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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: IDAHO ET. AL. V COEUR D'ALENE TRIBE OF IDAHO
ETC. ET. AL

CASE NO: No. 94-1474

PLACE: Washington, D.C.

DATE: WEDNESDAY, OCTOBER 16, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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IDAHO, ET AL., :
Petitioners :
v. : No. 94-1474
COEUR d'ALENE TRIBE OF IDAHO, :
ETC., ET AL. :
- - - - -X

Washington, D.C.

Wednesday, October 16, 1996

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:00 p.m.

APPEARANCES:

CLIVE J. STRONG, ESQ., Deputy Attorney General of Idaho,
Boise, Idaho; on behalf of the Petitioners.
RAYMOND C. GIVENS, ESQ., Coeur d'Alene, Idaho; on behalf
of the Respondents.

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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 94-1474, Idaho v. Coeur d'Alene Tribe of
5 Idaho.

6 Mr. Strong.

7 ORAL ARGUMENT OF CLIVE J. STRONG

8 ON BEHALF OF THE PETITIONERS

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

11 Although States are part of the Union, they
12 nonetheless retain certain attributes of sovereignty. Two
13 of those retained attributes of sovereignty, the States
14 sovereign immunity under the Eleventh Amendment and a
15 State's entitlement to lands beneath the beds and banks of
16 navigable waters under the equal footing doctrine are at
17 issue in this case.

18 The State of Idaho has been in possession of the
19 beds and banks of the navigable waters of Lake Coeur
20 d'Alene since Statehood. Pursuant to that possession, the
21 State, pursuant to its duty, has regulated those lands for
22 the benefit of the public as a whole. This action now by
23 the Tribe seeks to divest the State of that possession and
24 instead reside it with the Tribe.

25 The Ninth Circuit Court of Appeals recognized

1 that this action by the Tribes with respect to quiet title
2 claims was barred by the Eleventh Amendment, and
3 nonetheless, the court proceeded to allow the suit with
4 respect to the State officers to proceed under the
5 rationale of Ex parte Young.

6 Under the injunctive and declaratory relief
7 sought by the Tribe, the Tribe would be awarded quiet
8 title and exclusive possession of these lands.

9 QUESTION: But it would not, as I understand it,
10 be a decree that would estop the State if the State later
11 wanted to contest the title.

12 MR. STRONG: Your Honor --

13 QUESTION: Isn't that correct?

14 MR. STRONG: No, Your Honor, it's not.

15 QUESTION: You think the State would suffer
16 preclusion from that?

17 MR. STRONG: Your Honor, by the very nature of
18 these properties, it is impossible to separate the title
19 from the possession of the property.

20 QUESTION: Well, yes, but in one sense it's
21 always impossible to separate the officer from the State,
22 but that's what Ex parte Young does, and I would have
23 thought that the State's ultimate fear would be that if --
24 if it had an ultimate fear, is that if the officers lost
25 the suit, that the State would lose its title, and I would

1 have thought if for no other reason than the very nature
2 of the Eleventh Amendment claim that the State had, that
3 there would be no issue preclusion against the State if
4 the State either later wished voluntarily to litigate its
5 question of title, or was sued in a State court for that
6 purpose.

7 MR. STRONG: Your Honor, the very nature of this
8 lands is what brings the difficult interplay with Ex parte
9 Young. Under the officer's suit rationale it is assumed
10 that the State simply could bring another action to clear
11 its title to these lands, but if the Tribe were awarded
12 possession of these lands, under section 28 2409a, the
13 Federal Quiet Title Act specifically precludes an action
14 by the State against the United States Government for
15 possessions of lands held in trust for the benefit of the
16 Tribe. Likewise, tribal sovereign immunity would preclude
17 the State from bringing an action against the tribal --
18 against the --

19 QUESTION: So you're saying it's the Quiet Title
20 Act that would in effect require the preclusion?

21 MR. STRONG: The Quiet Title Act would because
22 of the language in the act that precludes an action by a
23 State against the United States for lands that are held in
24 trust for the benefit of the Tribe. The act -- the
25 argument would be made --

1 QUESTION: No, but that's not the only way the
2 State could perfect its title, is it?

3 MR. STRONG: Your Honor, that would be the only
4 way the State could perfect its title in this case.

5 QUESTION: He could walk in and seize the land,
6 I presume, send in the State National Guard and wait for
7 somebody to sue to get it off the land. Couldn't it do
8 that?

9 MR. STRONG: Your Honor, the State would be
10 bound to abide by lawful orders of this Court. The State
11 officers are the ones that are being enjoined from
12 possession of these lands --

13 QUESTION: The whole theory is that that doesn't
14 run against the State, it just runs against the State
15 officers. You've got to get some other State officer,
16 that's all.

17 MR. STRONG: But the State cannot act but
18 through its officers. If the officers are enjoined from
19 proceeding, there is no way that the State can go forward.

20 QUESTION: Supposing the State sends another
21 crop of officers who haven't been named in this particular
22 action, are they bound by the previous decree against the
23 original State officers?

24 MR. STRONG: Your Honor, the successors in
25 office are the ones that would be bound by this particular

1 order, but certainly they would suspect the tribe would
2 immediately sue the State to enjoin those people from
3 taking possession of the lands.

4 QUESTION: Now --

5 QUESTION: Of course, it works the other way
6 around. If you -- if you prevail on the merits with a
7 ruling by this Court that the President had no authority
8 to convey away the lands, I take it you would have the
9 benefit of that judgment.

10 MR. STRONG: I'm sorry, Your Honor, I don't
11 understand the question.

12 QUESTION: Suppose Idaho -- suppose the suit
13 were to go forward and Idaho would prevail in this suit,
14 or the officers would prevail in this suit, and it were
15 held that the land had not been conveyed to the Tribes,
16 that would work to your benefit, I take it. You could --

17 MR. STRONG: Yes, Your Honor, that would *work
18 to our benefit.

19 The nature of the Eleventh Amendment, *or the Ex
20 parte Young is a narrow exception to the Eleventh
21 Amendment. As an exception to the Eleventh Amendment, it
22 must be interpreted in a way that accommodates the
23 substantial sovereign interest at stake under the Eleventh
24 Amendment, and as this Court has stated in the past --

25 QUESTION: You think it always operates in such

1 a way that in fact the State is not bound? I mean, I
2 always thought Ex parte Young was just a great fiction,
3 that in fact 99 percent of the time you can say the suit
4 is only against the officers, but as a fact -- as a
5 practical matter the State is, you know, is precluded.
6 You don't think that's the way it works normally?

7 MR. STRONG: You're correct, Your Honor, it is a
8 fiction, and the fiction is that the suit can go forward
9 because it doesn't unnecessarily interfere with the
10 State's actions, but in this instance, because of the very
11 nature of the title of these lands, it interferes with the
12 State action.

