

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: BRUCE BABBITT, SECRETARY OF THE INTERIOR,  
ET AL. Petitioners v. MARVIN K. YOUPEE, SR., ET  
AL.

CASE NO: 95-1595

PLACE: Washington, D.C.

DATE: Monday, December 2, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BRUCE BABBITT, SECRETARY OF :

4 THE INTERIOR, ET AL. :

5 Petitioners :

6 v. : No. 95-1595

7 MARVIN K. YOUPEE, SR., ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Monday, December 2, 1996

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States at  
13 1:00 p.m.

14 APPEARANCES:

15 JAMES A. FELDMAN, ESQ., Assistant to the Solicitor

16 General, Department of Justice, Washington, D.C.; on  
17 behalf of the Petitioners.

18 RENE A. MARTELL, ESQ., Poplar, Montana; on behalf of the  
19 Respondents.

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On behalf of the Respondents	33



1 PROCEEDINGS

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 95-1595, Bruce Babbitt v. Marvin K. Youpee,  
5 Sr.

6 Mr. Feldman.

7 ORAL ARGUMENT OF JAMES A. FELDMAN

8 ON BEHALF OF THE PETITIONERS

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

11 This case concerns the constitutionality of  
12 section 2 -- of the amended version of section 207 of the  
13 Indian Land Consolidation Act. The unamended version of  
14 this statute was before this Court almost 10 years ago in  
15 Hodel v. Irving, and the Court found it unconstitutional.  
16 Our submission is that the amended statute remedies the  
17 flaws that this Court found in the original version of the  
18 statute, and the amended statute is therefore  
19 constitutional.

20 Now, the purpose -- the statute arose as a  
21 response to what this Court has characterized in Hodel as  
22 the extraordinary problem of extreme fractionation of  
23 Indian trust lands. Such extreme fractionation when many  
24 people combine to own undivided interests in single  
25 parcels of land makes productive use of the land very

1 difficult. If a given parcel has a large number,  
2 sometimes in the hundreds of different owners, it's very  
3 hard for anyone to take initiative to see to it that the  
4 parcel is put to a productive economic use.

5 QUESTION: Mr. Feldman, in this case, under the  
6 facts of this case, did the disposition of the land in  
7 question further fractionalize it or did one person take  
8 each interest as a whole? I mean, one daughter took some,  
9 and a son took all of another, the interest in another  
10 tract, and so on? It was not further fractionalized, was  
11 it, in this case?

12 MR. FELDMAN: That's correct. I mean,  
13 actually -- in respect to one parcel of land was further  
14 fractionated, but that was not a parcel that was subject  
15 to a --

16 QUESTION: Right.

17 MR. FELDMAN: It was small enough --

18 QUESTION: Right.

19 MR. FELDMAN: The decedent --

20 QUESTION: Does that make a difference, do you  
21 think, in our analysis?

22 MR. FELDMAN: No, I don't think it does. In  
23 Hodel v. Irving what the Court held was that the extreme  
24 fractionation is a serious problem, and that --

25 QUESTION: But we nevertheless thought it was a

1 taking in that case.

2 MR. FELDMAN: Right. It was a taking because --  
3 because such small -- because -- excuse me. Let me start  
4 again.

5 The Court held in Hodel that there was a taking  
6 because it completely and totally eliminated all rights of  
7 descent and devise for the land and, as the Court said  
8 twice in its opinion, even when permitting descent or  
9 devise would result in a consolidation of the land.

10 In this case none of the -- none of the interest  
11 that they had passed effectively through the will would  
12 have resulted in such a consolidation of the land and,  
13 indeed, in Hodel v. Irving when the Court -- in one of the  
14 places where the Court made that comment it put a Cf cite  
15 specifically to the amended version of the statute.

16 Now, the amended version of the statute in our  
17 view remedies the flaws in the original statute in two  
18 ways. In the first place, in connection with the economic  
19 impact of the statute, the amended -- the original statute  
20 required that land be escheated if in the 1 year prior to  
21 the decedent's death it had not earned more than \$100, and  
22 if the interest involved was less than 2 percent. The  
23 amended version of the --

24 QUESTION: Well now, let's talk about the  
25 amended version a little. Subsection (a) of 207 says if

1 the land is incapable of earning \$100 in any one of the  
2 5 years from the date of decedent's death, and where the  
3 factional interest has earned its owner less than \$100 in  
4 any one of the 5 years before the decedent's death there's  
5 a rebuttable presumption --

6 MR. FELDMAN: Yes.

7 QUESTION: -- that applies.

8 MR. FELDMAN: If I may, if I can take the first  
9 passage that you quoted, it's our position that that is  
10 ambiguous, and that the -- it is true that the any one --  
11 incapable of earning \$100 in any one of the 5 years could  
12 mean in any of the 5 years or in any one --

13 QUESTION: Well, that would be the normal  
14 reading of it, I suppose.

15 MR. FELDMAN: Well --

16 QUESTION: I had a hard time understanding your  
17 reading of it, which would read in the word each of the  
18 5 years.

19 MR. FELDMAN: No -- well, I think any in some  
20 circumstances can mean each, especially when it's  
21 conjoined with the negative, but let me just abstract from  
22 that for a minute.

23 In the first place, that issue isn't presented  
24 by this case because no one has claimed that our reading  
25 of the statute in this case was wrong, but more



1 importantly, the kinds of lands that we're generally  
2 dealing with here are lands that are useful primarily for  
3 grazing or for mineral leasing, and as a general matter it  
4 doesn't really make -- it will be a very small number of  
5 cases where which year you're looking at is going to be an  
6 important factor. If it can be leased for a 5-year period  
7 for grazing, it will be leased at about the same amount of  
8 money every year.

9 QUESTION: What about timber?

10 MR. FELDMAN: Well, and if it can be leased for  
11 timber harvest it might be more than a 5-year period that  
12 a lease would permit, but still --

13 QUESTION: Well that's -- I asked -- you said  
14 it's mostly grazing and mineral. Does the record support  
15 that, and not timber, because one of my concerns along the  
16 lines of Justice O'Connor's questioning under this statute  
17 is that timber harvesting typically is -- oh, some parts  
18 of California at least once every 15 years.

19 MR. FELDMAN: Right. As our reading of the --

20 QUESTION: But it could be very valuable in that  
21 one year.

22 MR. FELDMAN: That's right. In our reading of  
23 the statute, because the other key part of the change is  
24 not only that it changed to a 5-year period, but the  
25 question is whether it's capable, not whether in fact in

1 any given year it earns an amount --

2 QUESTION: What point does this go to? Does it  
3 go to the point that if the Government only takes a little  
4 bit of value it's not a taking?

5 MR. FELDMAN: No. It --

6 QUESTION: Do we have any law that says that a  
7 de minimis taking is not a taking?

8 MR. FELDMAN: No, but it -- I think it does go  
9 to the fact that Congress more carefully tailored what it  
10 did in this statute to just those interests that were  
11 causing the serious problem.

12 When someone owns the smallest interest that was  
13 involved in this case -- I think it was 5/1000ths of the  
14 parcel, and when people --

15 QUESTION: Yes, but it doesn't go to the extent  
16 of the interest. It goes to the value of the land more  
17 than the extent of the interest, or at least as much to  
18 the value of the land as the extent of the interest,  
19 right?

