

OFFICIAL TRANSCRIPT ORIGINAL
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WILLIAM STRATE, ASSOCIATE TRIBAL JUDGE,
TRIBAL COURT OF THE THREE AFFILIATED TRIBES
OF THE FORT BERTHOLD INDIAN RESERVATION, ET
AL., Petitioners v. A-1 CONTRACTORS AND LYLE
STOCKERT

CASE NO: 95-1872

PLACE: Washington, D.C.

DATE: Tuesday, January 7, 1997

PAGES: 1-58

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WILLIAM STRATE, ASSOCIATE :

4 TRIBAL JUDGE, TRIBAL COURT OF :

5 THE THREE AFFILIATED TRIBES :

6 OF THE FORT BERTHOLD INDIAN :

7 RESERVATION, ET AL., :

8 Petitioners :

9 v. : No. 95-1872

10 A-1 CONTRACTORS AND LYLE :

11 STOCKERT :

12 - - - - -X

13 Washington, D.C.

14 Tuesday, January 7, 1997

15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States at
17 11:06 a.m.

18 APPEARANCES:

19 MELODY L. McCOY, ESQ., Boulder, Colorado; on behalf of
20 the Petitioners.

21 JONATHAN E. NUECHTERLEIN, ESQ., Assistant to the Solicitor
22 General, Department of Justice, Washington, D.C.; on
23 behalf of the United States, as amicus curiae,
24 supporting the Petitioners.

25

1 APPEARANCES:

2 PATRICK J. WARD, ESQ., Bismarck, North Dakota; on behalf
3 of the Respondents.
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1 PROCEEDINGS

2 (11:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 95-1872, William Strate v. A-1 Contractors
5 and Lyle Stockert.

6 Spectators are admonished, do not talk until you
7 get outside the courtroom. The Court remains in session.

8 Ms. McCoy.

9 ORAL ARGUMENT OF MELODY L. McCOY

10 ON BEHALF OF THE PETITIONERS

11 MS. McCOY: Mr. Chief Justice, and may it please
12 the Court:

13 This case is about whether an Indian tribe has
14 jurisdiction over a tort action between two non-Indians.
15 A-1 Contractors was working on the Fort Berthold Indian
16 Reservation for the tribe's company.

17 QUESTION: Where is the reservation, Ms. McCoy?

18 MS. McCOY: The reservation is within the State
19 of North Dakota.

20 QUESTION: And the accident occurred on a State
21 highway on the reservation?

22 MS. McCOY: That's correct.

23 QUESTION: And what entity sets the speed limits
24 and the regulations for driving on that State highway? Is
25 it the State of North Dakota?

1 MS. McCOY: Yes, Your Honor, it is the State
2 that sets the speed limit.

3 QUESTION: And the other rules applicable to
4 driving on that State highway?

5 MS. McCOY: Those are set by both the tribe and
6 the State.

7 QUESTION: They have different regulations. The
8 State could say, no left turn without a stop, and the
9 tribe could say something the opposite?

10 QUESTION: No right turn.

11 QUESTION: No right turn, or whatever it is.

12 (Laughter.)

13 MS. McCOY: At this time, Your Honor, there's
14 never been a case that's answered any kind of conflict
15 between the regulatory jurisdiction.

16 QUESTION: But the State purports to adopt rules
17 and regulations and standards for driving on that State
18 highway.

19 MS. McCOY: That's correct, as does the tribe.

20 QUESTION: And could a State police officer be
21 there and issue citations for a violation?

22 MS. McCOY: That's correct, yes.

23 QUESTION: Of the State law?

24 MS. McCOY: As can the -- that's correct, as can
25 the Federal Bureau of Indian Affairs and the tribal

1 police.

2 QUESTION: And in fact, who does police that
3 stretch of road?

4 MS. McCOY: Primarily the Bureau of Indian
5 Affairs and the tribe. There are also -- this particular
6 stretch of road is a very small spur of a State highway.
7 It's not a major thoroughfare. On all of the roads --

8 QUESTION: Right. Well, if a criminal traffic
9 citation were issued by a BIA staff person or a tribal
10 policeman, would the subsequent prosecution be conducted
11 in tribal court?

12 MS. McCOY: Not if the person is a non-Indian.

13 QUESTION: Right. That would go to State court.

14 MS. McCOY: That's correct.

15 QUESTION: Because it's a criminal procedure.

16 MS. McCOY: That's correct. However, non-
17 Indians do answer to civil traffic offenses to the tribe,
18 even when they're cited by non-tribal or non-Federal law
19 enforcement --

20 QUESTION: What's a civil traffic offense?

21 MS. McCOY: Speeding, open container --

22 QUESTION: Those aren't punishable by fine or
23 imprisonment?

24 MS. McCOY: Those are punishable by fine. They
25 are civil offenses, civil traffic offenses, that's

1 correct. That's correct, and I think that -- the accident
2 in this case occurred on the State highway, but the State
3 highway is a very recent easement, a 1970 easement by the
4 Federal Government.

5 QUESTION: One other preliminary question. Is
6 the highway marked so that it says you are now entering or
7 now leaving the reservation?

8 MS. McCOY: Yes, it is, Your Honor. There
9 are -- there's a sign at the very entry to the
10 reservation. It only runs into the reservation for about
11 7 miles, but there's a sign, both the State speed limit
12 sign and the sign that you are entering the Fort Berthold
13 Indian Reservation.

14 QUESTION: But the suit filed here is not a
15 traffic enforcement suit of any kind. It's a suit between
16 two nontribal members.

17 MS. McCOY: That's correct.

18 QUESTION: And could the suit have been brought
19 in State court, do you suppose?

20 MS. McCOY: There's not a definitive answer from
21 this Court as to that question, but we would concede that
22 yes --

23 QUESTION: You would concede that it could have
24 been.

25 MS. McCOY: That's correct, concurrent. What

1 we're asking is the Court also recognize --

2 QUESTION: Has this Court ever recognized
3 concurrent jurisdiction in a civil context over a suit
4 that occurs on a State highway? Have we ever dealt with
5 that, do you think?

6 MS. McCOY: No, the Court has not.

7 QUESTION: Have we ever dealt with concurrent
8 jurisdiction with tribal courts at all?

9 MS. McCOY: Yes.

10 QUESTION: In the State tribal context?

11 MS. McCOY: Yes, Your Honor. That's the Three
12 Affiliated Tribes v. Wold decision of 1986, where the
13 civil cause of action arose on the reservation, this very
14 reservation, in fact, and this Court held that the tribe
15 could bring the claim against, in that case, a non-Indian
16 in the State courts on the theory of concurrent
17 jurisdiction.

18 QUESTION: But the plaintiff there was the tribe
19 itself?

20 MS. McCOY: That's correct, and here --

21 QUESTION: Not a private nonmember?

22 MS. McCOY: That's correct. That's correct.

23 Here -- here the plaintiff in tribal court is an elderly
24 woman who was married to a tribal member, and she was
25 going towards the home on the trust allotment there that

1 this highway runs over.

2 QUESTION: How could that make a difference?

3 She either is a tribal member or she's not, and she's not.

4 You concede that.

5 MS. McCOY: That's correct. I think, though,
6 there's two answers to your question. It doesn't make a
7 difference under our primary theory, which is that Indian
8 tribes have jurisdiction over the conduct of non-Indians,
9 including Mrs. Fredericks and A-1 Contractors, when the
10 case arises on Indian land, and on our alternative theory
11 it's not relevant either, because our alternative theory
12 is that --

13 QUESTION: Is the State highway easement
14 considered Indian land? The underlying fee surely is
15 trust land probably held for the Indian tribe.

16 MS. McCOY: That's correct. It is our position
17 that this highway constitutes Indian land sufficient --

18 QUESTION: But, indeed, the easement itself is
19 held by the State and could be considered, I guess, State
20 land for that purpose -- the easement, State property?