13 The lands that we're talking about here are
14 lands that came to the State through the equal footing
15 doctrine. The lands that are specifically identified with
16 sovereignty, as this Court stated in Oregon v. Corvallis
17 Sand & Gravel, that when you're dealing with submerged
18 lands you're not dealing with the issue of substantive
19 property law, but rather with the constitutional
20 sovereignty of the States.

21 QUESTION: So you're saying land and Treasury,
22 land and Treasury we won't apply Ex parte Young?

23 MR. STRONG: Your Honor, I'm saying in this
24 context, sovereign lands is the same as the Treasury. You
25 should not allow an action to proceed against lands that

1 the State receives as an incident of sovereignty, that
2 incidence of sovereignty, because of the very nature of
3 these lands, they're held open for the benefit of the
4 public as a whole, the State receives lands under an equal
5 footing doctrine, is required to manage those for the
6 benefit of the public for commerce, navigation, and other
7 purposes.

8 QUESTION: But can't you say in any case in
9 which a State officer suffers an injunction, that the
10 State officer is thereby deflected from performing duties
11 which in the judgment of the State would be better
12 performed either for some other purpose, for the purpose
13 that it -- that the -- that was enjoined, and that there
14 is always a kind of frustration of State activity as a
15 result of it, and I don't -- for that reason, I don't see
16 why there is some peculiar status of lands, even when the
17 State has a sovereign purpose in holding the lands.

18 MR. STRONG: Your Honor, these lands are
19 identified directly with sovereignty of the State. As
20 this Court has said in the past --

21 QUESTION: Yes, but the right to exercise any
22 governmental function is identified with the sovereignty
23 of the State, and yet the officer who is ordered by the
24 State to perform that function can be enjoined under
25 Young.

1 MR. STRONG: Your Honor, if the officers are
2 enjoined in this action, however, the nature and title --
3 the title isn't in the actual ownership of the property,
4 but it's the regulation of that property for the benefit
5 of the public as a whole. If the officers are enjoined in
6 the ability to manage and regulate these lands for the
7 benefit of the whole, then the very sovereign nature of
8 that title is entirely defeated.

9 QUESTION: Well, it isn't entirely defeated if
10 the State has, as I assumed it had, a right to contest the
11 title in a forum of its own choosing, and therefore it
12 seems to me that what the State is suffering boils down to
13 the fact that if its officers lose this suit, the
14 consequences of that may very well precipitate the State
15 into having to litigate the title itself.

16 But what the Eleventh Amendment protects is not
17 circumstances requiring the State as a practical matter to
18 litigate, but rather, it protects it from being hauled
19 into a particular forum to do its litigation, and
20 therefore, if what the State is ultimately suffering is in
21 effect the precipitation of litigation in the absence of
22 which it will suffer in some way. I don't see that that
23 is the Eleventh Amendment's concern.

24 MR. STRONG: Your Honor, if the State officers
25 are enjoined from the regulation of these lands, the point

1 that I'm making is that the State does not have a remedy.
2 The State couldn't simply go out and commence another
3 action.

4 QUESTION: Well, you -- let me put it this way.
5 If we were to hold, in explaining a judgment here, that
6 the State would not be estopped as a result of this
7 judgment against the officers if it wishes later on to
8 litigate its title, then you would have no quarrel, is
9 that correct?

10 MR. STRONG: No, Your Honor, because this Court
11 cannot grant the relief the State would need to bring the
12 action because of the Federal Quiet Title Act, and
13 assuming that the Tribe was successful in obtaining
14 possession, the argument would be made that our action
15 against the United States, the actual trustee of these
16 lands, would be precluded because those lands were held in
17 trust for the benefit of the State.

18 QUESTION: Okay. I understand your position --
19 yes.

20 QUESTION: So you say that the respondent Tribe
21 could not bring a quiet title action in State court?

22 MR. STRONG: No, Your Honor. In fact the
23 State's position has been that that is one of the
24 alternative remedies available to the --

25 QUESTION: Despite the Federal Quiet Title Act.

1 MR. STRONG: Well, the Federal Quiet Title Act
2 limits the State.

3 QUESTION: So it does not limit, in your view,
4 the Tribe from filing a quiet title action in State court?

5 MR. STRONG: No. The Federal Quiet Title Act
6 would have no limitation on the Tribe.

7 QUESTION: And the State of Idaho has waived its
8 sovereign immunity for such a suit.

9 MR. STRONG: That is correct, Your Honor,
10 that -- our courts would be available to the Tribe to
11 fully pursue in the entirety the relief that they are
12 seeking in this action.

13 QUESTION: What authority from this Court do you
14 rely on for the proposition that the Eleventh Amendment
15 bars adjudication of the State's sovereign title question
16 in Federal court?

17 MR. STRONG: Your Honor, we look to Treasure
18 Salvors. In Treasure Salvors the -- although there was a
19 split plurality opinion, all four justices on each side of
20 that plurality ultimately held that you cannot adjudicate
21 a State's title in the context of the Eleventh Amendment.
22 That would be precluded. You have to somehow be able to
23 segregate the possession of the property under Treasure
24 Salvors from the title to the property in order to move
25 forward.

1 The point that we're making here is, is that
2 under the presumption in Montana, which is a strong
3 presumption of State ownership, that the only way you can
4 determine that the -- the Court can determine that the
5 Tribe is entitled to possession of these lands is to first
6 determine that the presumption of State ownership has been
7 overcome, and that the United States abandoned its
8 traditional policy in favor of holding these lands in
9 trust.

10 Rather than the issue of taking tribal property,
11 this case really presents an issue of whether the United
12 States took the State's sovereign title and instead
13 bestowed it upon the Tribe. That is the very nature of
14 this case, and because it involves the State's title is
15 why it is barred by the Eleventh Amendment.

16 QUESTION: Mr. Strong, I understood you to say
17 that this case is about where the suit will be, and Idaho
18 has a State court remedy, a State court where this
19 disputed question can be tried out. Is that, the
20 existence of that remedy, essential to your position?
21 Let's suppose Idaho did not choose to consent to be sued
22 on this matter at all, would your position be any
23 different?

24 MR. STRONG: No, Your Honor, our position would
25 be no different. The Eleventh Amendment precludes an

1 action against the State, directly against the State, and
2 since this is a determination of the State's title, it
3 would be precluded by the Eleventh Amendment regardless of
4 the unavailability of the forum.

5 QUESTION: So you're saying that Idaho has
6 chosen to give the Tribe a remedy in Idaho's own courts,
7 but doesn't have to, so we would be left with the anomaly,
8 if Idaho hadn't consented to be sued in its own courts, of
9 a dispute over title determined by Federal law, right,
10 because both sides are --

11 MR. STRONG: That's correct.

12 QUESTION: -- staking their claim on Federal
13 law, and no Federal court could hear it, and a State court
14 has chosen not to hear it.

15 MR. STRONG: No, Your Honor, there is another
16 remedy that's available to the Tribe which also takes us
17 outside the context of Ex parte Young.