20 MR. FELDMAN: It goes --

21 QUESTION: I mean, you could have a pretty big  
22 chunk of an interest of worthless land and -- you know,  
23 worthless for anything except perhaps camping on it.

24 MR. FELDMAN: Right, but Congress was trying to  
25 define a category of land that was really causing the

1 problem, and in the amended version of the act it acted  
2 much more closely and precisely to target that particular  
3 land.

4 For example, by referring to land that's capable  
5 of earning \$100 rather than land that had in a certain  
6 year earned \$100, someone whose land might escheat might  
7 go into a court and say, well, this can be harvested for  
8 timber every 15 years, therefore I can lease the land to  
9 somebody for a 15-year period, and if the annual rental on  
10 that lease will result in more than \$100 for me, then I'm  
11 out of the statute. It's -- it was really the change to a  
12 capable-of-earning standard as much as focusing on the  
13 5 years versus 1 year that was significant.

14 QUESTION: I must admit, one has to marvel at  
15 the prognosticative ability, or else the serendipity of  
16 the Congress, that 3 years before our opinion in Hodel it  
17 should pass a statute which happens to solve the very  
18 things we were troubled with in Hodel. It should pass a  
19 statute which happens to solve the very things we were  
20 troubled with in Hodel.

21 MR. FELDMAN: Well, I think that in fact the two  
22 key things that the Court pointed out in Hodel that it was  
23 most concerned about were first that this -- taking just  
24 one arbitrary year before the decedent died might really  
25 result in the escheat of very valuable interest, and

1 secondly that it completely and totally abolished all  
2 descent and devise, even in cases where descent and devise  
3 might consolidate interests.

4 What Congress did was, it remedied the first  
5 problem primarily by talking about capable of earning,  
6 rather than just what it had in fact earned, and in  
7 addition by setting up this 5-year window rather than just  
8 1 year before the decedent's death, and it dealt with the  
9 second problem by permitting devise in precisely those  
10 cases where the devise would result in consolidation of  
11 the property.

12 The kind of property interest that we're talking  
13 about here, the smallest interest in this case, as I said,  
14 was something like 5/1000ths of a percent, and people who  
15 own that small of a property interest can't reasonably be  
16 expected, or at least very infrequently will take enough  
17 of an interest in the property to do anything with it  
18 to --

19 QUESTION: I don't know that we said in Hodel  
20 that there wasn't enough of a need. It seems to me what  
21 we said in Hodel is simply, you -- an essential part of  
22 the bundle of property rights is the ability to bequeath  
23 it, and if you take that away, you've taken property,  
24 period.

25 MR. FELDMAN: I think, as I read the -- as I



1 read the Court's opinion, what it was speaking of was the  
2 complete and total and absolute abrogation of rights of  
3 descent and devise.

4 After all, the Court reaffirmed a long line of  
5 precedent that had held that the Government has very broad  
6 authority to regulate the rules of descent and devise. In  
7 this case, this kind of rule is analogous both to typical  
8 escheat rules, which are kind of abandonment rules, where  
9 you have a very small interest, you can't really expect  
10 the owner to do anything, he doesn't have enough of an  
11 economic incentive to ever do anything with the property,  
12 even to return a post card, perhaps, that -- where someone  
13 proposes a use of the property that requires his consent,  
14 and what Congress was saying was, if that's the kind of  
15 interest you have, that is imposing serious costs on the  
16 community, and we're going to presume that you abandoned  
17 it unless you did one of three things.

18 Either, during your lifetime, you unite it with  
19 another interest and consolidate your interest and get  
20 above the 2 percent threshold, or second, you can dispose  
21 of the property during your lifetime and thereby -- and  
22 pass on -- you can certainly pass on any money that you're  
23 able to realize by disposing it to your heirs by descent  
24 or devise, or however it can be passed on, or three, you  
25 can pass it on by -- through -- after your death, through

1 a probate proceeding, but you can only devise it to  
2 somebody who already owns an interest in the same  
3 property.

4 QUESTION: Doesn't that effectively mean that  
5 you can't devise it to the people you are most likely to  
6 want to devise it to?

7 I mean, I presume it is highly unlikely that the  
8 people who are already owners of the parcel are related to  
9 you, or lineal descendants of yours, so I suppose that  
10 really cancels out most of the prospective devisees,  
11 doesn't it?

12 MR. FELDMAN: I actually don't think that's  
13 true. As a matter of fact, in this very case one of the  
14 six respondents got three properties that she wouldn't  
15 otherwise have gotten, because she was a daughter of the  
16 decedent, and she already owned interest in those  
17 properties.

18 But more generally, what's caused the problem  
19 that Congress was addressing here was kind of -- was rules  
20 of descent, was primarily rules of descent that allowed  
21 the land to be fractionated over the years, and frequently  
22 the land will be held within a given lineal family.  
23 Perhaps it's branched out quite a bit by the time it gets  
24 to the third or fourth generation.

25 QUESTION: We --

1 MR. FELDMAN: So generally it will be other --  
2 or at least, very frequently it will be other people who  
3 you do have a family tie to, who are --

4 QUESTION: But you're talking about collateral  
5 heirs, a quite distant relationship if you get to the  
6 third or fourth generation, aren't you?

7 MR. FELDMAN: You might be. You might well be,  
8 although as I said in this case one of the people was a  
9 daughter, but certainly many of them, some of the other  
10 five didn't get any land on that basis, and didn't already  
11 own interest in the parcels.

12 QUESTION: Mr. Feldman, I don't read Hodel as  
13 resting upon the total elimination of the ability to  
14 devise. It just doesn't say that. It says -- it says the  
15 regulation here amounts to virtually the abrogation of the  
16 right to pass on a certain type of property, the small,  
17 undivided interest, to one heir -- to one's heirs. Not  
18 totally, virtually.

19 MR. FELDMAN: Right, and --

20 QUESTION: And it does virtually that here, too.

21 MR. FELDMAN: And the Court -- I would say the  
22 Court also said in Hodel the difference in this case from  
23 the other cases that the Court reaffirmed that have  
24 affirmed the authority of the sovereign to set rules of  
25 descent and devise, the difference in this case is the

1 fact that descent and devise are completely abolished.  
2 Indeed, they are abolished even in circumstances where the  
3 governmental purpose sought to be advanced does not  
4 conflict with the further descent of the property.

5 But I think, stepping aside for a minute,  
6 whether the Court's -- and, indeed, I think the question  
7 before the Court today is the question of whether Hodel  
8 rested on the complete abrogation of descent or devise, or  
9 rested on a rule that would much more severely restrict  
10 the sovereign's ability to regulate descent or devise.

11 QUESTION: With respect to that, Mr. Feldman, I  
12 was trying to think of any other kind of regulation by the  
13 sovereign of the right to dispose of property on death  
14 that would be comparable to this, and you rely on the  
15 large power of the sovereign to regulate the disposition  
16 of property on death, and here the regulation says most  
17 lineal descendants will not qualify. I couldn't think of  
18 anything that would be close to this.

19 Is there any -- you talk about a larger  
20 authority, but is there anything that so severely  
21 restricts the category of potential devisees?

