Fox Nation  
10 and the United States came about in the allotment  
11 agreement. That's simply not the case. There has been a  
12 treaty relationship between the United States and the Sac  
13 and Fox Nation since 1789. The early treaties between the  
14 Sac and Fox Nation and the United States are exactly the  
15 same type of treaties that Worcester v. Georgia held to  
16 preempt all State action by the State of Georgia.

17 Now, the Court has gone then from a per se rule  
18 to a preemption analysis and has come back, at least in  
19 the tax situations, to the per se rule. The thing -- one  
20 thing that is happening here that I think is important in  
21 this context is the redevelopment or the reaffirmation by  
22 Congress, if you will, of the rights to tribal self-  
23 government, and I refer specifically to the Sac and Fox  
24 Nation's self-governance grant and compact that they have  
25 entered into now with the United States Department of the

1 Interior.

2 QUESTION: Mr. Rice, I don't -- how is this  
3 possibly administrable in a State, especially like  
4 Oklahoma, where there are just a lot of isolated pockets  
5 of Indian territory? Your position is if the money is  
6 earned by an Indian in Indian country, it's exempt from  
7 State tax. So, what do you do with somebody that, you  
8 know, drives to work -- let's assume he's a carpenter. He  
9 does part of his work on the Indian country, part of his  
10 work off of the Indian country. How can you possibly  
11 administer a scheme like that?

12 I mean, I can see if you're limiting it to  
13 income received from the tribe, you can identify it. But  
14 how is Oklahoma going to identify what income is earned on  
15 Indian country and what is earned off Indian country?  
16 There's a whole -- I can see whole volumes of law being  
17 written about this when Indian income is earned.

18 MR. RICE: I don't think it's that difficult to  
19 identify what the Indian country is.

20 QUESTION: Well, that's true.

21 MR. RICE: That's a fairly a simple analysis  
22 based on 18 U.S.C. 1151.

23 QUESTION: Right.

24 MR. RICE: You can identify a reservation, a  
25 dependent Indian community, or an Indian allotment, and

1 you immediately know where that is.

2 QUESTION: Okay. But let's assume I'm a  
3 delivery -- my business is delivering newspapers and I  
4 deliver newspapers to somebody in Indian country. Okay?

5 MR. RICE: Okay.

6 QUESTION: Part of my delivery is in Indian  
7 country and part of my route is outside of Indian country.  
8 What do I do? Divide my salary by 2 and --

9 MR. RICE: Well, no more than you would if you  
10 were selling things inside the State and outside the  
11 State, for instance. You would -- or the same type of  
12 situation occurs when you have taxable income and  
13 nontaxable income. You simply report that part that's  
14 taxable to the State of Oklahoma, and you report that part  
15 that's taxable to the Sac and Fox Nation.

16 QUESTION: Yes. I think the situation is a lot  
17 rarer in the interstate situation than it is with people  
18 living in the State of Oklahoma and driving in and out of  
19 Indian country all the time.

20 MR. RICE: Well, it's not really a case I think  
21 of driving in and out of the Indian country all the time.  
22 The more rational situation is going to be where you have  
23 a fellow who works all day, for instance, at the tribal  
24 office, drives back to a area outside of the Indian  
25 country and goes to a second job in the evening as a

1 checker at the grocery store or, you know, some other type  
2 of employment. I don't think that would be any trouble at  
3 all to decide what part of that income goes to the State  
4 authority and which one doesn't.

5 And that's the straw man really is the  
6 McClanahan -- Roselyn McClanahan who works for the Navajo  
7 legal services during the daytime, is not taxable on that  
8 income, and yet if she drives over to Gallup off of the  
9 reservation and works an evening job, then under the  
10 McClanahan rule, I presume she's taxable on the income  
11 that she earned at Gallup. And that's the case that's  
12 going to come up.

13 QUESTION: Mr. Rice, did I gather you said that  
14 the State may not only not tax Indians who live off Indian  
15 country and work on Indian country, but they also may not  
16 tax non-Indians who live off the Indian country and work  
17 on Indian country?