21 MS. McCOY: It's a State easement, a much lesser
22 interest than a fee simple.

23 QUESTION: It's division of a bundle of rights,
24 basically, the easement giving the right to use and the
25 underlying fee being the rest, I suppose.

1 MS. McCOY: That's correct, and it's clear that
2 this highway crosses exclusively Indian trust land for all
3 of 6-1/2 miles on the reservation.

4 QUESTION: Well, did -- where does the highway
5 end up?

6 MS. McCOY: At the lake. There's a lake,
7 Sakakawea.

8 QUESTION: Is it a -- because -- is the lake a
9 resort? I mean, why does the highway go to the lake, or
10 don't you know?

11 MS. McCOY: Yes, I do, Your Honor. On the Fort
12 Berthold Indian Reservation, this road was originally --
13 this is not in the record, but it was originally a Bureau
14 of Indian Affairs gravel service road that ran to the
15 original capital, or headquarters of this tribe's
16 reservation. That road has been there since at least,
17 according to Corps of Engineer maps, since the 1940's.

18 Below the boundaries of the reservation it
19 was -- it has been a State highway. In the 1940's, when
20 the Garrison Dam was built and the lake was flooded onto
21 the reservation, the tribe's capital was flooded, and that
22 was subsequently moved. But as to this road, it remained
23 a gravel BIA service road, only it stopped at the lake
24 because the lake came to meet the road.

25 In 1970, the tribe wanted this road paved to

1 serve the tribal community of Twin Buttes on the
2 reservation, because the lake had so isolated Twin Buttes.
3 The only things in Twin Buttes, population 300, are a K
4 through 8 tribal school, a satellite clinic for the Indian
5 Health Service, the tribal community center that A-1
6 Contractors helped to build, and a now-shut-down-due-to-
7 downsizing Bureau of Indian Affairs substation. This is
8 not a major marina for this lake. Those are on other
9 parts of the reservation.

10 QUESTION: Is there a marina of some sorts at
11 Twin Buttes, or --

12 MS. McCOY: It's my understanding there are two
13 dock sites, one at Red Buttes and one at -- they're --
14 Twin Buttes itself is about 3 miles below the lake on the
15 highway, and the two docks, they're not really full-blown
16 marinas, are to the left and right of that -- you know,
17 the east and west of that on the lake.

18 QUESTION: But -- and one gets access to those
19 docks, as you refer to them, by the highway?

20 MS. McCOY: That's correct, but the highway is
21 also used, you know -- that's seasonal use. The tribe in
22 fact regulates seasonal vehicle use on that stretch of the
23 highway, but there are many other roads on the Fort
24 Berthold Reservation that provide the major access for
25 recreation and use of this lake.

1 QUESTION: Why was it important for the
2 plaintiff to go to the tribal court?

3 MS. McCOY: That was her choice of forum that
4 she exercised.

5 QUESTION: Why is it important for her?

6 MS. McCOY: It's important for her because she's
7 very much a member of this reservation community. She
8 lives on the reservation. Her children are enrolled
9 there. She lived on her deceased tribal member's husband
10 allotment. That's the stretch of the highway that crossed
11 where the accident occurred in this case. She's lived on
12 this reservation since -- for most of her adult life, and
13 that is where her choice of forum was.

14 Plus, she put this Court's cases together --
15 Williams v. Lee, 1959 case, that says if you are a non-
16 Indian suing an Indian you have to go to tribal court, and
17 this Court's case in 1987, 10 years ago, Iowa Mutual, that
18 says if you're an Indian you can sue a non-Indian in
19 tribal court. She put those two together because she's a
20 non-Indian suing a non-Indian.

21 QUESTION: Isn't there, Ms. McCoy, some dispute
22 about the second case that you mention, whether it meant
23 anything more than you have to exhaust the tribal court
24 process? It didn't make an ultimate determination that
25 there was tribal court jurisdiction. Isn't that so?

1 MS. McCOY: No, I don't think there's any
2 dispute.

3 QUESTION: Is it not so that subsequent cases of
4 this Court have said that about Iowa Mutual?

5 MS. McCOY: I believe that the reference there
6 was in the plurality opinion in the Brendale case, a 1989
7 case. But that arose dealing with the issue in Brendale
8 of the tribe's authority to regulate the private property
9 of non-Indians. That's not this case.

10 QUESTION: But whatever Brendale involved, it
11 did distinguish Iowa Mutual on the basis that it was
12 merely an exhaustion, that there was no determination that
13 the tribe as opposed to the State had jurisdiction.

14 MS. McCOY: And that, to the extent -- I
15 understand, Your Honor. To the extent the plurality in
16 Brendale did hold that, that was not necessary to the
17 Brendale ruling and I think also the proper way to read
18 Iowa Mutual is that -- I realize it set the exhaustion
19 rule.

20 It also set the rule by which exhaustion would
21 be conducted, or else exhaustion itself would be a
22 meaningless exercise, because as this Court said in
23 National Farmers Union, where it expressly rejected the
24 argument that respondents make here now for a rule of
25 general and implicit divestiture of tribal court

1 jurisdiction over reservation-based civil actions, that
2 was unanimously rejected in National Farmers Union.

3 And 2 years later in Iowa Mutual, when it again
4 dealt with the issue of how to exhaust, Iowa Mutual set a
5 clear rule that tribal courts presumptively have
6 jurisdiction over reservation-based civil actions against
7 non-Indians, and the lower courts have relied on that --

8 QUESTION: That was dicta, though, was it not?
9 You didn't have to say that in order to decide the
10 question that the Court took the case to decide.

11 MS. McCOY: I think that I -- with all due
12 respect, Your Honor, I -- Mr. Chief Justice, I think that
13 it was the rule of that case by which exhaustion was to be
14 conducted, because it gives guidance to the tribal courts
15 and the Federal courts on that very issue, and we don't
16 have Congress divesting this tribe's jurisdiction.

17 QUESTION: There's a civil tort suit on fee
18 lands. I mean, you know, a tribe has some lands, it sells
19 some lands to people who are not Indian member, tribe
20 members, and there's a slip-and-fall accident. Does that
21 mean those court cases have to go to the tribal court? I
22 mean, the State court couldn't handle an ordinary slip-
23 and-fall accident on a fee land?

24 MS. McCOY: Well, I think, Your Honor, we should
25 distinguish between the existence of the tribe's

1 jurisdiction, which is the issue here, and the scope of
2 the --

3 QUESTION: Well, that's what I wondered. I
4 mean, I understand much better since your explanation why
5 the tribe really thinks of this, the highway, as really
6 its highway, and I can understand why they think that, but
7 I guess we have to decide this as if it were Interstate
8 93, or -- isn't that right? -- and the two people involved
9 had nothing to do with the tribe whatsoever, going down
10 the biggest State 10-lane highway in imagination, which
11 had -- just happened to cross the -- an Indian tribe's
12 land, and under an easement -- I mean, we'd have to decide
13 it on that basis, wouldn't we?

14 MS. McCOY: Not necessarily. We've offered the
15 Court three alternative theories for dealing with this.
16 The first one is, if you find the site of this accident is
17 Indian land, then this case is very easy to decide because
18 the tribes can regulate non-Indians, a fortiori, tort
19 cases, no problem in the courts.

20 The second theory, though, I think addresses
21 more of what you are saying, and that's if you don't want
22 to get into the status of the land issue, fee land here,
23 quasi fee land, trust land, then we offer the Court the
24 opportunity to apply the rule for Indian tribes that
25 governments can adjudicate tort cases arising within their

1 territory, because it is undisputed in this case that this
2 case arose within the reservation boundaries. There's no
3 issue of off-reservation contacts.