22 MR. FELDMAN: I don't think -- there's nothing I  
23 can -- I can't answer that I can give you an example of  
24 any particular statute that does -- that restricts the  
25 category of lineal devisees so thoroughly, although there



1 may be statutes that give -- include -- they give an  
2 interest to a spouse, for example, over the interests of  
3 children, or something like that, that could in some  
4 circumstances have that effect, but there have been, and  
5 the Court have upheld statutes that have restricted devise  
6 to one's children.

7 Under the common law, I believe, you couldn't  
8 devise property to an alien, real property, and even if  
9 the alien happened to be your child, and this Court has  
10 upheld that.

11 In addition, there are in -- there are rules  
12 that some Indian tribes have that you can't devise -- that  
13 you can't devise property --

14 QUESTION: But most of them come up as except --  
15 in the main, you can devise your property, but there are  
16 these exceptions, and here is in the main you can't,  
17 unless you come under the exception of somebody who  
18 already has a share of that same parcel.

19 MR. FELDMAN: And I think you really have to  
20 look at the unique character of this property interest,  
21 the kinds of property interests that we're talking about  
22 in this case.

23 QUESTION: Why is it unique?

24 MR. FELDMAN: It's unique because these  
25 interests are extremely small fractional interests, a kind

1 of fractional interest that very, very rarely exists  
2 outside of Indian law, and that the owners may well in  
3 fact have abandoned the property.

4 It's very hard to tell whether they've abandoned  
5 the property because the administrative costs of leasing  
6 it insofar as it's able to be leased, or doing it with  
7 whatever can be done are borne by the United States, and  
8 because they're not subject to State taxes, and really one  
9 of -- what -- meanwhile this interest is both -- I think  
10 it's analogous both to cases where Congress is saying  
11 owning this kind of an interest is in itself a kind of a  
12 nuisance that has to be abated, and if you don't take  
13 State action, you don't take action to abate that nuisance  
14 in the course of your lifetime by --

15 QUESTION: It was a nuisance that Congress  
16 created by -- principally by prohibiting the Indians from  
17 deeding this property. Isn't that how it all came about?

18 MR. FELDMAN: Well, I --

19 QUESTION: Weren't there severe limits on the  
20 alienation of it by the Indians?

21 MR. FELDMAN: There are limits on the alienation  
22 of it --

23 QUESTION: So Congress gives this property to  
24 the Indians, puts these severe limitations on it which  
25 creates this problem of fractionalization, and then comes

1 in and says, because of this problem of fractionalization  
2 which we've created, we're going to take it away from you.

3 MR. FELDMAN: I'm not sure that it's fair,  
4 though, to say that Congress created -- the process of  
5 fractionalization may have been a byproduct of a number of  
6 different factors, one among them are the fact that it's  
7 not subject to State taxes, and that the Government bears  
8 the cost of administering the property, and thereby it  
9 doesn't give anybody an incentive to determine whether  
10 this is property that they really want, and really want to  
11 do something with, or if this is just abandoned property  
12 that they're just going to ignore and pass on to the next  
13 generation in equal undivided interests.

14 QUESTION: Well, I suppose the Government could  
15 purchase these small interests, or take them by eminent  
16 domain --

17 MR. FELDMAN: That's correct.

18 QUESTION: -- paying something, and I guess the  
19 Government also could help the tribes do just that.

20 MR. FELDMAN: That's correct, although the  
21 magnitude of the problem -- you know, each of these  
22 interests -- in this case some of the interests are an  
23 estimated value of \$5, or \$10, or \$15, but the magnitude  
24 of the problem over millions of acres of Indian land,  
25 where the ownership is highly fractionated, is very, very

1 substantial, and Congress reasonably --

2 QUESTION: But Congress has imposed so many  
3 detailed requirements on efforts by the tribes to  
4 consolidate. Maybe some of those could be eliminated --

5 MR. FELDMAN: I think actually --

6 QUESTION: -- and make it simpler.

7 MR. FELDMAN: Actually, I'm sure there's room  
8 for improvement in the statutory schemes here, but in the  
9 Indian Land Consolidation Act and some of the other  
10 provisions that are right, I think -- this is codified at  
11 29 U.S.C. 2206 at 2205, 4, 3 -- there are some other  
12 provisions Congress enacted to enable tribes to take a  
13 variety of actions to purchase land or to consolidate  
14 interests on the reservation.

15 And in fact in 2206(c), I think it is, the very  
16 section we're talking about, Congress specifically  
17 indicated that if a tribe wanted to adopt a code of  
18 inheritance that would deal with -- that would also deal  
19 with this fractionation problem in some other way, that  
20 that could be approved by the Secretary --

21 QUESTION: Mr. Feldman, can I ask you sort of a  
22 basic question? Supposing Congress gave plenty of notice  
23 to the Indians -- you know, I suggested that in the Hodel  
24 case -- say that 20, a statute to take effect 20 years  
25 after its date, say, no Indian property may be passed



1 by -- at death to heir -- to anybody. Just, period. It  
2 will all escheat to the tribe. Would that violate the  
3 Takings Clause?

4 MR. FELDMAN: I'm sorry, that no --

5 QUESTION: Just, all property owned by any  
6 member of the tribe shall escheat to the tribe at death,  
7 but would not interfere with the owner's right to dispose  
8 of it inter vivos at any time during the 20 years. Would  
9 that violate the Takings --

10 MR. FELDMAN: I think it would under this  
11 Court's decision in Hodel, in fact, at least, and insofar  
12 as that was based on prior cases, I think it would violate  
13 the Takings Clause on that basis as well.

14 There really wasn't -- although there really  
15 wasn't an alternative for Congress' action that it took in  
16 this case, by -- section 2206 does two things. First, it  
17 eliminates the right of devise of these very small  
18 fractional interests.

19 In doing that, the Court itself in Hodel  
20 suggested that that's something that Congress may well  
21 want to -- may be able to do, and indeed, insofar as the  
22 statute has only that effect, it should be held  
23 constitutional insofar as it affects people who didn't go  
24 to the trouble of making a will to determine who an heir  
25 of a particular property should be.

1 QUESTION: Well, does the amended statute  
2 prevent descent, I assume without a will, of an interest  
3 even where the descent under the circumstances would  
4 result in a consolidation?

5 MR. FELDMAN: It doesn't do that, but if you  
6 think about it, it would be a very, very rare case where  
7 that will happen.