18 A Tribe is a dependent sovereign Nation, is --
19 cannot hold legal title to these trust lands. Legal title
20 is held by the United States on behalf of the Tribe, so
21 the Tribe has a remedy here that's not traditionally
22 available in an Ex parte Young --

23 QUESTION: But that's up to the United States to
24 pursue that remedy.

25 MR. STRONG: Your Honor, that is correct, but

1 the Tribe can petition the United States to bring an
2 action on its behalf, and if the United States fails to
3 take such action, and the Tribe believes that it should be
4 taking further action with respect to this property, it
5 has a remedy against the United States to bring an action,
6 breach of trust action against the United States to force
7 it to either litigate the title, or compensate it.

8 QUESTION: Is there an action pending now which
9 the United States has brought?

10 MR. STRONG: Yes, Your Honor, there is an action
11 pending in the United States District Court in Idaho, and
12 that action is properly brought under Texas v. -- United
13 States v. Texas. The State has no objection to an action
14 by the trustee of these lands as against the State of
15 Idaho. The law is very clear on that matter. That action
16 seeks to quiet title to the southern third of Lake Coeur
17 d'Alene. It again verifies the fact that there is a
18 remedy available to the Tribe, and that is to petition the
19 United States to bring an action on its behalf.

20 QUESTION: Of course, even if that remedy did
21 not exist, as well as the remedy of suit in State court,
22 which you say also exists, it still would not be a unique
23 situation. Presumably -- namely that the situation of the
24 Tribe not being able to get relief would presumably not be
25 unique, or relief in Federal court --

1 MR. STRONG: Would not be --

2 QUESTION: -- because that's presumably the
3 situation with respect to all claims to money from the
4 State Treasury.

5 MR. STRONG: That's correct, Your Honor. The
6 very nature of the Eleventh Amendment creates this tension
7 where there may not be an available remedy, and the idea
8 of Ex parte Young was to address that situation, but as
9 I've demonstrated both through the action by the Tribe in
10 State court, or by the action of the United States, the
11 rationale for Ex parte Young is not applicable in the
12 context --

13 QUESTION: How do you distinguish the old case
14 of Tindal v. Wesley?

15 MR. STRONG: Tindal v. Wesley has been limited
16 by the Larson case, and in that -- what it basically says
17 is that there has to be either an action by the officer
18 acting ultra vires, Larson does, or alternatively that
19 there has to be some violation of Federal law.

20 There is no allegation in this suit that the
21 State officers were acting any -- outside of their
22 authority. In fact, the State officers are doing exactly
23 what was expected of them under the presumption of Federal
24 ownership, that is, regulating these lands on behalf of
25 the public as a whole.

1 As to the Federal question, as to whether
2 there's a violation of Federal law, as I -- this is not an
3 instance where the State is taking tribal property but
4 rather, the question is whether the United States took the
5 State's entitlement and instead vested it to the Tribe,
6 and so the very essence of the claim isn't a violation of
7 Federal law, but a determination of what that Federal law
8 means, and this is --

9 QUESTION: Well, but from the Tribe's point of
10 view, I suppose if they have good title and the State
11 occupies their land, they would be able to treat it as
12 some form of inverse eminent domain, wouldn't they?

13 MR. STRONG: Your Honor, the State does not have
14 an ability to take tribal land. If these are tribal
15 lands, State authority would not extend to them. This
16 case is most analogous to a tortious interference type
17 situation where there is competing claims as to what
18 Federal law means, and we're simply trying to resolve
19 this, very much similar to, say, the Oregon v. Hitchcock
20 case, in which the State claimed ownership of lands under,
21 I believe the Submerged Lands Act, and the Court said no,
22 that was prohibited because it was an action as to the
23 title of lands in the United States.

24 The State would contend that the officer's suit,
25 the traditional officer's suit as we think of it, going

1 back to the United States v. Lee, is premised on the
2 notion that it's a State affirmatively acting in -- as a
3 private citizen to take its property, and that it's a
4 taking that brings those actions into play, and the
5 rationale of Lee is that we need that kind of rule to
6 avoid the tyranny of the Government simply confiscating
7 State property -- or, I mean, private property for benefit
8 of State governmental actions.

9 We contend that under the equal footing doctrine
10 that concern is not present in this case because the State
11 entered into possession as a result of Statehood, and it's
12 been in possession for over a century with respect to
13 those lands, and so we simply don't have that problem
14 before us today.

15 Likewise, as to whether the conduct of the
16 officer is unlawful, which is a premise of Ex parte Young,
17 there is nothing in the conduct of the officers here that
18 would suggest that they're violating any Federal law. In
19 fact, they're operating, as I've indicated in the past,
20 consistent with the Federal premise of these equal footing
21 doctrines to regulate them on behalf of the public as a
22 whole.

23 QUESTION: Yes, but if they're -- if the Tribe
24 is right on the merits, aren't they then violating some
25 Federal rights?

1 MR. STRONG: Your Honor, if the Tribe is right
2 on the merits there would be a violation of the Federal
3 rights, but in this context you --

4 QUESTION: It seems to me your argument is sort
5 of proceeding on the assumption that they're wrong on the
6 merits, an issue we don't reach until we decide the
7 threshold question.

8 MR. STRONG: No, Your Honor. In determining
9 this case you must first consider the applicable law, and
10 the applicable law under Montana v. United States is that
11 you must presume State ownership of these submerged lands
12 absent an express congressional conveyance, and until that
13 is established, the State is entitled to operate as it has
14 in the past, that it is entitled to the ownership of these
15 beds and banks, and until that issue is resolved, it is
16 impossible to state that the State officers are not acting
17 consistent with Federal law.

18 QUESTION: But isn't it correct -- I know you
19 say here there is both a Federal action pending where the
20 United States is suing, and there's a State forum
21 available, but if neither of those things were true, we
22 had a different case, you would still say that there was
23 no remedy here.

24 MR. STRONG: Yes, Your Honor. The --

25 QUESTION: So the Federal question could never

1 be resolved.

2 MR. STRONG: That's the very nature of the
3 tension between the Eleventh Amendment and the compact
4 made with the States and the Federal Government, is that
5 the States are to be free from suits that will interfere
6 with --

7 QUESTION: Yes, but with the exception created
8 by Ex parte Young.

9 MR. STRONG: That's correct, with the exception
10 created by Ex parte Young, but as I am contending today,
11 this action doesn't fall within Ex parte Young.

12 The purpose of Ex parte Young is to enjoin the
13 unlawful enforcement of State laws, and before you can
14 determine that the actions upon which the officers --

15 QUESTION: They're unlawful in the sense that
16 they violated a supreme Federal law.

17 MR. STRONG: That's correct.

18 QUESTION: Yes.

19 MR. STRONG: And we don't know in this case
20 whether there's a violation --

21 QUESTION: But we didn't know in Ex parte Young
22 until after the case was tried whether there was a
23 violation, either.