4 If the status of the land is not necessary to a
5 determination of the --

6 QUESTION: That's why my question --

7 MS. McCOY: -- adjudicatory jurisdiction --

8 QUESTION: Is that clear, in an ordinary slip-
9 and-fall tort accident in the middle of a reservation, but
10 on fee land involving non-Indians, that those cases go as
11 a matter of course to tribal courts?

12 MS. McCOY: It's not. No case of this Court has
13 reached the issue of tribal adjudicatory jurisdiction on
14 fee lands. However, Iowa Mutual and National Farmers
15 Union both arose either on non-Indian-owned fee land or on
16 a Federal highway crossing Indian reservations, and the
17 Court did not rule against tribal jurisdiction.

18 QUESTION: Now, is your assertion that the
19 tribe -- you keep referring to adjudicatory jurisdiction.
20 As I recall, you say it is possible for the tribal court
21 to adjudicate the case but not to apply tribal law.

22 MS. McCOY: That's correct, Your Honor.

23 QUESTION: And you don't ask us to decide right
24 here whether they should apply tribal law or not, or do
25 you think they shouldn't?

1 MS. McCOY: That's two questions. I think that
2 the Court need not reach that issue in this case if it
3 chooses not to, because we're not at that point yet.
4 We're at the threshold point.

5 However, we would also argue that if the Court
6 wants to set the rule that it could be on a case-by-
7 case -- it should be on a case-by-case basis because it
8 might involve fee land, it might involve quasi fee land,
9 it might involve trust --

10 QUESTION: I don't understand your answer to
11 that question, because it seems to me the two are tied
12 together.

13 If you're basing the jurisdiction on, it
14 happened on our land, whether the underlying -- it
15 happened on our land, then the most basic choice of law
16 rule is the place of injury. The law comes from the place
17 of injury, and when you have a coincidence between the
18 forum and the place of injury, what other law would apply?

19 MS. McCOY: It's quite common, Your Honor, that
20 in cases, nonresident tort, motor vehicle tort cases that
21 the test is higher. It's significant context, and often
22 they apply the forum -- not the forum jurisdiction law,
23 but the law of the other -- the residents.

24 QUESTION: The whole idea of the nonresident
25 motor vehicle statute is that the -- committing the act in

1 the territory, having the accident there, there's no
2 counting of other contexts. It's, the accident happened
3 there. That's a basis for both jurisdiction and well-
4 accepted that you apply the local law.

5 MS. McCOY: I think that's been the traditional
6 rule, but more and more the State courts are moving
7 towards a more -- a significant --

8 QUESTION: Do you have any case where an
9 accident happened inside a forum and the forum didn't --
10 applied some other law to the -- to determine the
11 regulating rules for that, for the conduct of the driver?

12 MS. McCOY: The closest cases that we cite in
13 our briefs are the Allstate v. Shutts and The Hague for --
14 they're not particularly analogous, because they were not
15 motor vehicle tort cases. They were other kinds of civil
16 tort --

17 QUESTION: May I ask -- I have two questions I
18 want to get in before you lose your time. Is there a body
19 of Indian law on issues such as contributory negligence
20 and comparative negligence, and what is -- you know, all
21 the -- is there a common law that's been developed in the
22 tribe?

23 MS. McCOY: In this tribe?

24 QUESTION: Yes.

25 MS. McCOY: They follow State law.

1 QUESTION: They follow State law.

2 MS. McCOY: That's correct. They do not have
3 a --

4 QUESTION: And my second question is, how does
5 the -- how would the plaintiff get the judgment enforced
6 if the plaintiff got a judgment?

7 MS. McCOY: In this case North Dakota has both a
8 supreme court case and a supreme court rule of the State
9 court that deal with enforcement of tribal court judgments
10 when it needs to be enforced by a court.

11 QUESTION: The plaintiff would have to bring an
12 independent proceeding in State court to get it enforced?

13 MS. McCOY: I believe that's correct, yes.

14 QUESTION: I see.

15 MS. McCOY: That's correct.

16 QUESTION: If the action were brought in State
17 court in the first place, is there any question in your
18 mind that the State would apply State law as opposed to
19 tribal law?

20 MS. McCOY: As a theoretical matter I think
21 there's again the argument that it's the sovereign forum's
22 choice whether to apply its own law.

23 I don't know the answer, but I know the test.

24 QUESTION: As a practical matter, though, we do
25 know the answer. They'd apply State law, wouldn't they?

1 MS. McCOY: This tribe has no substantive body
2 of law, that's --

3 QUESTION: And yet if the tribal court has
4 jurisdiction, that is a real question, isn't it, as to
5 which body of law would be applied, for the very reason
6 that Justice Ginsburg raised. They might say, well, we're
7 going to apply tribal law. At the present time, tribal
8 law follows State law, but we could develop tribal law,
9 and our general rule will be that we're going to apply
10 tribal law. That would be possible, wouldn't it?

11 MS. McCOY: That's correct, yes.

12 QUESTION: All right. Isn't it a consideration
13 that we ought to bear in mind in deciding this case that
14 people who drive on a State highway within State
15 territorial jurisdiction ought to have a uniform body of
16 law that they can depend upon having administered if there
17 is a tort so that at least within a given State they don't
18 have to worry about suddenly being subjected to a new
19 legal regime if they happen to cross the border into
20 reservation territory? Wouldn't that be a good
21 consideration for us to bear in mind in deciding this
22 case?

23 MS. McCOY: I think that's right, and it's also
24 buttressed by the fact that in this case both of the
25 parties happen to be citizens of North Dakota.

1 Thank you.

2 QUESTION: Thank you, Ms. McCoy.

3 Mr. Nuechterlein.

4 ORAL ARGUMENT OF JONATHAN E. NUECHTERLEIN
5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
6 SUPPORTING THE PETITIONERS

7 QUESTION: Mr. Nuechterlein, let me ask you a
8 question that relates to the discussion we were just
9 having.

10 Is there -- if tribal court jurisdiction is
11 proper here between the two non-Indians, and if the tribal
12 court were in the subsequent trial to apply some tribal
13 law and make a choice of law that it was going to look to
14 tribal law, assuming it had one, is there any way later
15 that that could be challenged by the losing party in any
16 Federal court?

17 MR. NUECHTERLEIN: It is true, Justice O'Connor,
18 that in Iowa Mutual --

19 QUESTION: Yes or no?

20 MR. NUECHTERLEIN: I believe the answer is
21 probably yes, although this Court has not specifically
22 addressed that issue.

23 QUESTION: I thought it was quite unclear
24 whether any subsequent challenge could be made.

25 MR. NUECHTERLEIN: I think if a challenge goes

1 directly to the scope of the tribe's jurisdiction --

2 QUESTION: No. No. The challenge goes to the
3 choice of law rule.

4 MR. NUECHTERLEIN: Well, choosing its own law in
5 the course of adjudication is a form of exercising
6 jurisdiction.

7 QUESTION: Well, suppose the jurisdiction
8 question were decided in favor of the petitioner. The
9 tribal court has jurisdiction. Then suppose the tribal
10 court tries the case and were to choose to apply tribal
11 law.

12 That's not this case because the petitioner's
13 counsel says we don't have tribal law, so we wouldn't do
14 that. But let's suppose it's a tribe that does. They
15 choose tribal law. Can that ever be tested in any
16 subsequent proceeding in a Federal or State court?

17 MR. NUECHTERLEIN: I think the answer to that
18 question is yes, and the reason the answer to that
19 question is yes is because as a matter of comity among
20 sovereigns it is important for there to be a Federal
21 review of a tribal exercise of --

22 QUESTION: Well, but there's no case, is there,
23 holding that yes, sure, you can have subsequent review in
24 another jurisdiction?