8 QUESTION: It seems to say so.

9 MR. FELDMAN: It would --

10 QUESTION: It says nothing in this section shall  
11 prohibit the devise --

12 MR. FELDMAN: Right.

13 QUESTION: -- of such an escheatable fractional  
14 interest.

15 MR. FELDMAN: Right.

16 QUESTION: But if there's an intestate  
17 succession --

18 MR. FELDMAN: No, I agree with you, I think that  
19 it would prevent any descent, that it's -- what it's  
20 saying --

21 QUESTION: Even if it results in a  
22 consolidation.

23 MR. FELDMAN: Right, but it will be a very  
24 unusual situation where descent would -- descent was what  
25 caused the problem, and it would be a very unusual

1 situation where that would result in consolidation,  
2 because if somebody who has an interest, passes it to his  
3 two, three, four, five, six, however many there are  
4 children, they're each going to get a smaller part of  
5 that, and even if one of them already owns a very small  
6 interest in the property, it's going to be very unlikely  
7 that it's going to result in -- it's almost certain to  
8 result in increased fractionation, and so I don't think  
9 Congress had to go that far in order to remedy the  
10 problem, and indeed --

11 QUESTION: What do --

12 MR. FELDMAN: I was just going to say that I do  
13 think, as I was saying before, that the statute should  
14 be -- would be constitutional at least insofar as it  
15 prohibits descent, and if there is a case like that out  
16 there --

17 QUESTION: But Mr. Feldman, isn't that a -- I  
18 know you asked us to say, at least with respect to descent  
19 or further fractionalizing a share by devise, but those  
20 people are not before this Court, and we do have these  
21 people who were devised shares that were not reduced  
22 further by the devise. We can decide that case.

23 But isn't there something about procedural due  
24 process that would inhibit us from deciding the cases of  
25 people who have not been given notice and an opportunity

1 to be heard that their cases are going to be affected by  
2 this?

3 MR. FELDMAN: Yeah -- I'm not suggesting the  
4 Court should decide any case that's not before it, but I  
5 do think -- there's two points. One is, we are asking the  
6 Court to make clear that this is an as-applied challenge  
7 in this case, and that there are these other kinds of  
8 cases, including a large number where there's no will at  
9 all, and where the decedent --

10 QUESTION: Those could be left open, but I  
11 don't --

12 MR. FELDMAN: Those at least should be left  
13 open --

14 QUESTION: And --

15 MR. FELDMAN: -- and it may well be that the  
16 Court's reasoning, although we don't -- reasoning -- if it  
17 were to reach the conclusion that the statute's  
18 unconstitutional as applied here, the Court's reasoning  
19 may well make clear that in these other contexts it would  
20 be constitutional, albeit those cases themselves would be  
21 left for another time.

22 QUESTION: May I modify my hypothetical?

23 Suppose instead of prohibiting both devise and  
24 intestacy, it simply prohibited intestacy. No property of  
25 any Indian shall pass by reason of intestacy, but all --



1 if there's no will the property will all escheat to the  
2 State -- to the tribe, rather.

3 Do you think that would be constitutional?

4 MR. FELDMAN: I think it -- I suppose it might  
5 depend at least in part on what it is that Congress is  
6 intending to accomplish by that. If all that Congress is  
7 intending --

8 QUESTION: Intending to consolidate property  
9 interests that are small and fractionated in the --

10 MR. FELDMAN: Right, but --

11 QUESTION: -- in the tribe.

12 MR. FELDMAN: Well, insofar as it deals with  
13 just very small fractionated interests, our argument is  
14 that it would be constitutional, but if a statute like  
15 that also applied to, for instance, entire interests in  
16 the property, then it's hard to see what it would be  
17 trying to accomplish, other than just -- it wouldn't be  
18 remedying any kind of nuisance --

19 QUESTION: Well --

20 MR. FELDMAN: -- for the community. It wouldn't  
21 be solving any adverse problem that seems to be occurring,  
22 and I think in those cases there would be a problem under  
23 the Penn Central analysis.

24 QUESTION: You're saying property you don't care  
25 enough to will it to anybody goes back to the tribe.

1 MR. FELDMAN: Well, I -- it's --  
2 QUESTION: We said in Hodel, Justice O'Connor's  
3 opinion said that it may be appropriate to minimize  
4 further compounding by abolishing the descent of such  
5 interest by rules of intestacy.  
6 MR. FELDMAN: Right, and it's possible --  
7 QUESTION: Thereby forcing the owners to  
8 formally designate an heir --  
9 MR. FELDMAN: Right.  
10 QUESTION: -- to prevent escheat.  
11 MR. FELDMAN: It's possible that a statute like  
12 that would be constitutional and, indeed, there are other  
13 contexts --  
14 QUESTION: That would solve a lot of the  
15 problem, wouldn't it?  
16 MR. FELDMAN: To -- it would solve --  
17 QUESTION: And it would focus especially on  
18 these little interests that are so insignificant that, you  
19 know, the person doesn't care enough --  
20 MR. FELDMAN: I don't --  
21 QUESTION: -- to even mention in a will.  
22 MR. FELDMAN: I don't believe it would -- the  
23 problem is, I don't believe it would focus on those  
24 interests. It would -- a statute -- if we're talking  
25 about a statute that would limit devise of all interests

1 in allotted trust lands, it would sweep far more broadly.

2 QUESTION: Intestate. Eliminate intestate --

3 MR. FELDMAN: All intestate.

4 QUESTION: Yes.

5 MR. FELDMAN: All intestate descent. I think it  
6 would focus far more broadly than is necessary or  
7 suggested, but I think the Court -- there would be  
8 authority for that kind of an outcome, if Congress did not  
9 act too broadly.

10 For example, in United States v. Locke, and in  
11 Texaco v. Short, the Court dealt with cases that involved  
12 people who, in order to maintain a very real ownership  
13 interest -- in this case I think it was mineral leases --  
14 they had to take some kind of action like filing a paper  
15 or something like that with a recorder of deeds.

16 If that kind of thing were required, if a will  
17 were seen as equivalent to taking that kind of action,  
18 then I think a statute like that would be constitutional.

19 QUESTION: Then it seems to me if you haven't  
20 gone that far, really -- if you said that was okay, I  
21 don't know why you can't say we're going to insist on  
22 inter vivos action in order to protect the value and the  
23 interest.

24 I'm making you argue the wrong side of the case,  
25 I guess. I shouldn't do this.

1 (Laughter.)

2 QUESTION: But if you're going to abolish  
3 intestacy, I don't know why -- and say you've got to show  
4 sufficient interest in the property to identify it in your  
5 Last Will and Testament.

6 I don't know why you couldn't similarly -- if  
7 the property owner has plenty of notice, plenty of time to  
8 prepare his or her affairs, say you must dispose of it  
9 inter vivos in order to preserve the value, and then you  
10 can leave the cash to somebody else, because there is a  
11 national interest in getting rid of these fractionated  
12 interests.

13 MR. FELDMAN: Yes I -- I can only answer that I  
14 think that it may be that you could do that --

15 QUESTION: Well --

16 MR. FELDMAN: -- but that what Congress did in  
17 this case is much more narrowly tailored to dealing  
18 with --

19 QUESTION: A great many wills don't simply set  
20 out parcels of property and do nothing else. They'll  
21 devise the residuary estate, everything else I have, which  
22 would pick up these fractional interests, so wills  
23 wouldn't necessarily pick out this property.

24 The person who writes the will may have no more  
25 idea that he has the interest than the person who lets it



1 go by intestate succession.

2 MR. FELDMAN: Right. Indeed, the will in this  
3 case, actually a number, maybe 15 or so of the interests  
4 that escheated here were, I think, escheated from someone  
5 who just got them as a result of a residuary clause in the  
6 will in this case.

7 QUESTION: Are any of the Indian lands in  
8 question here ever subject to partition? Suppose three or  
9 four owners are in a real dispute over what to do with the  
10 land, do they have a remedy of partition?