24 MR. STRONG: But we do know in this case that
25 there is a presumption of State ownership in that --

1 QUESTION: Which is a rebuttable presumption.

2 MR. STRONG: That is a rebuttable presumption,
3 but nonetheless it's a strong presumption, and the Court
4 is required to begin with that presumption in any analysis
5 of an equal footing conveyance situation, and given that
6 presumption --

7 QUESTION: But isn't there also a presumption in
8 the Ex parte Young area that State action is generally
9 considered lawful and constitutional? You always start
10 with a presumption of constitutionality whenever you
11 challenge State action.

12 MR. STRONG: Your Honor, the essence of what
13 we're trying to contend before the Court today is that
14 under Ex parte Young you start with the premise that a
15 well pled complaint alleges a violation of some Federal
16 law, a supremacy issue, and the contention we make today
17 is that there is no Supremacy Clause question here,
18 because if the State is correct and you are required to
19 assume that the State is correct because of the
20 presumption until it's litigated, then the State is acting
21 consistent with Federal law.

22 Once that Federal law is determined, as it was
23 in Treasure Salvors, then it would be appropriate for the
24 Court to go forward and to evaluate the merits of --

25 QUESTION: I really don't understand why the

1 presumption in the Montana case is any different from the
2 general presumption that State action conforms with the
3 Constitution. That's where I'm not sure I follow your
4 argument.

5 MR. STRONG: I understand, Your Honor.

6 QUESTION: Well, isn't your -- isn't the essence
7 of your argument, I guess, and your best answer to Justice
8 Stevens, if I understood you earlier, that Ex parte Young
9 is concerned with a situation in which the plaintiff
10 claims under Federal law, and the officers sued are
11 claiming under State law, and here you're saying both
12 parties are claiming under Federal law, and that's why
13 Young doesn't apply. Is that your argument?

14 MR. STRONG: Your Honor, in part that's our
15 argument. We contend that the question here is, whose
16 interpretation of Federal law is correct? And until that
17 interpretation is resolved, it's impossible to say the
18 officers are in violation of Federal law.

19 QUESTION: Well, yes, but if we understand Ex
20 parte Young simply to be a means of litigating a claim of
21 Federal right against State officers, then it would not in
22 any way be dispositive that the State officers were
23 themselves claiming to be operating consistently with
24 Federal law, or to be claiming affirmatively that they had
25 a Federal right to do what they do.

1 MR. STRONG: Well, Your Honor --

2 QUESTION: So I mean, that would be the end of
3 your argument, I take it, there, and I guess my question
4 is going to be, doesn't every defendant in an Ex parte
5 Young case say, I am operating consistently with Federal
6 law?

7 MR. STRONG: Well, certainly a party says that
8 in an Ex parte Young situation.

9 QUESTION: Okay, so that the only thing peculiar
10 about this case is that they're pointing, in effect the
11 State officers here are pointing, or are going to point if
12 they have to, to a title claim rather than to some other
13 basis in Federal law to say that they are acting lawfully
14 within the meaning of Federal law.

15 MR. STRONG: Your Honor --

16 QUESTION: Which --

17 MR. STRONG: -- what they point to is, rather
18 than an assertion that they're acting in conformance with
19 Federal law, is a presumption under Federal law that they
20 are --

21 QUESTION: No, but that goes to the merits. I'm
22 just saying, what are the issues that are being litigated,
23 and the issue that's being litigated is, on the
24 plaintiff's part, a claim of Federal right, on the
25 defendant's part, a claim to be acting consistently with

1 Federal law.

2 MR. STRONG: That is correct.

3 QUESTION: And that is true of every Ex parte
4 Young case that is ever litigated, isn't it?

5 MR. STRONG: But, Your Honor, the Eleventh
6 Amendment serves the purpose of protecting the State in
7 the operation of its sovereign duties. These lands, as
8 this Court has said --

9 QUESTION: No, it protects a State -- it
10 protects a State from being hauled into a Federal court
11 under certain circumstances, and Ex parte Young says you
12 can in those same circumstances sue the officer. Ex parte
13 Young cases are by nature based on claims of Federal right
14 and defenses based on claims of consistency with Federal
15 law. That's what you've got here, isn't that so?

16 MR. STRONG: Your Honor, what you have here is
17 property that's been identified as an essential attribute
18 of sovereignty. If the Eleventh Amendment is to serve any
19 purpose at all, it is to protect the sovereignty of the
20 States from being sued in a court.

21 QUESTION: Mr. Givens, you raise two questions
22 in your petition, and you have had no opportunity yet to
23 get to the second one. I hope you'll take some time, if
24 my colleagues allow you to get to it.

25 MR. STRONG: Yes, Your Honor. Just to complete

1 that thought, the essence of the -- if the Eleventh
2 Amendment serves any purpose, it serves to protect the
3 sovereignty of the State and its operations of its
4 Government. If -- Ex parte Young cannot be used as a
5 method to simply sue an officer and to infringe upon the
6 State's authority. In this action the only way relief can
7 be granted is if you directly determine the State is
8 without title.

9 Turning to the second question that we have
10 presented to the Court, we want to make -- first make
11 clear the issue that is before the Court. We are not
12 seeking a determination as to whether Congress took
13 affirmative action in this case to defeat the State's
14 equal footing title.

15 Rather, our contention is that the President
16 cannot act without express congressional authority to
17 defeat a State's equal footing title, and we point back to
18 the Sioux Tribe case in which it is specifically stated
19 that the authority of the President is limited directly to
20 a delegation of power from Congress, because the operation
21 of the Property Clause is vested exclusively in Congress.

22 So if in Sioux Tribe the Court found that it is
23 impossible for the President to convey an interest in
24 property to a tribe of uplands which are public lands -- I
25 want to emphasize it's public lands not submerged lands --

1 then it's also likewise and even axiomatic that with
2 regard to submerged lands, which are held in trust for the
3 benefit of future States, that the President could not act
4 to defeat that title.

5 Mr. Chief Justice, if I may, I'd like to reserve
6 the balance of my time for rebuttal.

7 QUESTION: Very well, Mr. Strong.

8 Mr. Givens, we'll hear from you.

9 ORAL ARGUMENT OF RAYMOND C. GIVENS

10 ON BEHALF OF THE RESPONDENTS

11 MR. GIVENS: Mr. Chief Justice, please the
12 Court:

13 The State is really asking for -- its State
14 officers are asking for a new submerged land exception to
15 pretty -- very well-developed areas of the law.

16 QUESTION: What -- the complaint is rather
17 sketchy as to what these officers are supposed to be
18 doing. It names the Governor and the Commissioner of
19 lands, I believe, and the Secretary of State. Does it set
20 forth with any specificity, or do other pleadings,
21 supplemental pleadings set forth with any specificity
22 exactly what these officers are doing that is inconsistent
23 with the ownership that you allege?