25 MR. NUECHTERLEIN: That's correct, Justice

1 O'Connor, but that case has not yet arisen before this
2 Court.

3 QUESTION: But it certainly could -- would be
4 unthinkable in a sister State context, that a second State
5 could second-guess the first State's choice of law in a
6 collateral attack. Isn't that -- isn't there a definite
7 no, a sister State can't do that to each other?

8 MR. NUECHTERLEIN: That is true. I think the
9 difference between the two cases is that Congress has
10 specifically given the losing party in the State court
11 system a right to appeal to this Court to allege under the
12 Due Process and Full Faith and Credit Clauses --

13 QUESTION: But Congress hasn't done that for
14 tribal court judgments.

15 MR. NUECHTERLEIN: That is correct, Justice
16 O'Connor, Congress has not passed a statute giving this
17 Court appellate jurisdiction.

18 QUESTION: And a choice of law question isn't
19 necessarily due process. It can be in extreme cases, but
20 if there's a valid basis or an arguable base for choosing
21 either law you can't get into Federal court under a due
22 process --

23 MR. NUECHTERLEIN: That is correct, Justice
24 Kennedy, but there are in fact important Federal
25 constraints on a forum's choice of its own law. As this

1 Court held in cases like Shutts and Allstate the scope of
2 a forum jurisdiction's ability to choose its own law as
3 the rule of conduct is narrow --

4 QUESTION: As you said it held in Allstate, but
5 Allstate, some might have regarded the homing instinct of
6 that State court as exorbitant, and yet this Court held
7 that it didn't violate due process for the State to prefer
8 itself, so it seems to me that Allstate proves that at the
9 very least this Court has been extraordinarily indulgent
10 to choice of law decisions made by a forum. Isn't that
11 what one would take away from Allstate?

12 MR. NUECHTERLEIN: Well, in the subsequent case,
13 Justice Ginsburg, of Phillips Petroleum v. Shutts this
14 Court did in fact invalidate the choice of Kansas law as
15 the rule of decision --

16 QUESTION: Certainly not as to an accident that
17 happened within a reservation. I mean, wasn't the Shutts
18 concern people who were outside Kansas whose entire
19 connection to this venture was outside Kansas?

20 MR. NUECHTERLEIN: I think that's correct,
21 Justice Ginsburg. However, I think there's an important
22 difference. This Court in cases like Montana, Brendale
23 and Bourland has pointed out that the scope of a tribe's
24 ability to regulate non-Indians, at least on certain kinds
25 of lands within a reservation, is subject to stricter

1 limitations than a State's ability to regulate outsiders.

2 QUESTION: Mr. Nuechterlein, if this is a
3 problem, I suppose it's a problem that only takes a
4 Federal statute to solve, right?

5 MR. NUECHTERLEIN: That is correct, and I --

6 QUESTION: I mean, if the question is, has -- do
7 the current Federal statutes leave it to the tribal court
8 to decide the case, and perhaps leave it to the tribal
9 court without any review in Federal courts to decide what
10 substantive law to apply --

11 MR. NUECHTERLEIN: I think Congress has spoken
12 to that consideration.

13 QUESTION: That's their issue, and if you're
14 wrong about getting out of tribal court, Congress can
15 solve that problem by passing a statute.

16 MR. NUECHTERLEIN: That's correct, and I think
17 it's also significant in that regard that in 1993 Congress
18 based the Indian Tribal Justice Act, which commits
19 essential Federal resources to the development of tribal
20 courts on the premise embraced by this Court in Iowa
21 Mutual that tribal jurisdiction over events arising on a
22 reservation presumptively does lie in tribal court.

23 QUESTION: Yes, but what sense does it -- I
24 mean, suppose there is room in the cases to go either way.
25 I could understand a rule that says, people who build

1 houses in fee -- you know, I'm thinking that this highway
2 is a like a fee land. I realize that's a big issue in
3 dispute, but assume it is for the sake of argument.

4 Two people who are not Indians living on the
5 land in fee, they have a house like -- you know, they have
6 no -- I can understand a rule that say, they have to go to
7 the tribal court, and tribal law applies. That would be
8 one rule. That's a possible rule. That's how you treat
9 California, probably.

10 Or I could understand a rule which said, well,
11 it's not like California. It's a rule that South Dakota
12 law applies. Then have them go to South Dakota court.

13 I mean, what good does this mixing up of
14 everything do except to leave -- the lawyers will get very
15 mixed up and the judge will get mixed up, and it will mean
16 a lot of extra cost and very hard to sort out who goes
17 where.

18 I mean, what's to be said against simplifying
19 this? If it's South Dakota law on the fee thing, go to
20 the South Dakota court. If it's the tribal law, go to the
21 tribal court, if there's room to do it.

22 MR. NUECHTERLEIN: As an initial matter, Justice
23 Breyer, we believe that both the State and the tribe have
24 concurrent jurisdiction over this sort of suit in the same
25 way that adjoining States often have jurisdiction over

1 accidents --

2 QUESTION: I'm not talking about jurisdiction.
3 I'm saying if we had room to do it, why wouldn't the
4 sensible thing be to simplify? If it's the State law that
5 governs it, have them go to a State court. If it's the
6 tribal law that governs it, have them go to a tribal
7 court. That way we'd save legal fees, time, and effort.

8 MR. NUECHTERLEIN: I think actually the approach
9 that best saves resources is the one adopted by this Court
10 in Iowa Mutual for the following reason.

11 It is undisputed that a tribe has adjudicatory
12 jurisdiction even over nonconsenting non-Indians in cases
13 where the tribe can point to a particularized interest in
14 the outcome of the dispute sufficient to justify the
15 application of tribal regulatory authority under the
16 Montana tribal interest test.

17 That test looks to see whether or not the
18 activities of non-Indians have a direct effect on tribal
19 welfare or whether or not they've entered into --

20 QUESTION: How is that present here?

21 MR. NUECHTERLEIN: The -- no one -- no court has
22 yet addressed whether that's present here, and it's my
23 point that it should be the tribal court in the first
24 instance that determines whether or not that fact-specific
25 inquiry is, indeed, satisfied.

1 QUESTION: Well, how about if it goes to trial
2 in the tribal court and the tribe chooses to use as the
3 jury all the friends and relatives of the victim, and they
4 say, yeah, she's really been injured, and we're going to
5 give a heck of a verdict here, and they do, and suppose
6 other errors that might amount to a due process violation
7 in a Federal or State court obtain. There is no way to
8 challenge that as a due process violation later in any
9 State or Federal court, I assume.

10 MR. NUECHTERLEIN: I think that's not quite
11 accurate, Justice O'Connor. In this case --

12 QUESTION: What would be the mechanism --

13 MR. NUECHTERLEIN: Well, in this case, for
14 example --

15 QUESTION: -- for a subsequent challenge?

16 MR. NUECHTERLEIN: In this case, it's my
17 understanding that A-1 has no assets on the reservation,
18 so to enforce the tribal judgment the prevailing litigant
19 would have to go to State court and persuade that court
20 that the underlying tribal proceedings comported with the
21 rules of comity that are applicable to the enforcement of
22 the foreign judgment.

23 QUESTION: And would those questions be open --

24 MR. NUECHTERLEIN: Yes, they would, Justice --

25 QUESTION: -- on enforcement --

1 MR. NUECHTERLEIN: Yes, they would.

2 QUESTION: -- in North Dakota?

3 MR. NUECHTERLEIN: Yes, they would.

4 QUESTION: Why is it leaving open the
5 possibility of such a difficult and elaborate proceeding?
6 We know perfectly well that if the jurisdiction is
7 exclusively in the State courts, in practical terms State
8 law will be applied. There won't be the potentiality for
9 these due process issues.