11 MR. FELDMAN: Under some circumstances, yes.  
12 All I can say is that there's dispute as to whether it can  
13 be done -- it requires a majority of the ownership  
14 interests in order to seek partition, or whether it  
15 requires all the owners to agree to partition.

16 QUESTION: And if it does, I suppose that only  
17 certain authorized persons at the sale, because it can't  
18 be devised to a non-Indian.

19 MR. FELDMAN: It can be -- right, it can't be.  
20 That's right. Well --

21 QUESTION: Or transferred to a non-Indian.

22 MR. FELDMAN: It can be -- if an Indian has an  
23 ownership interest in a parcel of land and seeks to take  
24 it out of trust status, ordinarily if the person is  
25 competent the Secretary agrees to that, and then at that

1 point it can be transferred --

2 QUESTION: But who would be the bidder at the  
3 partition sale, if there are limited -- if there are a  
4 limited number of --

5 MR. FELDMAN: No, I --

6 QUESTION: -- qualified owners?

7 MR. FELDMAN: I think -- I believe there would  
8 be authority even to take it out of trust status, take --  
9 to view the, let's say a unanimous application by the  
10 owners, to view that as their request to take it out of  
11 trust status --

12 QUESTION: Well, but then it wouldn't be  
13 partitioned.

14 MR. FELDMAN: Well, they'd sell it and then --

15 QUESTION: If it's unanimous, you don't need  
16 partition.

17 MR. FELDMAN: Well, they'd want to sell it and  
18 then it would be partitioned, but I do think that  
19 partitioning as a practical matter is not really a  
20 solution to the problem, because taking a parcel of land,  
21 especially with the size of some of these ownership  
22 interests involved, and trying to figure out how fairly to  
23 divide it up so the economic value of what you're getting  
24 is equal to your ownership interest is extraordinary  
25 difficult.

1 QUESTION: But that's just what happens in  
2 the -- I mean, outside of the Indian law, isn't that what  
3 happens?

4 MR. FELDMAN: Right, but --

5 QUESTION: And moreover, hasn't that stopped the  
6 proliferation of these interests? In other words, why  
7 can't you do precisely the same thing in respect to the  
8 small interests in the Indian territory that you do in  
9 respect to the small interests in respect to non-Indian  
10 territory?

11 MR. FELDMAN: I think --

12 QUESTION: You give people the right to  
13 partition, or to ask for it, and the person who owns \$5-  
14 worth of land says, you know, I'll sell it to him for the  
15 \$5. I'm not going to go to court for that.

16 MR. FELDMAN: Right. I think the problem is  
17 that it's very rarely the case outside of the Indian  
18 contexts where these very, very small --

19 QUESTION: That's because we've had that system.

20 MR. FELDMAN: The fractions are so small that it  
21 gets to be very, very cumbersome to effectively partition,  
22 or even to -- well, I guess it could be sold, but --

23 QUESTION: No, I thought -- my point is I  
24 thought that outside the Indian context we find that we  
25 don't have this problem because there are these mechanisms

1 in place, and so if you -- why couldn't you, instead of  
2 taking the thing away, just put the same mechanisms in  
3 place? I'm not arguing that.

4 MR. FELDMAN: But you have --

5 QUESTION: I'm just -- what the reason is. What  
6 is the reason why that hasn't happened --

7 MR. FELDMAN: I think --

8 QUESTION: -- or wouldn't happen, or couldn't?

9 MR. FELDMAN: I think the reasons is because in  
10 order to partition -- I suppose one reason is that it is  
11 thought that you don't want to just dispossess all of  
12 these Indians of their land because perhaps some owner of  
13 a very small interest doesn't -- wants to have it  
14 partitioned.

15 QUESTION: Well, it's one thing, too, for an  
16 owner, say, of three-quarters of a tract to buy out  
17 fractions from the other quarter, but for someone with  
18 3/100ths interest to start a partition proceeding, you  
19 have quite different incentives.

20 MR. FELDMAN: That's right, and also the one  
21 other thing I'd add is that this land is -- the  
22 administrative expenses of upkeep of the land are borne by  
23 the United States, and it's not subject to State taxes,  
24 and therefore you don't have some of the incentives of why  
25 owners of land in a non-Indian context that gets



1     fractionated would want to partition it, so you can just  
2     deal with those problems.

3             QUESTION: All of this just seems to me to say  
4     the Government has created an economic wonderland which  
5     has caused this problem.

6             The normal market economic incentives that stop  
7     fractionalization have been taken away by the Government,  
8     and now the Government comes in with this ham-handed  
9     approach of simply solving the problem by denying the  
10    right to devise, and I don't know why it couldn't solve  
11    the problem just as readily by letting the normal  
12    incentives of the market come back into the picture.

13            MR. FELDMAN: I suppose the only answer is that  
14    because of -- it really goes to the whole history of  
15    Indian law and all of the purposes that are served by  
16    holding the land in trust and maintaining an Indian land  
17    base that is a much more complex problem than just saying,  
18    let's take the land out of trust or whatever we would have  
19    to do and treat this like any other land.

20            QUESTION: No, but let's take one of the  
21    mechanisms.

22            It's perfectly true that for these minuscule  
23    interests it may be very cumbersome even to get the ball  
24    rolling by going into court in the normal course, filing  
25    petitions and so on.

1 But the Government can certainly provide a  
2 simplified partition scheme, for example, that would, I  
3 suppose, just allow an extremely simple filing before an  
4 administrative officer with a low filing fee or none at  
5 all, and that would be a way of bringing a kind of normal  
6 market mechanism adapted to the particular problem that  
7 the Government has caused.

8 Why can't the Government do something like that?

9 MR. FELDMAN: There -- I suppose that there are  
10 partition schemes, there are partition regulations that we  
11 cite in our brief that are currently applicable to this  
12 land that allow partition in some circumstances.

13 But I suppose the problem is that the land,  
14 many, many people have attachments to land, especially  
15 some of the larger landowners, and they don't necessarily  
16 want their land partitioned, and it's important for the  
17 Government to keep the land as part of -- it's not  
18 important for the Government, it's important for the --  
19 for Indian policy to have the land maintained in trust for  
20 the Indians, and that carries with it a lot of other  
21 baggage that you can't just -- you can't just discard to  
22 deal with this aspect of the problem.

23 QUESTION: Thank you, Mr. Feldman.

24 MR. FELDMAN: Thank you.

25 QUESTION: Mr. Martell, we'll hear from you.

1 ORAL ARGUMENT OF RENE A. MARTELL

2 ON BEHALF OF THE RESPONDENTS

3 MR. MARTELL: Mr. Chief Justice, and may it  
4 please the Court:

5 We're here today to discuss the effects of the  
6 amendments on the Hodel decision.

7 Mr. Youpee left 34 parcels to six of his  
8 children, and he left them in such a fashion that each  
9 child would be sole owner of the parcel that he left. He  
10 pretty much is now put in the position that the plaintiffs  
11 were in the Hodel decision.

12 The amended act does not cure the problems  
13 pointed out by the Court in the Hodel decision, and it  
14 wasn't until 1992 that this -- Congress decided to have,  
15 again, hearings on the fractionalization problem, and in  
16 1994 the Secretary distributed for comment new amendments  
17 that had -- the heart of it, of which was a revolving  
18 money fund to pay for these interests.