18 MR. RICE: I'm not sure I quite understand the  
19 question.

20 QUESTION: Well, let's assume there's a non-  
21 Indian who lives off the reservation or lives off Indian  
22 country, but works on Indian country. Maybe that's just a  
23 figment of -- maybe that's just -- because it may be that  
24 nobody who's a non-Indian ever gets to work on --

25 MR. RICE: No. There are some that work there.

1 QUESTION: All right. So, what's the answer?

2 MR. RICE: Well --

3 QUESTION: A non-Indian living off but working  
4 on?

5 MR. RICE: I think there's two answers to that.  
6 One is --

7 QUESTION: Well, I know, but you can either say  
8 the State may tax him or may not.

9 MR. RICE: Well, I think the State may not tax  
10 him for two reasons. One is that as long as he is working  
11 for the tribe or engaged in conduct which is subject to  
12 regulation and if the State interferes by taxing him with  
13 tribal self-government to the point that they are trying  
14 to use their tax to regulate conduct --

15 QUESTION: Did the Tenth Circuit decide against  
16 you on that?

17 MR. RICE: No, they did not. They decided that  
18 adversely to us.

19 QUESTION: That's what I said. Against you.  
20 They decided against you.

21 MR. RICE: Yes.

22 QUESTION: And we denied cert on that.

23 MR. RICE: You denied cert on that.

24 QUESTION: Yes. So, that isn't at issue here.  
25 We know what your position is.

1 MR. RICE: That's the position that we had  
2 because of the treaties and the other.

3 Now, in addition to the per se rule and the  
4 preemption, we also have the stare decisis questions.  
5 McClanahan squarely holds that Indians, I think, in the  
6 Indian country are not subject to State income tax. Moe  
7 v. Confederated Salish & Kootenai and Washington v. the  
8 Colville tribes provide the same type of background for  
9 automobile taxes. The taxes here are property taxes, pure  
10 and simple. They're based on the value of the car.

11 The Oklahoma courts, as shown in exhibits 18 and  
12 27 through 32 in the Tenth Circuit exhibits, have ruled  
13 against the Tax Commission on exactly this issue. It was  
14 interesting in the Solicitor General's letter lodged with  
15 the court that the Oklahoma Court of Appeals has now ruled  
16 against the Tax Commission on the issue of the income tax  
17 in Core v. Oklahoma Tax Commission.

18 The stare decisis situation here is such that  
19 the Court all -- really just needs to simply apply those  
20 cases to this situation. Those cases apply in the Indian  
21 country, and since they are applicable in the Indian  
22 country in my view, the Court need go no further.

23 Now, if the Court chooses to take the next step,  
24 then the question becomes whether the original boundaries  
25 of the Sac and Fox Indian reservation have been



1 extinguished, and that's an issue that neither the  
2 district court nor the Tenth Circuit chose to address. It  
3 would be our position in that case that you could either  
4 remand for that decision or you could go ahead and decide  
5 it on the record that's here.

6 QUESTION: Who brought this suit?

7 MR. RICE: Excuse me?

8 QUESTION: Who brought this suit?

9 MR. RICE: The Nation brought this suit, the Sac  
10 and Fox Nation.

11 QUESTION: Well, did you -- and was part of your  
12 claim that the reservation had never been --

13 MR. RICE: Yes, sir, it was.

14 QUESTION: -- destroyed?

15 And none of the lower courts decided it?

16 MR. RICE: They did not decide that issue at  
17 all. The reference is continuously to the abolished  
18 reservation or the old reservation or the reservation  
19 that's not there anymore. The fact of the matter is no  
20 court has ever ruled that way. That was part of the  
21 complaint. That was part of the argument all the way up.  
22 That was never ruled on.

23 The courts below simply did what we said is the  
24 only thing that this Court really needs to do, and that  
25 was to apply the per se rule and the rules of stare

1       decisis and say that these cases, McClanahan, Moe,  
2       Colville, and Central Machinery, apply, pure and simple,  
3       within the Indian country. Because of that, we have  
4       Indian country where the tribal trust land is because all  
5       our reservation has ever really been is land that has been  
6       set aside under the superintendence of the Government for  
7       Indians. That's what our reservation turns out to be. We  
8       have dependent Indian communities. We have allotments  
9       that are still in trust.