10 Why not have a simple highway rule? What's
11 wrong with that?

12 MR. NUECHTERLEIN: I think this Court's --
13 Justice Souter, I think this Court's precedents recognize
14 that the tribe would always have jurisdiction not just to
15 regulate conduct but also to adjudicate disputes in cases
16 where the tribe has a particularized interest. That
17 aspect of the tribe's sovereignty has remained intact.
18 It's the --

19 QUESTION: Do we really want to slice the onion
20 this many ways so far as practical effects are concerned?

21 MR. NUECHTERLEIN: I think that whenever we
22 recognize that there are a variety of sovereigns within
23 our Nation, whether they're States or Indian tribes,
24 jurisdictional issues will arise. I think the best rule
25 to apply here --

1 QUESTION: It seems to me the least desirable,
2 is what you propose. The Indian tribal court should first
3 decide whether there's an Indian interest and then
4 presumably 4 or 5 years later that might be reviewed here.

5 MR. NUECHTERLEIN: I think that the best rule
6 is, in fact, that one, and this is the reason why. This
7 Court has constantly recognized that Indian tribes retain
8 the core sovereign authority to regulate conduct that
9 poses a threat -- may I finish my sentence?

10 QUESTION: Yes.

11 MR. NUECHTERLEIN: That poses a threat to the
12 integrity of the tribe. It should be the tribal court in
13 the first instance that makes that determination. That's
14 the implicit premise of National Farmers Union. It would
15 be inefficient not to let the tribe complete the
16 adjudication.

17 QUESTION: Thank you, Mr. Nuechterlein.

18 Mr. Ward, we'll hear from you.

19 ORAL ARGUMENT OF PATRICK J. WARD

20 ON BEHALF OF RESPONDENT

21 MR. WARD: Mr. Chief Justice and may it please
22 the Court:

23 This Court has, on several occasions, indicated
24 reasons why the tribal court lacked jurisdiction over
25 Mr. Stockert and A-1 in this case. Tribal courts exist

1 primarily to apply tribal customs between tribal members.
2 In this instance, the tribe has given up its power to
3 exclude nonmembers from the State highway. In using the
4 State highway on this occasion, Mr. Stockert did not give
5 up his rights to due process, equal protection or trial by
6 a jury of his peers.

7 QUESTION: So the result would be different if
8 the accident had occurred inside the reservation, on a
9 reservation road, not a road on which the State had a
10 perpetual easement?

11 MR. WARD: Not necessarily, Your Honor, not in
12 an incidence involving two nonmembers of the tribe.

13 QUESTION: So then you're not relying on, as
14 Justice Souter spoke, this case could be -- could be
15 described as a State highway case, and that would be the
16 end of it, but I think you're telling us now that -- that
17 even if it occurred on a reservation road, there would not
18 be tribal jurisdiction. Is that what you're saying?

19 MR. WARD: Your Honor, yes. In this -- the
20 precedents of this Court's would indicate that the State's
21 authority over nonmembers of the tribe, over its citizens,
22 reaches into the reservation. And so it doesn't
23 necessarily require that the road has been alienated by
24 the tribe. But in this case, that gives the Respondents
25 an even stronger position, because this is a State highway

1 and it is regulated by the State and it is controlled by
2 the State.

3 And as Justice Breyer indicated, there are
4 interstate highways that run through reservations as well.
5 And citizens of this country have no idea when they enter
6 an interstate highway to travel to Yellowstone Park or
7 something out in the West that they're subjecting
8 themselves to the tort jurisdiction of a tribal court that
9 could deprive them of their property.

10 QUESTION: But they're -- they're -- when they
11 cross the line from, say, North Dakota into Montana,
12 they're going from one jurisdiction into another. How
13 much of an impression do you think that makes on them?

14 MR. WARD: Your Honor, I think it makes a great
15 impression. I think that citizens of the United States
16 recognize the sovereignty of different States and are
17 comfortable with that. But when they --

18 QUESTION: Maybe they should recognize tribal
19 sovereignty as well. I mean, you're just defending the
20 ignorant, it seems to me.

21 MR. WARD: Well, no, Your Honor; I believe that
22 there are limits on tribal sovereignty. And this Court
23 has indicated that in the past.

24 QUESTION: Why is it --

25 QUESTION: But they shouldn't be based on

1 whether the typical motorist has respect for a tribal
2 court or not, I don't think.

3 MR. WARD: No, Your Honor. They should be based
4 on the historical record. They should be based on the
5 decisions of this Court and on the constitutional --

6 QUESTION: Well, how is it different, when you
7 go to Maine from Massachusetts, you know, very few people
8 know, but you have to go through New Hampshire?

9 (Laughter.)

10 QUESTION: And you could be subject to the
11 courts --

12 QUESTION: I know someone who knows that.

13 (Laughter.)

14 QUESTION: I know someone who knows that.

15 (Laughter.)

16 QUESTION: Isn't -- isn't there kind of a dual
17 concern implicit in what you're saying here? It's
18 perfectly true that when you go from North Dakota to South
19 Dakota you realize you're going into a different
20 jurisdiction. But the general assumption that's made is
21 highway laws, liability rules and so on are generally,
22 more or less, the same. So that the substantive legal
23 regime probably is not changing very much.

24 MR. WARD: That's correct.

25 QUESTION: Here, however, I think, underlying

1 some of your argument are two suggestions. One is we
2 really don't have a sense of what the legal regime is
3 going to be if we are subject to tribal jurisdiction with
4 the probability of tribal substantive law. And, number
5 two -- and one of the amicus briefs was pretty explicit
6 about this -- there is a real concern about fairness of
7 treatment in the tribal courts by virtue of the fact that
8 the tribal judges can be removed by the tribal political
9 authorities, in effect, if they don't like the results.

10 Are those two reasons -- the fact that we have
11 real question about what the substantive legal regime will
12 be in a tribal court and, number two, we have a real
13 question about due process because of the appointment
14 scheme -- are those two reasons, reasons that you rely
15 significantly on and feel that we should rely
16 significantly on in deciding this case?

17 MR. WARD: Justice Souter, those are two
18 significant reasons, I agree with that. We rely on those
19 reasons and, in addition, we rely on all of the other
20 reasons we have stated.

21 QUESTION: Well, all those reasons are very
22 interesting, as are our prior cases. Is there any text
23 that we can look to for the answer to this question that
24 -- anybody talk about any statutory provision, treaty
25 provision -- what -- what --

1 MR. WARD: There are treaties --
2 QUESTION: What is the text that we're talking
3 about --
4 MR. WARD: Your Honor, there -- there is --
5 QUESTION: -- to decide this question?
6 MR. WARD: There is no specific text, in the
7 sense of a statute, that addresses this question. There
8 are treaties with the tribe. And in those treaties, the
9 tribe has historically recognized the right of safe
10 passage for people passing through the reservation.
11 If -- if one looks at those treaties, those
12 treaties -- never -- if you look at the common notions of
13 the day at the time that those treaties were entered into,
14 these tribes, from the time almost 20 years after Lewis
15 and Clark to this day, realized that there would be rights
16 of way, there would be people passing through, and they
17 would not interfere with the rights of those people
18 passing through. And if --
19 QUESTION: -- some of the same questions that
20 Justice Scalia is raising. Could Congress authorize this
21 jurisdiction? Is that question before us? Or are we --
22 or are we asking whether or not this is inherent in tribal
23 sovereignty absent some extra directive from the Congress?
24 What is the source of the law that controls this case?
25 MR. WARD: The -- the -- in answer to your first

1 question, yes, Justice Kennedy, the Congress could create
2 this jurisdiction if it chose to do so. But it hasn't.

3 With respect to the second part of your
4 question, this -- this case below has been decided on the
5 issue of the inherent sovereignty. And that question is
6 addressed by the decisions of this Court.