19 One of the problems that remains with the  
20 amendments now is that the amendments still try to  
21 categorize the land as de minimis by considering only the  
22 income that they generate, whereas the Court in Hodel say  
23 the proper determination is the land's actual economic  
24 value.

25 The economic value here is that \$2,100 of

1 these -- is what these parcels are worth. That's a  
2 significant sum of money, and it's significant in  
3 Roosevelt County, which is one of the poorest counties in  
4 Montana.

5 Mr. Youpee's property interests, if they were  
6 partitioned, in 10 of those parcels those interests would  
7 be between 2 and 6 acres, so as the Court has said --

8 QUESTION: Two and 6 acres in each parcel, or  
9 total?

10 MR. MARTELL: When I divided his -- the acreage  
11 by his interest, in one parcel it was 6 acres, in four  
12 other parcels, those were 4-acre tracts, and in three  
13 other parcels those tracts were in excess of 2 acres, so a  
14 taking even of small land is still a taking.

15 Under the amendments, at 25 U.S.C. 2206(c), it  
16 appears that if the tribe wants to have a consolidation  
17 program and pay -- and -- excuse me, a consolidation  
18 program and have -- add within their code how they're  
19 going to treat descent and distribution, and that code  
20 disenfranchises nonmember Indians and non-Indians, that  
21 they have to pay fair market value for those interests  
22 that they get as a tribe.

23 The second problem here is that the option of  
24 inter vivos transfers do not cure the taking. Mr. Youpee  
25 has virtually no opportunity to leave his land to his



1 children. It is only through a devise of his land that he  
2 would be able to, and that's only if his children are  
3 already owners.

4 QUESTION: Well, why would that be, Mr. Martell?  
5 I would think that if he knows who he might devise it to,  
6 which among his children, he might also make an inter  
7 vivos transfer to those children, unless he's dependent  
8 upon income from the property.

9 MR. MARTELL: He wasn't dependent on income.  
10 It's just such a headache to do it, and to know --

11 QUESTION: Well, but surely it's every -- it's  
12 no bigger a headache to devise it inter -- or to grant it  
13 inter vivos than to leave it by will, is it?

14 MR. MARTELL: Well, it's a tremendous  
15 bureaucratic process. I mean, if he was to try to  
16 transfer his land in his lifetime, it involves the  
17 approval of the local agency --

18 QUESTION: He would have to go through it if he  
19 did it in his lifetime. His children would have to go  
20 through it if he did it by will.

21 (Laughter.)

22 MR. MARTELL: The third --

23 QUESTION: Isn't it true that he did consult the  
24 Bureau of Indian Affairs in drafting the will? They did  
25 it -- isn't that true, that these owners do rely on the

1 Bureau for assistance in their legal affairs and dealing  
2 with their property?

3 MR. MARTELL: Correct, Your Honor. In 1981 he  
4 went to the regional, the area office in Billings, away  
5 from the reservation, and had the chief realty officer  
6 draw up his will, and it was retained there, and at no  
7 time after 1981 was he ever told that his devises would be  
8 ineffective.

9 QUESTION: There's no explanation of that in the  
10 record, is there, why they wouldn't have been advised that  
11 the devises didn't comply with the statute?

12 MR. MARTELL: No. It's just a reality. Nobody  
13 knows about this law, and nobody is told about this law.  
14 It's just not happening.

15 QUESTION: Yes.

16 QUESTION: Suppose they had passed -- suppose  
17 the system were totally different, the administrative  
18 system, and what had happened is, every person who has one  
19 of these interests got a big piece of paper. In big  
20 letters it said, you own a small interest. Check the box  
21 below. Box 1, at my death I would like it to go to the  
22 tribe. B, at my death I would like it to go to, fill in  
23 the blank, okay?

24 MR. MARTELL: Right.

25 QUESTION: Now, suppose they got that, and their

1 signature on that, it says, if you check B, proceed to  
2 page 3 and sign that, and it happened on page 3 and 2 is  
3 all the necessary stuff for an inter vivos transfer, i.e.,  
4 all the necessary stuff for a trust, and you set up the  
5 trust, and then at your death it goes to the beneficiary.  
6 You know, all those things were all there.

7 So they'd gotten total notice, they'd gotten  
8 exactly how to do it, their wishes would be carried out.  
9 It's not that hard to work out. Then would this be  
10 unconstitutional?

11 MR. MARTELL: I don't think it would be a due  
12 process problem, but I think there would still be a  
13 problem in that the land is not compensated.

14 QUESTION: Well then, why could a State ever,  
15 for example, say traditional dower rights are, the wife  
16 got one-third of a life estate in the husband's property.  
17 We think that's out of date, so we pass a statute that as  
18 to the future the wife or husband is to have one-half of  
19 the property acquired during marriage. We make the dower  
20 States the same as the community property States, into the  
21 future.

22 Could that never occur --

23 MR. MARTELL: I --

24 QUESTION: -- giving everybody proper notice,  
25 giving everybody plenty of chance? I don't know. I mean,

1 I'm not asking this because I have an answer. I'm just  
2 trying to figure out what the theory is that underlies the  
3 unconstitutionality.

4 MR. MARTELL: I think the theory is, is that  
5 he's being forced to forfeit his land to the tribes.

6 QUESTION: Well you have escheat. I mean --

7 MR. MARTELL: Right.

8 QUESTION: -- escheat. And can they never  
9 change the escheat law? They say, we think 7 years in our  
10 State, gee, that's an awfully long time in today's day and  
11 age. We think you have to notify the person who has the  
12 bank account that you forgot about within 6 years,  
13 otherwise you lose it.

14 MR. MARTELL: I think there wouldn't be  
15 abandonment if there was an opportunity, if there was a  
16 process, you knew about the process, and you chose not to  
17 do it. Then perhaps the property would be abandoned.

18 QUESTION: It's abandoned.

19 MR. MARTELL: But that's -- people here don't  
20 about the process.

21 QUESTION: Yes. That's what I'm trying --

22 QUESTION: Do any of the tribes impose any kind  
23 of a property tax on these lands, or are they permitted to  
24 under Federal law?

25 MR. MARTELL: Not that I know of, Your Honors.



1 Some tribes do have consolidation programs, but --

2 QUESTION: Because, of course, with non-Indian  
3 property there are State and local taxes applicable, and  
4 if the owner doesn't pay them for a period of time, there  
5 are procedures that the State or county can go through to  
6 forfeit the property for nonpayment of taxes.

7 QUESTION: Mr. Martell, regarding Justice  
8 Breyer's question about changing the escheat law, or  
9 changing the inheritance laws, I suppose there's a  
10 difference, is there not, for purpose of takings law, as  
11 to whether you have a general State law or Federal law  
12 that is applicable to all property owners versus a law  
13 that simply picks out a few property owners, or one class  
14 of property.

15 For example, I think we'd have a different  
16 question before us if on the one hand the State law said,  
17 property escheats in just 2 years instead of 8 throughout  
18 the State, versus a law that picks out a particular class  
19 of property owners and just says, we're going to make an  
20 exception from the normal State law for you, and your  
21 property shall escheat more quickly. There might be a  
22 takings issue in the latter case when there isn't in the  
23 former.