10               Now, because we have that situation, we don't  
11       have to decide the reservation boundary issue. We've got  
12       the tribe on trust land. We've got most of the people  
13       that work there on trust land, and we can let the  
14       reservation boundary issue go --

15               QUESTION: But you lost half your -- you lost  
16       some of your case in the Tenth Circuit, and we denied  
17       cert.

18               MR. RICE: Yes, sir.

19               QUESTION: And it might have come out  
20       differently if they had decided that the reservation had  
21       not been abolished.

22               MR. RICE: No, I don't think under their  
23       analysis that it would have come out any differently --

24               QUESTION: Oh, I see.

25               MR. RICE: -- because what they simply said is

1 they drew a distinction between tribal members and  
2 nontribal members, and that was the basis of the  
3 distinction there.

4 QUESTION: Yes, all right. All right.

5 MR. RICE: It wasn't an Indian country decision.

6 QUESTION: Could you tell me just a little bit  
7 more about the nation itself? This 800 acres, is that --  
8 that's trust land I understand.

9 MR. RICE: Yes, sir.

10 QUESTION: Trust for the tribe or for individual  
11 Indians?

12 MR. RICE: That is -- the 800 acres is land  
13 which was explicitly reserved out of the operation of the  
14 allotment agreement by the agreement itself.

15 QUESTION: I see.

16 MR. RICE: It was to be held as the tribal land  
17 had always been held, in other words, under the 1867  
18 treaty.

19 QUESTION: It's held by the United States in  
20 trust for the tribe.

21 MR. RICE: Yes, sir.

22 QUESTION: And roughly how many -- how big is  
23 the nation? How many Indians live on that?

24 MR. RICE: About 2,500 members of the --

25 QUESTION: I see. And --

1 MR. RICE: They don't all live on the 800 acres.

2 QUESTION: But some of them live on the 800.

3 MR. RICE: There's a few of them that do, yes.

4 Most of them reside on allotments or around the original  
5 reservation area.

6 QUESTION: What is the 800 acres primarily used  
7 for? What is it?

8 MR. RICE: That is where the center of the  
9 tribal government is, the tribal administrative offices.  
10 Everything from the Chief's office and residence down to  
11 the pow-wow grounds is on that 800 acres --

12 QUESTION: And --

13 MR. RICE: -- plus a couple hundred that has  
14 been added to it.

15 QUESTION: And is there a large number of  
16 employees working for the tribal government?

17 MR. RICE: Most of them work there. There's  
18 about 90 tribal employees that work right -- you know,  
19 mostly in that area. Now, that number does not include  
20 members of tribal boards, commissions, agencies, and --

21 QUESTION: If we took all of the employees of  
22 the tribe together, how many people would we be talking  
23 about roughly?

24 MR. RICE: Roughly 140 to 150 people.

25 QUESTION: There's quite a group, yes.

1           And most of them, if not all, live on the -- on  
2 Indian country.

3           MR. RICE: I would say the large majority of  
4 those live on Indian country.

5           Now, we are I suppose back to the bright line  
6 rule. We think that that is what Indian country is, is  
7 the place that Congress has set aside the tribe, if you  
8 will, behind the law, and they have said in 1151, which  
9 basically codified decisions of this Court and the  
10 understanding that Solicitor Cohen had in his handbook of  
11 Indian law in 1942, that the Indian country is the place  
12 for tribal self-government. It's a place where State law  
13 only applies when Congress says that it does. Now, that  
14 has been the concept of Indian country.

15           You don't have to decide the reservation  
16 boundary issues to decide the case if you adopt and apply  
17 the McClanahan, Moe, Colville series of cases through  
18 stare decisis or through the per se rule.

19           On the other hand, it seems to me that if you do  
20 not apply those cases to the Indian country generally, as  
21 it has been defined by Congress and 1151, then in order to  
22 rule against the tribe on the part of the case on which  
23 certiorari was granted, you have to overrule that line of  
24 cases because it's kind of an either/or proposition. If  
25 our reservation is there, then those cases ought to apply.

1 If those cases apply to all Indian country, regardless of  
2 reservation status, we don't have to get to that issue,  
3 but if the reservation is there, then the only way that  
4 these cases don't apply would be to overrule.

5 QUESTION: Well, yes, but your bright line rule  
6 I think would cover Indians who live on Indian country and  
7 work on Indian country, but it doesn't cover Indian --  
8 tribal members who don't live in Indian country.