7 QUESTION: Well, with reference -- the answer to
8 your first question -- then there would be no
9 constitutional impediment to the exercise of tribal
10 jurisdiction?

11 MR. WARD: The constitutional impediment would
12 be that this -- the Constitution recognizes two
13 sovereigns, the United States and the States. And unless
14 that sovereign -- the United States gives this authority
15 -- somehow delegates this authority to the tribes, the
16 tribes do not have it.

17 QUESTION: Well, let's put it this way, there
18 would be no due process violation in subjecting the --
19 your client to the jurisdiction of the tribal court?

20 MR. WARD: Yes, Your Honor, there would be.

21 QUESTION: Well, then, why did you say that
22 Congress could authorize it?

23 MR. WARD: Well, Your Honor, I -- I think that
24 Congress certainly he is -- my client is a citizen of the
25 United States. And Congress can certainly create a court

1 that he would have to respond to, unless that action
2 itself was unconstitutional. And we have not addressed
3 that question here.

4 QUESTION: Well, you're not challenging the
5 concept of Indian tribal sovereignty, surely?

6 MR. WARD: No, I'm not, Your Honor.

7 QUESTION: I mean, this Court, in many
8 decisions, has recognized that. The Federal Government
9 has recognized it. It's a fact of -- of existence.

10 MR. WARD: No, we are not questioning the
11 concept of tribal sovereignty --

12 QUESTION: Well, then, are you asking us just to
13 make a general choice of law rule as to what's wise? I
14 mean, what is -- what's the controlling doctrine that --
15 that guides this case?

16 MR. WARD: The controlling doctrine is the
17 Montana case that was decided by this case, which provides
18 the limitations, or at least addresses the limitations, on
19 tribal sovereignty and the exceptions to those limitations
20 where nonmembers are involved.

21 QUESTION: But that was regulatory sovereignty
22 and then that was legislative sovereignty.

23 MR. WARD: It was -- it was legislative, but the
24 sovereignty of a tribe, whether it's legislative or
25 adjudicative, comes from the same place. It comes from

1 whatever retained inherent sovereignty remained after the
2 tribes were incorporated into the United States. And as
3 this Court has recognized in Oliphant and Wheeler, for
4 purposes of criminal jurisdiction, there is no tribal
5 sovereignty, and the tribe could not, as in some of the
6 earlier examples, exercise any criminal jurisdiction over
7 either of the parties here because they were both
8 nonmembers of the tribe.

9 QUESTION: But may I go back to a -- to an
10 answer -- to a question from Justice Kennedy? You said,
11 well, even if Congress provided by statute that there
12 would be jurisdiction in the tribal court in -- in this
13 case, that there would -- there would or could -- I'm not
14 sure which you said -- still be a due process problem.
15 Did you mean by that simply that you might still raise a
16 due process challenge to the particular manner in which
17 the -- the court offices were appointed or the jurors
18 selected or whatnot?

19 MR. WARD: That's correct, Your Honor.

20 QUESTION: Okay.

21 MR. WARD: And also potentially to the manner in
22 which those courts are --

23 QUESTION: How could you raise that? By -- by
24 what mechanism do you think you could get into another
25 court to -- to raise some due process challenge to what

1 actually occurred?

2 MR. WARD: Well, Your Honor, that would be a
3 difficult problem, because the Court's Santa Clara Pueblo
4 decision seemed to indicate that the -- the issues of the
5 Indian Civil Rights Act with respect to due process will
6 not be reviewed except in habeas corpus proceedings. So
7 unless there was some revision of that decision with
8 respect to review for nonmembers, the Santa Clara Pueblo
9 case did involve a member, and she was questioning tribal
10 -- the issue of tribal membership rules.

11 QUESTION: But why wouldn't it operate --
12 Ms. McCoy, I think, told us that, as a practical matter,
13 to enforce a judgment of this nature rendered by the
14 tribe, you'd have to go into State court, bring a fresh
15 proceeding, to enforce that judgment. And couldn't the
16 defendant in that enforcement proceeding say that I
17 recognize Indian tribal sovereignty; it's like the
18 sovereignty of France or Italy.

19 When we're dealing with a sovereign to whom the
20 full faith and credit clause doesn't apply, then we have
21 certain checks. And one of them is due process. So we
22 would look to the particular proceeding and see if
23 essentially fair procedure was accorded in the tribal
24 court.

25 MR. WARD: There would be, in this instance, a

1 comity provision, pursuant to the North Dakota rule with
2 respect to enforcement of this tribal judgment. So there
3 would be some limited review. But --

4 QUESTION: But you say that's fortuitous, just
5 because there happens to be no property on the reservation
6 that could be seized?

7 MR. WARD: Correct.

8 QUESTION: But, you know, the same situation
9 exists if it's a suit between two Indians or, I assume, a
10 suit between one Indian and a person off the reservation.
11 Why do we -- why is it so terrible that -- that two
12 non-Indians can't get review of a tribal court judgment by
13 a Federal or State court, but not terrible that -- that
14 two Indians can't get a review of a similarly outrageous
15 tribal court? I mean, do we care more about non-Indians
16 than Indians for some reason?

17 MR. WARD: No, I don't think we do --

18 QUESTION: If we're content with that rule for
19 Indians, why -- why can't we be content with it for
20 non-Indians?

21 MR. WARD: Your Honor, because Indians are
22 members of the tribe. They choose to be members of the
23 tribe. They choose to reside on the reservation. They
24 benefit from that membership.

25 QUESTION: And I'm a Virginian, but Virginia can

1 -- can deny me due process just as well.

2 MR. WARD: I would argue that it can't, Your
3 Honor.

4 QUESTION: I -- I just don't think that's --

5 MR. WARD: I mean, you could challenge it if
6 Virginia did.

7 You certainly -- a non-Indian does not have a
8 right to participate in tribal governance. He doesn't
9 have the right to vote. He doesn't have the right to be
10 involved in any of the decisionmaking.

11 QUESTION: -- happy family, and never deprive
12 one another of due process --

13 MR. WARD: Your Honor, I would hope that --

14 QUESTION: -- right, and think it's some -- I
15 don't know -- bucolic, pre-nature regime there? I don't
16 think so. It seems to me that the injustice could exist
17 just as well between -- in a suit between two Indians.
18 And if we're resigned to not having that reviewed for
19 them, I don't know why we can't be resigned to not having
20 that reviewed for a suit between two non-Indians.

21 MR. WARD: Well, Your Honor, that question, I
22 guess, has not been answered by this Court, with respect
23 to non-Indians.

24 QUESTION: Well, let me ask a related question.
25 Although there's been a speculation about due process

1 horribles, are there -- do you have any documented
2 examples that anything is going wrong in these courts?

3 MR. WARD: Absolutely, Your Honor. I mean, it's
4 not part of this record, but certainly --

5 QUESTION: Where -- where would I -- where would
6 I -- where could I properly look to find these accounts?

7 QUESTION: Is the case -- a similar case being
8 considered now in the 9th Circuit?

9 MR. WARD: Yes, there is, Your Honor. There's a
10 case involving the Burlington Northern Railroad, which
11 filed one of the amicus briefs here, in which the tribal
12 jury was composed of relatives and friends of the
13 complainants. There was a parade of horribles in that
14 case and an extremely unfair verdict. And that is pending
15 review in the 9th Circuit --

16 QUESTION: Well, that's -- I don't mean to
17 belittle that case, but that is one case. Do we --

18 MR. WARD: Yes, there --

19 QUESTION: Do we have any -- any documentation
20 of a generalized problem?

21 MR. WARD: Well, Your Honor, as far as
22 documentation, other than -- there are other cases that
23 I'm aware of, where due process violations are occurring
24 in tribal courts with respect to nonmembers --

25 QUESTION: Well, can I -- is there a law report

1 or something that I can read to find these examples?