24 MR. GIVENS: The short answer is no, there are
25 no supplemental pleadings, Your Honor, and that's part of

1 the difficulty of the whole case. We're at -- this case
2 stems from the most preliminary procedures.

3 The Tribe filed its complaint -- it is a
4 generalized complaint. It does specify certain statutes
5 that they are -- the State officers are operating under.
6 The Governor is holding a statutorily -- State statutorily
7 created water right. The members of the land board that
8 was -- are enforcing a State statute that gives
9 encroachment permits.

10 QUESTION: Is that set forth in the complaint?

11 MR. GIVENS: In -- yes, Your Honor.

12 QUESTION: I didn't see that. It's in your
13 response at page --

14 MR. GIVENS: At --

15 QUESTION: Three.

16 MR. GIVENS: -- our response to the petition
17 for cert, page --

18 QUESTION: Page -- it begins at page 3 --

19 MR. GIVENS: Page 12.

20 QUESTION: -- and then that's at page 12.

21 MR. GIVENS: Asking that the water right of 67-
22 4304 be declared invalid, and the rest of them, Your
23 Honor, are really in more of a general way.

24 QUESTION: Which brings us --

25 QUESTION: Yes, but that simply sets forth the

1 extent of the declaration that you choose. It doesn't say
2 that any particular officer is enforcing this in any
3 particular respect. It just seems to me if you're going
4 to rely on the doctrine of Ex parte Young this is a very
5 sketchy pleading.

6 MR. GIVENS: It should be -- it needs to be
7 amended, Your Honor, for -- obviously for that reason. If
8 the State felt that there was -- they didn't understand
9 what we were suing about. Of course, there's the rule for
10 asking for more specific statement.

11 The other reason the complaint needs to be
12 amended is that when the complaint was filed we felt we
13 had a theory because of the way Idaho defined its
14 sovereignty as to not include quiet title actions that we
15 could sue the State for quiet title.

16 QUESTION: Not include what, quiet title
17 actions?

18 MR. GIVENS: Yes. Yes. There are two Idaho
19 supreme court cases that say that quiet title actions do
20 not impact the sovereignty of the State, and we felt
21 because of that the Eleventh Amendment was not applicable.
22 The Ninth Circuit felt otherwise. We asked this Court to
23 review that. It chose not to, so it's not part of the
24 case, so to get that out of the case we're going to have
25 to amend on remand, and very well the complaint should be

1 more specific.

2 QUESTION: Can you just tell us briefly what the
3 reasoning of that is, that quiet title actions don't
4 impact the sovereignty of the State?

5 MR. GIVENS: The cases are Roddy and the Lyons
6 cases, and the -- the thinking of the Idaho court was
7 simply that quiet title actions were actions against the
8 land, not against the sovereignty of the State.

9 QUESTION: Was it the in rem personification
10 notion?

11 MR. GIVENS: They didn't use those exact words,
12 but that basic concept, yes, Your Honor.

13 QUESTION: Well, that's a pretty strange
14 doctrine, isn't it? I mean, if the State claims sovereign
15 title and the quiet title action deprives the State of it,
16 how can it be said it doesn't affect the State in its
17 sovereign capacity?

18 MR. GIVENS: Maybe I didn't understand the
19 question, Your Honor.

20 QUESTION: Well, I don't see how the State could
21 take the position that a quiet title action asserting that
22 the State lacks title to lands that the State claims in
23 its sovereign capacity, how can it be said that doesn't
24 affect the State sovereign interests?

25 MR. GIVENS: The Idaho court was -- in the Roddy

1 and Lyons cases were presented with a -- claims against
2 the State to quiet title, and they chose not to waive
3 sovereign immunity judicially, which is what most States
4 have done.

5 QUESTION: Yes, but you do agree in any event
6 that a quiet title action could be brought by the Tribe in
7 State court?

8 MR. GIVENS: No, Your Honor. There is a very
9 serious question of State court jurisdiction. Of course,
10 there's the initial question of no State court
11 jurisdiction over the tribe, personal jurisdiction, but
12 there is also a very serious subject matter jurisdiction
13 question.

14 From the outset of the Indian law jurisprudence
15 in this country, the courts have held that, generally,
16 State courts have no jurisdiction over Indian lands --

17 QUESTION: Even when the Indian tribe is the
18 plaintiff?

19 QUESTION: Yes.

20 MR. GIVENS: Well -- I'm not talking about
21 personal jurisdiction, the subject matter jurisdiction of
22 the court.

23 QUESTION: But the subject matter jurisdiction,
24 aren't the court -- what is it, the circuit court, the
25 superior court, the district court --

1 MR. GIVENS: District --

2 QUESTION: The district court is a court of
3 general subject matter jurisdiction, isn't it?

4 MR. GIVENS: Yes.

5 QUESTION: I mean, it's not confined to certain
6 types of cases. You can bring any case you want, can't
7 you, if -- unless there's an amount in controversy
8 requirement.

9 MR. GIVENS: Well, I guess the problem, Your
10 Honor, is that litigants cannot create subject matter
11 jurisdiction upon a court that it doesn't otherwise have,
12 and the only congressional act that -- or the primary
13 congressional act that conveyed subject matter
14 jurisdiction on State courts to adjudicate Indian
15 interests was Public Law 280, of course, and in that -- in
16 Public Law 280, as is discussed in Bryan/Itasca County,
17 it's very clear that the statute -- Congress specifically
18 said that State courts do not have jurisdiction to
19 adjudicate property determinations in Indian country
20 against tribes.

21 QUESTION: So an Indian tribe couldn't go into
22 the district court of Ada County or something like that
23 and sue someone who is trespassing on tribal property, in
24 your view.

25 MR. GIVENS: I guess it would be -- the short

1 answer to your question, Mr. Chief Justice, is there is a
2 serious question of subject matter jurisdiction. It would
3 be like someone in Maryland going into a Virginia court
4 and suing to quiet title against someone in Virginia for
5 property in Maryland. The Tribe's basis of the whole
6 lawsuit in this case is, of course, the Tribe's title to
7 the lake. It is not -- the Tribe is not trying to take
8 anything away from the State. The Tribe has always owned
9 that lake, in the Tribe's position, and all that the Tribe
10 is asking for is to have a Federal court hold that the
11 State officers who are regulating on that lake are --
12 should not be doing that.

13 QUESTION: In fact, there is another suit
14 pending right now that would determine the issue of title?

15 MR. GIVENS: For -- yes, Your Honor, for a
16 portion of the lake. Lake Coeur d'Alene is a long, skinny
17 lake, and the United States has brought suit for a portion
18 of the southern part of the lake. The Tribes suit is for
19 the entire lake, so part of it is covered by the U.S.'s
20 suit, part of it is not.

21 The Tribe has been granted intervention status
22 in that case, and we tried to expand it to the whole suit
23 and the district court I think quite properly limited it
24 to the parameters of the United States' complaint.