24 Aren't you relying to some extent on the fact  
25 this is not a general, you know, intestate disposition

1 law? It's one targeted at a particular class of property  
2 owners.

3 MR. MARTELL: Correct, Your Honor, and I -- you  
4 know, I would maintain that that's pretty much the essence  
5 of it, because Indians take -- took this property under  
6 the allotment act with the understanding that they would  
7 have these rights to --

8 QUESTION: But the Government has a great deal  
9 of authority under the Constitution over the affairs of  
10 the Indian tribes. I don't think the Federal Government  
11 could step in and prescribe a general partition statute  
12 that would be contrary to the laws of all of the 50  
13 States, but it does have special authority to deal with  
14 Indian property, and certainly that's what it's attempted  
15 to do here.

16 MR. MARTELL: Correct, Your Honor.

17 QUESTION: Well, you concede that? This doesn't  
18 apply to all Indian property. It only applies to Indian  
19 property that is fractionated the way this is. The only  
20 people who are affected are those who hold these small --  
21 these small shares. All other Indians can continue to  
22 devise or dispose of through intestacy as before.

23 MR. MARTELL: Yes, Your Honor.

24 QUESTION: Yes, but it does apply to the entire  
25 Indian population, and all Indian lands where there is an

1 interest that is undivided and it meets the statutory  
2 formula.

3 MR. MARTELL: Right.

4 QUESTION: Maybe we should just talk to each  
5 other.

6 (Laughter.)

7 QUESTION: I mean, anyway, you can say that in  
8 this case he didn't get enough notice. They didn't send  
9 him the paper. It was passed only a few years before he  
10 died. It wasn't for the future, and so from your point of  
11 view I guess this is somewhat irrelevant, the debate of  
12 what would happen under other circumstances.

13 QUESTION: Well, but it's -- but is it not true  
14 that what we have at issue in this case is your particular  
15 client's claim? We aren't necessarily deciding that the  
16 statute would be valid or invalid as to a host of other  
17 applications, isn't that true?

18 MR. MARTELL: Yes, Your Honor.

19 QUESTION: You -- it's not a class action, or  
20 it's not an industry-wide piece of litigation.

21 MR. MARTELL: Right.

22 QUESTION: You would just have a --

23 QUESTION: We wrestled with this whole thing 10  
24 years ago. I thought the issue before us is a much more  
25 narrow one, and that is whether, as applied to the -- this

1 as-applied challenge Hodel governs or not.

2 What is it that you say to the Government's  
3 contention that this is different from Hodel? It's a hard  
4 question as an original matter, and I remember agonizing  
5 quite a bit over the decision in Hodel, but there is the  
6 decision. It's on the books. Now, tell us why this is  
7 the same as Hodel rather than, as the Government says,  
8 different.

9 MR. MARTELL: Okay. It's the same as Hodel  
10 because Mr. Youpee has no options. I mean, his option,  
11 his complex -- during his lifetime a -- you know, a series  
12 of complex transfers, and the Court in Hodel said  
13 that's -- you know, that's not a substitute for the rights  
14 that's taken.

15 His right that is taken is, he can't -- his land  
16 cannot descend, and he cannot leave it to his children,  
17 because devise has to be limited to a coowner, and a  
18 reality is, as was pointed out before, children don't  
19 inherit land at the same time their parents do. Most  
20 Indians, when they receive land, receive it through  
21 inheritance, but most kids do not.

22 QUESTION: Mr. Martell, what about the first  
23 difference? The Government didn't bring it up at  
24 argument, but on the brief they said that the 1984 change  
25 had three things in it that weren't there before, and one



1 of them had to do with authorizing tribes to adopt laws  
2 that would govern dispositions of escheatable interests.  
3 Have there been, to your knowledge, any such tribal codes?

4 MR. MARTELL: No, Your Honor. Anything that  
5 tribes have done that consolidate, have consolidation  
6 programs were before these amendments.

7 QUESTION: So that significant change turns out  
8 still to be undeveloped and unused.

9 MR. MARTELL: Correct, Your Honor.

10 QUESTION: I gather the tribes don't care. The  
11 owners of the small, fractionated interests don't care.  
12 The only person who cares is the Government, who's saddled  
13 with the enormous administrative burden of keeping track  
14 of all of these fractionated interests. Is that what's  
15 going on?

16 MR. MARTELL: I think that the tribes  
17 strategically don't care because they get the land by not  
18 making an effort. If they don't pass a consolidation  
19 program they still get the land, but I think the people  
20 care about the land. That's kind of why we're here. I  
21 mean, Mr. Youpee wanted his children to have the land of  
22 his ancestors, and they wanted that land, and so --

23 QUESTION: Oh, when I say don't care, I don't  
24 mean don't care about the land. They don't care about the  
25 fractionating.

1 MR. MARTELL: They care about it, but there's  
2 such an overwhelming bureaucracy there that it's hard to  
3 make headway into it. I mean, it -- I mean, it would be  
4 hard to make headway into 34 parcels if the people that  
5 you were talking to weren't receptive to doing it, and  
6 that's the reality of it. I mean, they don't want to  
7 spend the time to help you do a gift deed 34 times, or let  
8 you know that perhaps you should do that.

9 We have considered in our argument that under  
10 the amendments there is still a problem, as -- exactly as  
11 there was in Hodel, that for Indians under 18 and those  
12 incompetent, that they -- they're totally just -- are just  
13 like the plaintiffs in Hodel, is that devise and descent  
14 are totally abrogated for them.

15 We feel that the escheat provision is in fact a  
16 categorical taking, because as I mentioned, Mr. Youpee has  
17 no options. I mean, in the -- the operative provisions of  
18 the amendments leave him no choice. He could -- you know,  
19 he could leave it to a coowner, but that will not be his  
20 children, and he could do inter vivos transfers, but  
21 that's -- as the Court said, that's not an effective  
22 substitute for losing the right of devise and descent, so  
23 in effect his land is transferred to a tribe without his  
24 consent.

25 We feel as a regulation that -- if you consider

1 these amendments a regulation, that they go too far,  
2 again. I mean, the stated Government purpose is to stop  
3 the fractionization of Indian land, but the underlying  
4 purpose that comes out time and again in the legislative  
5 history is that the Government wants to save money, and  
6 saving money has never been a sufficient reason to allow a  
7 taking, and there's no average reciprocity of advantage  
8 here. I mean, there's no public benefit to Mr. Youpee for  
9 his children if the tribes obtain his land interests.

10 Mr. Youpee's right of descent is a vested right,  
11 and compensation should be paid for that right if it is  
12 taken.

13 QUESTION: But would you contest -- suppose  
14 all -- the only limit was, you can give away what you  
15 have, but you can't divide it up into further hands. So  
16 you've got this one piece. You can give it to one person,  
17 but you can't give it to three people. Would that be  
18 constitutional, to put that restriction on the ability to  
19 devise?

20 MR. MARTELL: I think it would Your Honor,  
21 because his land would not be taken from him, and that's  
22 in fact what he did, so --

23 QUESTION: What if the Government were to put in  
24 some sort of a unitization program like the States have  
25 put in a lot of oilfields, where the thing is consolidated

1 into certain minimum tracts and you get a percentage from  
2 that, but you don't have the right to deal on your own  
3 with it any more. Would that be permissible, do you  
4 think?