2 MR. WARD: There -- there are some law review
3 articles on the subject, Your Honor. The best, I think,
4 would be the amicus brief of the Burlington Northern
5 Railroad in this case, and the American Automobile
6 Association --

7 QUESTION: Mr. Ward, do you agree that if we
8 take what Justice Souter suggested might be a rule of the
9 road here -- that is, if it's an interstate highway, it's
10 a State highway, then the State -- this case belongs in
11 State court and State law will apply. But we don't get
12 into any of these other questions that might arise if this
13 accident occurred on a road within the reservation?

14 MR. WARD: That's true.

15 QUESTION: Just stay on the good roads; you've
16 got nothing to worry about. Stay on the State highways.

17 MR. WARD: That's -- that's true. You could do
18 that. And in this case -- and that would be consistent, I
19 think, in this case, with the alienation of the land in
20 the Bourland case, which involved the dam for Lake Oahe,
21 just below the dam for Lake Sakakawea, which is --

22 QUESTION: How does it normally work with -- I
23 mean, this notion of splitting adjudicatory jurisdiction
24 for -- from legislative or regulatory jurisdiction is
25 rather interesting. I just wonder, as a practical matter,

1 in the Dakotas or Montana or places where there are quite
2 a few reservations and alienated quite a lot of land, so
3 that there are many fee -- inhabitants who own their land
4 in fee, what's the expectation now, how does it work when
5 there's a simple accident, a tort, a slip-and-fall, a
6 contract dispute, not with any of the tribes, but -- I
7 mean, do those people now think they're supposed to go to
8 a tribal court to get their matter adjudicated?

9 MR. WARD: No, Justice Breyer.

10 QUESTION: They go to the State court?

11 MR. WARD: Yes, they do.

12 QUESTION: And are you aware of any instances in
13 which tribal courts took jurisdiction over these
14 simple slip-and-fall, normal contract disputes on the
15 houses or farms of the people who hold their land in fee?

16 MR. WARD: Involving nonmembers? No, not to my
17 knowledge, Your Honor. Those people are treated as
18 citizens of the State of North Dakota. They have access
19 to the courts in the State --

20 QUESTION: But, Mr. Ward, here's a question of
21 concurrent jurisdiction. And isn't this -- this kind of
22 case can only come up if the plaintiff -- even if a
23 nonmember would have a real close affiliation with the
24 tribe. In the cases Justice Breyer was suggesting, it's
25 the plaintiff's choice of forum. Most non-Indians

1 probably wouldn't go to the tribal court in this kind of
2 accident. But this non-Indian had a very close
3 relationship with the tribe. And so that's why she did.

4 MR. WARD: That's correct.

5 QUESTION: Well, why is that? Why is that? I
6 don't -- I mean, I don't --

7 MR. WARD: Why did she choose?

8 QUESTION: Why, if in fact there is adjudicatory
9 authority in -- over, say, this -- if this is equivalent
10 to fee and there is adjudicatory authority of the tribal
11 court over people who hold their title in fee, then why
12 couldn't the tribe, if it wished to, say that you have to
13 go to the tribal court whether you're related to somebody
14 who's a member of the tribe, whether you're not?

15 MR. WARD: Your Honor, the tribe could, assuming
16 that the other party was --

17 QUESTION: So, in fact, then I think the issue
18 in this case -- there are two issues. One is whether
19 they're going to have adjudicatory jurisdiction over all
20 accidents, contracts on fee land, or the second issue
21 could be this isn't fee land; this is not fee land. This
22 is an easement -- shouldn't be treated as fee land. So
23 I'd appreciate your addressing that second contention
24 briefly.

25 MR. WARD: Well, Your Honor, this is not fee

1 land, because this land was --

2 QUESTION: If you say "not," then they win, I
3 think.

4 QUESTION: I think you're -- you're talking
5 about fee land in --

6 MR. WARD: I -- I'm sorry --

7 QUESTION: -- Montana talked about fee land in
8 the sense of other people owning it, not the tribe owning
9 it.

10 MR. WARD: Well, you confused me. I was
11 confused by the question, Your Honor.

12 QUESTION: No, it's my fault.

13 MR. WARD: And what -- what I mean is this is --
14 this -- this easement for this highway is certainly the
15 equivalent of fee land. It is an alienation of the land
16 by the tribe. It is a giving up of the power to control.

17 QUESTION: Oh, it's just an easement, like any
18 other highway easement or like any other utility
19 easements. It is a permission for the State to have a
20 highway there, is it not?

21 MR. WARD: It is --

22 QUESTION: That's what we have. It's part of
23 the total bundle of property rights.

24 MR. WARD: Well, but it's -- it's more than that
25 in the sense that it's giving up the power to exclude.

1 It's giving up the power to regulate the highway. The
2 State regulates the highway. The State sets the
3 standards.

4 QUESTION: Well, now, we heard that the tribe
5 also regulates the rules of the road, so to speak, on this
6 highway; is that the case?

7 MR. WARD: The tribe -- the tribe --

8 QUESTION: Do they have regulations governing
9 the use of this highway?

10 MR. WARD: The tribe regulates its members with
11 respect to the highway, Your Honor.

12 QUESTION: Not nonmembers?

13 MR. WARD: Not to my knowledge, Your Honor.
14 Generally speaking --

15 QUESTION: We heard to the contrary from the
16 Petitioners' counselor.

17 MR. WARD: Well, my understanding is that the
18 practical application by the -- by the tribe and the
19 highway patrol is that if a non-Indian is involved, the
20 tribe will call in the deputy sheriff from the county or
21 they would call in the highway patrol.

22 QUESTION: So your understanding is different
23 from Petitioners' counsel --

24 MR. WARD: That's correct.

25 QUESTION: -- in this regard?

1 MR. WARD: That's correct.

2 QUESTION: If the tribe had not given up the
3 easement to the State for the highway, could non-tribal
4 members be totally excluded? I mean, can the tribe just
5 say, you know, we don't want to give the State any highway
6 land, and since there are no State highways, no outsiders,
7 just tribal members. Can the tribe do that? I --

8 MR. WARD: The tribe, in this instance,
9 certainly did give up the easement. Whether the tribe
10 could decide not to, I believe the tribe --

11 QUESTION: Well, sure it could.

12 QUESTION: Well, haven't we had cases involving
13 that; that on tribal land, the tribe has the right to
14 exclude others? We've had cases decided on that very
15 basis.

16 MR. WARD: Yes -- yes, you have, Your Honor.
17 And those cases involved reservations, where the tribe
18 retained its power to exclude, as opposed to where it had
19 given that up and agreed to give free passage, and agreed
20 to allow rights-of-way.

21 QUESTION: And did it go along with this
22 easement that the tribe promised not to exclude anybody?

23 MR. WARD: Yes, Your Honor. The only rights
24 reserved to the tribe in the easement were the right to
25 create crossings for purposes of approaches to farms and

1 things like that. Otherwise, the easement gave the State
2 the rights to the surface of the road.

3 QUESTION: Do you know of any case where a tribe
4 claims exclusive jurisdiction, which I believe is what
5 Justice Breyer was suggesting -- claim exclusive
6 jurisdiction as distinguished from concurrent jurisdiction
7 with the State over a tort that happens on a highway or on
8 fee land?

9 MR. WARD: I'm not aware of any case from this
10 Court, Your Honor, where the tribe has --

11 QUESTION: But do you know of any tribe that has
12 asserted exclusive jurisdiction as distinguished from
13 concurrent jurisdiction, where the plaintiff chooses the
14 forum?