25 As to the Eleventh Amendment issue generally, if

1 I could get to that, the thrust of the State's argument,
2 State officer's argument, as we understand them, is that
3 there is another remedy, just as we've been speaking of,
4 this State court remedy, and the Tribe could go there like
5 any other citizen could go to State court.

6 Well, there may be problems with it we just
7 discussed, but the State officers merge Federal officer
8 suits and State officer suits and pick and choose bits and
9 pieces of cases back and forth, when in reality when
10 they're looked at carefully they really come from
11 protecting different interests in the Eleventh Amendment
12 or in a sovereign immunity context.

13 The Federal officer suits are designed to
14 provide a remedy primarily in the takings area, and as
15 Congress has provided those remedies, be it the quiet
16 title act or some other remedy, then there is not the
17 constitutional problem in Federal officer suits.

18 In the State officer suits, the problem has
19 primarily been the supremacy of Federal law. There have
20 been a few State officer suits where the Federal law
21 problem has been lack of a remedy, but that is not the
22 situation in this case.

23 The State officers' position finds no support in
24 the cases that actually provided the foundation for Ex
25 parte Young, the Tindal, particularly Tindal. There's --

1 it is -- unless there is a distinction made because this
2 is submerged land as opposed to any other kind of land.

3 QUESTION: Tindal tends to negate your statement
4 that you distinguish sharply between State officer suits
5 and Federal officer suits. Didn't they say there that a
6 question whether a particular suit is won against the
7 State within the meaning of the Constitution must depend
8 on the same principles that determine whether a particular
9 suit is won against the United States?

10 MR. GIVENS: The Federal -- violation of Federal
11 law, the supremacy interest that was being protected in
12 Tindal in that case was a taking interest. The -- just as
13 it was in Lee. There wasn't -- hadn't been provided a
14 remedy, so to that context the two concepts merged.

15 In this case the Federal interest that is being
16 protected is the constitutional primacy of Federal
17 regulation, Federal control of Indian reservations.

18 The statutes which implemented various aspects
19 of the creation of the Coeur d'Alene reservation is the
20 executive order and the common law theory of aboriginal
21 title of the tribes, so there -- I mean, Mr. Chief
22 Justice, it's one of those situations, I think, where you
23 can say yes, this is like that, but really, when you look
24 at it underneath, Tindal, just like all of the other State
25 officer suits, are protecting the supremacy of Federal

1 law.

2 QUESTION: But in this case that's odd, because
3 we're only talking about Federal law on both sides. The
4 usual justification for Young is that you have to
5 vindicate the superior Federal law as against the inferior
6 State law, but here both sides are advancing Federal law
7 as the basis for their claim.

8 MR. GIVENS: Your Honor, there's no question but
9 what the State officers thrust that forward as their
10 argument, but I think the more appropriate way to analyze
11 the issue here is that the Tribe claims ownership based on
12 Federal law, and as a result of that claimed ownership, is
13 asking the Federal court to enjoin State officers from
14 their regulation of the Tribe's lake under State law.

15 Now, then the State officers come back on the
16 other hand and say well, no, we have a claim under Federal
17 law why our officers are doing the right thing, and it --
18 it's just as Justice Souter was describing in his
19 question. It's exactly the same sort of situation,
20 really, that you always have in any Ex parte Young
21 situation where the State officers are saying we are
22 acting appropriately under Federal law, whether it be this
23 particular one or some other Federal law that justifies
24 our action.

25 QUESTION: Mr. Givens, could you -- could the

1 Tribes sue in Federal court just to determine title to
2 this property, or do you concede that that is not -- that
3 the Eleventh Amendment would bar that?

4 MR. GIVENS: Well, Your Honor, that's what we
5 did, and the -- that's what the Ninth Circuit said it
6 could not do, because that would be an adjudication
7 against the State.

8 QUESTION: Do you accept that?

9 MR. GIVENS: Yes, Your Honor. The State
10 officers themselves, those are the only defendants that
11 we're left with.

12 QUESTION: All right, and you are not here
13 arguing that the Tribe could bring a direct suit in
14 Federal court to determine title.

15 MR. GIVENS: That is correct. That is the --

16 QUESTION: Well, what are the attributes of
17 title ownership? They are the right to possess and
18 control and regulate the property, I guess.

19 MR. GIVENS: Well, it's -- I guess it's like --

20 QUESTION: And won't that have to be determined
21 basically by deciding who has the title?

22 I mean, how would you ever be able to determine
23 that the tribe has the right to possess, regulate, and
24 exclusively do so without determining that the Tribe had
25 title and that's the basis for it?

1 MR. GIVENS: The issue of title will be an
2 issue, just as --

3 QUESTION: Well, that being the case, I don't
4 see why the Eleventh Amendment shouldn't be a bar here,
5 because you are in essence asking the Court to do what
6 you've conceded the Court can't do. I just don't see why
7 the Eleventh Amendment doesn't kick in here.

8 MR. GIVENS: That is exactly the question that
9 this Court addressed in Lee, it is exactly the question
10 this Court addressed in Tindal, and in both instances they
11 said no, we can separate the determination of title from
12 the, in those cases trespass, in this case regulation by
13 the State officers.

14 The litigation against the State officers does
15 not preclude the State from later litigating title, and --

16 QUESTION: Mr. Givens, Larson is more recent
17 than those, and I thought it was made pretty clear in
18 Larson, which was against the Federal Government, of
19 course, that you can't proceed unless either the officers
20 are acting beyond their authority ultra vires, or their
21 action is unconstitutional.

22 Now, that was a Federal case against the United
23 States, but I thought that we made clear, or at least the
24 various opinions made clear in Treasure Salvors that we
25 would apply Larson in the State context as well. Now,

1 would you meet the requirements of Larson?

2 MR. GIVENS: The officers -- it is never within
3 the officer's ability as a State officer to violate the
4 Federal Constitution, and these -- part of which is the
5 Supremacy Clause, and that is where the State officer and
6 Federal officer cases depart, Your Honor, and I think it
7 is why it is so important to keep clearly in mind which
8 interest is really being protected.

9 In the State officer cases the constitutional
10 interest that is at issue is the supremacy of Federal law,
11 it is not the -- whether or not the State officer is
12 acting within or without his authority.

13 That State officer can be acting within his
14 authority under State law and still be acting in violation
15 of Federal law unconstitutionally, and the thrust of all
16 of Ex parte Young jurisprudence is that this -- the
17 Federal court still should appropriately provide a remedy
18 not necessarily to test whether or not the officer is
19 acting properly or improperly, but to uphold the supremacy
20 of Federal law. That is the underlying thrust of all the
21 State officer cases.

22 So to the extent that the -- this is -- this
23 factual situation is a little bit different than Larson,
24 it is -- the result should be different in Larson, it is
25 because it rests on different underpinnings.

1 QUESTION: Mr. Givens -- oh, I'm sorry. Please.

2 QUESTION: I wondered if -- I'm slightly -- I'd
3 appreciate some clarification on this question of title
4 versus what's going on here.