5 MR. MARTELL: I think it would be permissible,  
6 because you'd still have the identifiable property  
7 interest.

8 QUESTION: Would you refresh my recollection on  
9 the facts of this case? The decedent had several  
10 children.

11 MR. MARTELL: He had 10 children, Your Honor.

12 QUESTION: So that if the will were given  
13 effect, you would have further fractionalization, then,  
14 wouldn't you? Each would get an undivided tenth of what  
15 he had.

16 MR. MARTELL: No, I'm sorry, Your Honor. If the  
17 will was allowed to go through, each of his children would  
18 only take one interest. His land was not fractionated  
19 under his will. I mean, if there was a royalty check  
20 coming, instead of coming to him it would go to one child.  
21 The next parcel, it might go to another child, but it  
22 wouldn't go to two children.

23 QUESTION: In other words, this decedent left  
24 his interests in such a way that there was no further  
25 fractionalization --



1 MR. MARTELL: Correct.

2 QUESTION: -- of the real property interests.

3 MR. MARTELL: Yes, Your Honor.

4 QUESTION: I don't -- would you give me a little

5 more detail? Explain how that could be, if he had 10

6 children and the will just -- was it -- did he give a

7 partial to each of the 10? Is that what he did?

8 MR. MARTELL: I guess I've confused it by saying

9 he had 10 children. His other children were taken care of

10 through other devises.

11 QUESTION: Oh, so there's one devise to the one

12 child that's at stake here.

13 MR. MARTELL: There's six children here, but

14 each of them had a specific devise that gave them --

15 QUESTION: And each in a separate parcel.

16 MR. MARTELL: Correct.

17 QUESTION: I see. Okay. I'm sorry.

18 MR. MARTELL: Sorry to be unclear.

19 QUESTION: And would you clarify for me -- this

20 case does not further subdivide the interests, but the

21 Government says even if it did it would be valid. If it

22 further fractionalized the interests --

23 MR. MARTELL: Correct.

24 QUESTION: -- the Government says that would be

25 valid. What is your position on that? Can the Congress

1 prohibit further fractionalization?

2 MR. MARTELL: I don't think they can prohibit it  
3 unless they pay for it.

4 QUESTION: Okay. I didn't find that you took a  
5 position in your briefs.

6 MR. MARTELL: That's --

7 QUESTION: Why would there be a payment  
8 requirement there? I would suppose that precluding  
9 further fractionalization was not going to make the land  
10 worth less, so you're saying the value would be simply the  
11 value of the capacity to fractionize.

12 MR. MARTELL: I'm not sure, Your Honor.

13 QUESTION: Mr. Martell, I'm surprised, because I  
14 thought you told me that you thought it would be a  
15 legitimate restriction for the Government to say to  
16 Mr. Youpee or anyone else, you can give each parcel that  
17 you have to one person, or to that many different people  
18 as you have parcels, but you cannot take that one parcel  
19 and turn that parcel into two.

20 I thought in answer to my question you said,  
21 that's right, that would be the kind of restriction that  
22 we wouldn't attack as a taking.

23 MR. MARTELL: Correct, Your Honor.

24 QUESTION: And then you seemed to give a  
25 different response to Justice O'Connor.

1 I thought you accepted that you can freeze the  
2 size of the parcel as they now are.

3 MR. MARTELL: Okay. I guess I --

4 QUESTION: And no further division, and that  
5 would be okay.

6 MR. MARTELL: I guess I was confused. I mean,  
7 it seems that as long as he doesn't lose his land, that  
8 that would be a legitimate way to do it.

9 QUESTION: So I guess that means that a number  
10 of applications of this very statute would be permissible,  
11 although the one involving your clients would not be,  
12 because this statute will prevent that. It prevents  
13 further fractionalization, as I understand it.

14 MR. MARTELL: But I would think it -- I guess  
15 I'm getting confused. I mean, I don't think it would ever  
16 be -- you know, if you're taking somebody's land and not  
17 paying for it, then it's not permissible.

18 QUESTION: There are a lot of -- there are  
19 statutes in different countries that -- and that's what I  
20 was -- this case differs from the last case in that here  
21 there is a set of people whom you can leave the property  
22 to and a set to whom you cannot leave it to. That's the  
23 difference, right?

24 MR. MARTELL: Right.

25 QUESTION: Okay. Well, there are a lot of land

1 law, I think, property law in different countries that do  
2 things like that. They say, you can leave -- you cannot  
3 leave this land, or you cannot leave this part of your  
4 estate to anyone but your first child, or to anyone but  
5 the children. They already have an interest in it.

6 Or you have to leave a certain amount to your  
7 wife, or you have -- those are traditional, and that's why  
8 I was trying to see, is there anything in those cases  
9 that -- suppose we wanted to move towards some of those  
10 kinds of rules. I don't know that any State would or  
11 wouldn't, but this sounds a little bit like that.

12 MR. MARTELL: It seems like most of the State  
13 laws that deal with -- you know, with forced heirs like  
14 that are doing it for the benefit of the family.

15 QUESTION: Right, and here they say, you see the  
16 tribe is like your family. We're doing it for the benefit  
17 of the tribe.

18 MR. MARTELL: But not for the benefit of Mr.  
19 Youpee's.

20 QUESTION: No, and that's also true if you don't  
21 like your children.

22 (Laughter.)

23 QUESTION: I suppose if the forced heir was the  
24 Nation of France, that might be a different question.

25 QUESTION: Some of these Indians whose property



1 would escheat to the tribe are from, in fact, different  
2 segments of the tribe, aren't they, that are not on that  
3 reservation?

4 MR. MARTELL: Correct.

5 QUESTION: Either from a different reservation,  
6 or in some cases different tribes, isn't that possible?

7 MR. MARTELL: Right, Your Honor. There's three  
8 reservations involved.

9 We would argue that Mr. Youpee's right of  
10 descent is vested because this is an Indian law case, and  
11 his right of descent was in -- was part of the bundled  
12 rights that was understood to be taken to the General  
13 Allotment Act, so the General Allotment Act had as its  
14 purpose to start the Americanization of Indians, and  
15 therefore the right to be -- of descent was a vested  
16 traditional property right that the Indians understood  
17 they had when they took the land.

18 QUESTION: How large an area is the Fort Peck  
19 reservation, and how many of the tribe reside on it?

20 MR. MARTELL: It's a -- within exterior  
21 boundaries it's a million acres. The tribal and the  
22 Indian ownership is about 51 percent, and there's about  
23 5,000 people, 5,000 Indians.

24 QUESTION: So if it's a family, it's a rather  
25 large family.

1 MR. MARTELL: Yes, Your Honor.  
2 Thank you. I've nothing further, Your Honor.  
3 CHIEF JUSTICE REHNQUIST: Thank you,  
4 Mr. Martell.

5 The case is submitted.

6 (Whereupon, at 1:55 p.m., the case in the above-  
7 entitled matter was submitted.)

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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the  
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BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL. Petitioners v.  
MARVIN K. YOUPEE, SR., ET AL.  
CASE NO. 95-1595

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BY Don Mari Federico  
(REPORTER)