9 MR. RICE: It would seem to me it covers conduct  
10 of an Indian in the Indian country.

11 QUESTION: Well, I know, but --

12 MR. RICE: And let me --

13 QUESTION: -- none of the cases just cover --  
14 clearly cover that, and you indicated that --

15 MR. RICE: Well --

16 QUESTION: -- you didn't know of any case that  
17 covered it.

18 MR. RICE: Not in the income tax situation.

19 QUESTION: Yes, right.

20 MR. RICE: There are criminal cases, for  
21 instance --

22 QUESTION: Well, I'm talking about --

23 MR. RICE: -- or other cases.

24 QUESTION: We're talking about income taxes.

25 QUESTION: But your bright line rule -- I just

1 want to be sure I understand it -- would cover the  
2 operation of a commercial activity, not just working for  
3 the government. If they ran a casino, for example, in  
4 Indian company -- country, even though it's on a  
5 reservation, but as long as it's in Indian country, that  
6 -- the bright line rule would protect the income from the  
7 casino --

8 MR. RICE: That's exactly right.

9 QUESTION: -- or discover an oil well or  
10 something like that.

11 MR. RICE: That's exactly right.

12 QUESTION: Yes.

13 MR. RICE: If it's the Indian conduct in the  
14 Indian country, then that is what Congress has put behind  
15 the law.

16 QUESTION: But if the tribe is running a  
17 business off -- out of Indian country, I suppose Mescalero  
18 controls.

19 MR. RICE: That would be Mescalero. If the  
20 tribe chose to take the business 100 miles away from its  
21 Indian country, and the United States does not put that in  
22 trust or does not otherwise take action that would make it  
23 Indian country, then that's subject to State jurisdiction.

24 QUESTION: Suppose the Indian -- suppose the  
25 reservation -- even if the reservation wasn't formally

1 abolished, all of the land, other than that which has been  
2 held in trust and allotted to Indians, all of that has  
3 already been patented to non-Indians or to somebody else.

4 MR. RICE: True.

5 QUESTION: So, it would be -- you might say,  
6 well, here's where the reservation used to be, but there's  
7 --

8 MR. RICE: Well, there's still a real solid  
9 Indian presence in that area, and I think we've taken the  
10 position in --

11 QUESTION: Well, I know, but you wouldn't say  
12 that you could exclude anybody you wanted to any -- within  
13 the bounds of the old reservation now.

14 MR. RICE: Well, no, I wouldn't say that we  
15 would exclude the landowners, no. I think that one is  
16 solved in Montana v. the United States --

17 QUESTION: Yes.

18 MR. RICE: -- and a couple of other cases.

19 QUESTION: Yes.

20 MR. RICE: The difference, though, with the  
21 Indian conduct in those areas that have still retained  
22 reservation status is Mattz v. Arnett, and those cases say  
23 that the Indian work -- the Indian activity there, their  
24 actions, are still within the Indian country.

25 I think I want to make it very clear that our



1 position in the brief and here also is that there's three  
2 fallback positions basically on the Indian country issue.  
3 One of those is -- and the first one I think is that the  
4 original boundaries are still there.

5 The second one is that regardless -- if you read  
6 the allotment agreement and the legislative history, which  
7 is in the exhibits that were in the Tenth Circuit --

8 QUESTION: But --

9 MR. RICE: -- we've got a diminished one, not a  
10 big one.

11 QUESTION: But if the reservation were still  
12 there and was not abolished, you wouldn't say that every  
13 acre of ground within the bounds of the reservation would  
14 be Indian country.

15 MR. RICE: Yes, sir, it is Indian country  
16 because 1151(a) says that it includes all Indian  
17 reservations notwithstanding the issuance of any patent,  
18 and Seymour v. Superintendent says a patent to anybody,  
19 whether that's a patent to an Indian or a patent to a non-  
20 Indian.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rice.

22 The case is submitted.

23 (Whereupon, at 2:00 p.m., the case in the above-  
24 entitled matter was submitted.)

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: No. 92-259

Oklahoma Tax Commission , Petitioner v. SAC and FOX Nation

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BY Leon M. May

(REPORTER)