5 My understanding of it was that really this is a
6 suit which someone who was not steeped in Eleventh
7 Amendment law would say was a suit for title. I don't
8 know what the State can do, if you win, with this
9 submerged land. I don't know what laws it could enforce.
10 It sounds like you're getting the property.

11 The only reason I suppose that title came in is,
12 in a case called Tindal the Court held that a suit just
13 like this one wasn't really against the State, though it
14 is, but nonetheless we give the State an escape hatch,
15 that because of the last paragraph the State won't be
16 bound as to title, thus they get an extra chance to come
17 back and fight it if they want.

18 Is that understanding correct?

19 MR. GIVENS: I think that would be correct, yes,
20 Your Honor. The --

21 QUESTION: Don't say it's correct if you don't
22 really agree with it, because you're the expert in this
23 area.

24 MR. GIVENS: Oh, maybe I misunderstood exactly
25 what you said, then.

1 QUESTION: Yes -- I mean, no, no, if you do
2 agree, fine. I'm happy that that is correct, if it is,
3 but I mean, I'm trying to follow through the intricacies.
4 I got your argument before that you thought in reality Ex
5 parte Young is simply a way of permitting in certain cases
6 the assertion of the Federal interest in States obeying
7 Federal law.

8 MR. GIVENS: That's correct, Your Honor.

9 QUESTION: And you think that you can't
10 distinguish real property cases where the Federal law
11 gives the property to Jones, or Smith, or the Indian tribe
12 from cases involving mental hospitals, schools, churches,
13 whatever. Is that right?

14 MR. GIVENS: That's correct, Your Honor.
15 They're both based on the supremacy of Federal law.

16 QUESTION: All right, but then we run into this
17 doctrine, and you think Tindal is strongly in support of
18 you.

19 MR. GIVENS: It is to the extent, Your Honor,
20 that Tindal said clearly that you -- the Federal court can
21 enjoin a State officer who is holding property
22 unconstitutionally without adjudicating the title to that
23 property.

24 QUESTION: So what we have, is it fair to
25 characterize -- we have a fiction on a fiction. There's

1 the fiction of Ex parte Young, because it's simply a
2 fictional way of allowing the assertion of Federal
3 supremacy in an important number of cases. And then we
4 have the fiction that that wasn't really a property State
5 title, which it is, and now we get a new fiction which
6 allows the State to come back and really sue for title,
7 even though you win this case. You win the case, the
8 State isn't barred from bringing its title suit, is that
9 right?

10 MR. GIVENS: That's right. That's right.

11 QUESTION: All right.

12 QUESTION: What good does it do you, then, to
13 win this case if the State isn't bound?

14 MR. GIVENS: The State officers can no longer
15 regulate the Tribe's lake. The --

16 QUESTION: So you really -- you -- the benefit
17 you get is, you get the same result as if you acquire the
18 title.

19 MR. GIVENS: There are very -- there are
20 similarities, Your Honor, there is no question about that,
21 and the --

22 QUESTION: Mr. Givens, isn't it more than
23 similar? Isn't -- aren't you saying in effect you get --
24 the result of your lawsuit, if it were allowed to go
25 forward, would be, you'd have title as against all the

1 world except the State of Ohio -- Idaho?

2 MR. GIVENS: The -- after --

3 QUESTION: Because you would have to establish
4 your title, although one party, Idaho, wouldn't be bound
5 by it.

6 MR. GIVENS: The -- in determining this suit,
7 the Court would adjudicate the Tribe's ownership. It
8 would not have to adjudicate the State's ownership.

9 QUESTION: Well, they both -- I think we can
10 agree that they both can't own the same land. It either
11 belongs to one or the other, and my question to you is,
12 isn't the thrust of your lawsuit, we own it? There's one
13 party left out there who can contest that but no one else
14 in the world.

15 MR. GIVENS: That's right, and as with any --
16 anyone who files any quiet title action, if you don't sue
17 Jones and Jones has a claim to it, you may get your
18 quiet -- your title quieted to everybody except Jones.
19 Jones can still come in and make a claim for it.

20 QUESTION: Mr. Givens, may I go back to your
21 answer to an earlier question from Justice Ginsburg? I'm
22 not sure that this should be dispositive of anything in
23 the case, but as I recall your answer, it was -- in
24 questioning whether this case fit within the Ex parte
25 Young framework. You said that in fact what the State

1 officers were claiming here, were claiming rights to
2 regulate in the enforcement of State law.

3 In other words, it wasn't merely a matter of two
4 contesting titles, there was State law which had been
5 enacted to determine just how the State would regulate,
6 and what it would do, and that therefore the contest here
7 was really a contest between a claim of superior title on
8 the one hand and a claim to enforce particular State laws
9 which ultimately implied a contrary claim of title, is
10 that right?

11 MR. GIVENS: Yes, Your Honor.

12 QUESTION: Are we in a position to assess that
13 answer, because I thought the very answer that you gave to
14 Justice Kennedy earlier was that there are no specific
15 detailed claims against State officers at this point,
16 that's just not the state of the pleadings, and you said,
17 well, we ought to go back and amend.

18 So, are we really in a position to accept your
19 answer that what is being contested here are particular
20 acts of regulation by particular State officers enforcing
21 particular State laws? Is that really before us?

22 MR. GIVENS: The -- you may be correct, Your
23 Honor. It puts a litigant, of course, in a difficult
24 position. You plead a complaint with several different
25 counts and theories, and the appellate court says, well,

1 you lose on some of those, and there are some that's left,
2 and instead of having the opportunity then to amend as you
3 would on remand normally, all of a sudden you're up here
4 on the remainder.

5 The preliminary nature of this case makes it
6 very difficult to deal with this -- not only this issue,
7 but also the Property Clause issue, and if I could just
8 address that for just a moment, the tension in the
9 Property Clause that the State officers raise is really
10 between the executive and the Congress. And, again, the
11 State officers are asking for a unique exception to some
12 very well settled law in this regard.

13 Thirty years ago in Arizona, California, this
14 Court said that there was no difference between
15 reservations, Indian reservations created by executive
16 order and those created by treaty as to either land or
17 water.

18 QUESTION: Yes, but they weren't talking about
19 the equal footing doctrine then, were they?

20 MR. GIVENS: They were not. They were talking
21 water rights, Your Honor.

22 The -- 80 years ago --

23 QUESTION: And it's different -- creating a
24 reservation is much different than conveying land.

25 MR. GIVENS: The -- well, the creation of the

1 reservation can or cannot convey land, and there was
2 little analysis in that case, there's no question about
3 that, but it did cite to Midwest Oil, which was decided
4 80 years ago when this Court held that the congressional
5 acquiescence could -- or by congressional acquiescence
6 executive orders creating reservations, those reservations
7 would be valid.

8 QUESTION: Well, Midwest Oil was certainly
9 distinguished in the steel seizure case, was it not?

10 MR. GIVENS: It -- acquiescence is not a --

11 QUESTION: A sure thing.

12 MR. GIVENS: -- favored doctrine. However,
13 Coeur d'Alene was cited as one of the 99 Indian
14 reservations in Midwest Oil.

15 One hundred and twenty-five years ago in Holden
16 this Court said that if there's an executive order and
17 then later congressional acts that recognize that, and
18 that's exactly what we have here. We have four of them
19 that were listed in the brief, all pre-Statehood, that
20 specifically recognize the Coeur d'Alene reservation,
21 specifically recognized the -- what the executive had
22 done.

23 And probably most on point, in 1888 Congress
24 asked the executive, does this reservation include some of
25 this navigable waters, and should we send -- appoint a

1 negotiating team to go out and negotiate for the cession
2 of some of that?

3 The executive branch said yes, it does, and if
4 you do, you should pay them for it.

5 They then acted affirmatively upon that and
6 appointed a negotiating team, so there is that later
7 congressional recognition.

8 Finally, as --

9 QUESTION: Of course, you could have the
10 reservation here by executive proclamation and simply not
11 get the submerged land rights.

12 MR. GIVENS: That's entirely possible, Your
13 Honor, and the difficulty with even arguing this issue at
14 this point is, it is at such a preliminary stage, and
15 those questions need to be -- I mean, that's the heart of
16 the case. They need to be developed, and that's -- the
17 place to do that is at trial.

18 QUESTION: Well, how further would you do -- I
19 mean, if, in fact, a presidential proclamation without the
20 authority of Congress cannot cut off a State's rights
21 under the equal footing doctrine, there's nothing that a
22 trial is going to prove about that.

23 MR. GIVENS: Oh, yes, Your Honor. The State
24 concedes that there are several other theories which are
25 pled in the Tribe's complaint which are not within the

1 issue presented and which has to be remanded to trial.

2 QUESTION: Well, but at least that would decide
3 this -- if we were to hold that, that would decide this
4 aspect of the case.

5 MR. GIVENS: I've gotten lost in the words, Your
6 Honor.

7 QUESTION: Well, I -- I won't detain you. Thank
8 you.

9 MR. GIVENS: I'd love it, Your Honor. Thank
10 you.

11 QUESTION: Mr. Strong, you have 4 minutes
12 remaining.

13 REBUTTAL ARGUMENT OF CLIVE J. STRONG

14 ON BEHALF OF THE PETITIONERS

15 MR. STRONG: Thank you, Your Honor.

16 One quick point with regard to the Eleventh
17 Amendment issue. I would like to go back to a question,
18 two questions that were posed by this panel to Mr. Givens,
19 one by Justice O'Connor, and one by Justice Ginsburg.

20 As Justice Ginsburg rightly points out, what the
21 Tribe seeks, and it's stated in their response brief on
22 page 4, what remains in the suit is declaratory and
23 injunctive relief against Idaho officers to stop their
24 violation of Federal law and to quiet the title, the
25 Tribe's title against the world other than Idaho and its

1 departments.

2 And as Justice O'Connor rightly observed, the
3 essence of title to property is the opportunity to possess
4 that property, and that's particularly true with respect
5 to sovereign submerged lands.

6 As this Court said in Oregon v. Corvallis Sand &
7 Gravel, submerged lands cannot be compared to substantive
8 property law, but rather as an issue substantially related
9 to constitutional sovereignty of the States.

10 The unique aspect of that sovereign title --
11 there is a legal title and a public title -- is the
12 responsibility of the State to manage those lands for the
13 benefit of the public. If the officers are enjoined from
14 carrying out that sovereign duty, how can it be said that
15 the sovereignty of the State is not affected?

16 QUESTION: And what's the answer on that point,
17 on that very point in Tindal? I thought they got that
18 from the last paragraph of Tindal, so what is the answer
19 to that?

20 MR. STRONG: I'm sorry, Your Honor, I --

21 QUESTION: Where the Court -- this Court seemed
22 to divide all the aspects of title -- I mean, with the
23 fiction of the title itself, and says the State gets
24 another chance to litigate it.

25 MR. STRONG: Tindal is a much different case

1 than the case we have before us, because in Tindal it was
2 an issue where the officers through their actions came
3 into possession of the property.

4 These officers have no relationship to the title
5 here. The title passed to the State on Statehood. We've
6 possessed it since that date, and so the officer's duties,
7 what they're doing, have no relationship to title
8 whatsoever, and so the only way you could bring in Tindal
9 is to say that the officers are taking the property.

10 How can it be said that they're taking the
11 property if they have never, by their own actions, took
12 possession of the land, but rather, came into possession
13 as a result of the constitutional presumption?

14 QUESTION: Idaho could have no complaint, could
15 they, except for a defense on the merits, if the United
16 States in its suit had chosen to litigate on behalf of the
17 Tribe for this entire -- for all the land that the Tribe
18 is now claiming, rather than just a part of it?

19 MR. STRONG: Certainly not, Your Honor. If the
20 United States had felt that there was a basis for making a
21 claim for the entire lake, it could have brought that
22 action and the State would have no objection to that type
23 of lawsuit.

24 QUESTION: And there's nothing to indicate why
25 the United States -- in this record why the United States

1 sued for less than what the Tribe is claiming in this --

2 MR. STRONG: No, Your Honor, but the reasonable
3 assumption is that the United States has evaluated that
4 claim and determined that there isn't a Federal interest
5 in the northern two-thirds of the lake.

6 Turning to the last or second question we
7 presented to the Court, as Mr. Givens rightly points, that
8 his theory is based upon the idea that Midwest Oil somehow
9 gave the President authority by acquiescence of Congress,
10 and it's our position that the Property Clause powers are
11 vested exclusively within Congress, and then in the Sioux
12 Tribe the only way that authority can be delegated to the
13 President is by an express action of Congress.

14 This is particularly true with regard to the
15 submerged lands, which are held in trust for the future
16 States. If a President can simply unilaterally take those
17 lands out of trust, then what aspect of sovereignty is
18 really being protected?

19 In fact, the sovereignty of States, they would
20 have no way of protecting themselves against such a
21 withdrawal.

22 Moreover, Midwest Oil is a very unique case.
23 It's limited to the situation in which the President is
24 withdrawing lands, public lands that are available for
25 sale. In Midwest Oil, the Court found acquiescence to be

1 acceptable, because in that instance no third party was
2 being injured.

3 The State of Idaho is being injured by this
4 action because the lands were held in trust for the
5 benefit of the State, and if they're taken out of trust
6 and conveyed to the Tribe, then the State's sovereignty
7 has been injured.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Strong.
9 The case is submitted.

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

IDAHO ET. AL V COEUR D'ALENE TRIBE OF IDAHO, ET AL.
CASE NO. 94-1474

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

BY Don Mari Federico

(REPORTER)