15 MR. WARD: I believe that the tribes, maybe.
16 And I believe that the effect of what happens, pursuant to
17 the Petitioners' argument in cases -- as a result of Iowa
18 Mutual -- is that State courts and Federal courts are
19 reluctant to proceed because the action has been started
20 in a tribal court. And so, from that standpoint, whether
21 the tribe asserts exclusive jurisdiction, in effect, it is
22 by the way that the procedure is followed once that
23 jurisdiction is invoked.

24 QUESTION: I must say, I am confused by the
25 easement discussion. I'm -- you know, a sovereign can

1 cede land, even the whole fee much less an easement,
2 without conceding any sovereignty over that land. If I
3 purchased land from the United States, the United States
4 doesn't give up jurisdiction over that land. It's still
5 subject to United States law.

6 I don't know that the fact that the tribe gives
7 an easement to a State necessarily means that the tribe
8 thereby cedes all of its jurisdictional responsibility
9 over the -- over the land as to which the easement was
10 given. Why do you assume that's the case?

11 MR. WARD: Well --

12 QUESTION: Is it clear that the tribe could not
13 regulate Indians on that -- on that easement, for example?

14 MR. WARD: Well, the -- the reason I assume
15 that's the case is for reasons similar to the Bourland
16 decision of this Court, that, in that case, the tribe gave
17 up the authority over the taken area for the building of
18 the dam and for the recreational enjoyment of hunting and
19 fishing in that area. And the tribe, similar to this
20 case, asserted that it maintained regulatory control even
21 over non-Indians in that area. And this Court decided no,
22 it did not; that it did not retain that regulatory
23 control. And it further decided that that kind of control
24 was not part of the tribe's inherent sovereignty.

25 QUESTION: Only over non-Indians, you would say,

1 though. So, I mean, your highway principle that Justice
2 Souter was discussing with you would only apply to
3 regulation of non-Indians on the highway?

4 MR. WARD: Well, Your Honor, this -- this Court
5 has never decided whether an easement or an alienation of
6 land would give up the authority over the tribal members.
7 I don't think it goes that far. I think the tribe -- the
8 essence of the tribe's sovereignty is the tribe's right to
9 regulate the affairs of its members. So, in that sense,
10 there may be concurrent jurisdiction of the tribe over its
11 members with respect to the highway.

12 QUESTION: But to members within the boundaries
13 of the reservation?

14 MR. WARD: Exactly, yes. Until the -- once the
15 State highway goes beyond the borders of the reservation,
16 the tribe loses its authority even over its members.

17 QUESTION: I take it the terms of the easement
18 in this case do not address these questions?

19 MR. WARD: Not specifically; no, Your Honor.

20 What this Court stated in the Montana decision

21 --

22 QUESTION: Well, is that really completely true?
23 Some have argued that one of the sources of tribal
24 jurisdiction over non-Indians is the power to exclude.

25 MR. WARD: That's correct.

1 QUESTION: And the tribe has given up the power
2 to exclude non-Indians from this road.

3 MR. WARD: Yes, they have, Your Honor.

4 QUESTION: So, arguably, they might have given
5 up jurisdiction to regulate non-Indians on this road?

6 MR. WARD: I would submit that that's true, Your
7 Honor.

8 And I think that this Court --

9 QUESTION: Well, except it's given up the power
10 not only to exclude them from the road, but the power to
11 exclude them from the reservation. So, I mean, if you
12 follow that logic, they would not have -- they would not
13 have power to regulate their activities on the rest of the
14 reservation either?

15 MR. WARD: That may be true, Your Honor.
16 Because with respect to --

17 QUESTION: Have they given up the power to
18 exclude generally from the reservation?

19 MR. WARD: Well, with respect to these
20 particular tribes, there are no closed areas like there
21 were in the Brendale decision. This is an open
22 reservation. There are approximately 40 percent fee land.
23 Close to 50 percent of the people living on the
24 reservation are nonmembers. So there's a significant
25 interaction.

1 And from an economic standpoint, a decision that
2 would close the reservation or make people fearful of
3 entering the reservation for fear of losing their property
4 as a result of an adverse judgment there would not be good
5 for the tribes and it would not encourage intercourse with
6 the tribes, which is something that Congress has always
7 indicated is part of its essential purpose in dealing with
8 the tribes --

9 QUESTION: Could you explain something to help
10 focus on the precise law that we look to, to resolve this
11 case? If a State court exercises personal jurisdiction
12 over someone erroneously -- there's no personal
13 jurisdiction -- that person doesn't run into Federal court
14 and get an injunction. What was the theory on which you
15 went into Federal court here originally?

16 MR. WARD: The theory that we originally went
17 into Federal court was that we had exhausted our tribal
18 court remedies with respect to jurisdiction and that the
19 tribe did not have jurisdiction to involuntarily force
20 Mr. Stockert and A-1 Contractors into one of its courts
21 for purposes of a civil case.

22 QUESTION: But -- but is that -- was it a
23 violation of a Federal standard or a Federal law for the
24 tribe to proceed that way?

25 MR. WARD: It was a violation of the decisions

1 of this Court in the Montana case and a misapplication of
2 the exceptions of that case in order to --

3 QUESTION: It sounds to me like you're saying
4 that there is no authority to proceed, but I'm not sure
5 why that's -- presents a Federal question, until they --
6 until they try to levy on your assets or something.

7 MR. WARD: Well, Your Honor, I believe the
8 Federal question is presented by the fact that there is a
9 deprivation of Mr. Stockert's rights. There is a
10 deprivation of his right to have this case heard in a
11 court to which he is a member, to which he can vote --

12 QUESTION: Well, how is that any different from
13 my hypothetical of going into a State court -- a State
14 court exercising jurisdiction over me, and I say, well,
15 you have no jurisdiction?

16 MR. WARD: Well --

17 QUESTION: I don't rush into Federal court and
18 get an injunction. I don't see that there's a Federal
19 question here.

20 MR. WARD: Well, it's different in the sense
21 that there's different sovereigns involved, Your Honor.
22 The States -- the sovereignty of the States is different
23 from the States and the tribes.

24 QUESTION: Well, is there a Federal question of
25 jurisdiction over -- any question of Indian law?

1 MR. WARD: Yes, there is, Your Honor, because
2 the -- because of the plenary power of Congress in dealing
3 with the Indians that's referenced in the Constitution.
4 This Court has indicated --

5 QUESTION: Well, certainly -- certainly our
6 cases like Iowa Mutual certainly suggest that you can --
7 not only suggest, but I think they hold you can come into
8 Federal court --

9 MR. WARD: Absolutely.

10 QUESTION: -- if there has been exhaustion.

11 MR. WARD: That's exactly what the Farmers Union
12 case said, Your Honor. The Farmers Union case said that
13 Federal courts are the final arbiters of questions of
14 Indian jurisdiction. So, to the extent that authority is
15 needed for that proposition, it's in the Farmers Union
16 case. And it was again in Iowa Mutual.

17 And basically, what Iowa Mutual was, was an
18 extension of that exhaustion requirement. But, again --
19 and it dealt with Section 1332 jurisdiction for diversity
20 cases. But it extended that exhaustion requirement that
21 was announced in Farmers Union and recognized that yes, it
22 is a Federal question -- the question of Indian
23 jurisdiction is a Federal question, because of the unique
24 nature of Indian tribes in their dealings with the
25 Congress and with the American people.

1 There has been no congressional delegation of
2 adjudicatory --

3 QUESTION: Can I ask one other question? What
4 if the plaintiff in this case had been a tribal member,
5 would your case be stronger or weaker?

6 MR. WARD: Your Honor, I believe, in this case,
7 under these facts, my case would not be any weaker. The
8 -- the -- if the plaintiff were a tribal member, you would
9 still have the same issues of the divestment of the
10 highway. You would still have the divestment of the power
11 to exclude. You would still have --

12 QUESTION: Aren't there in fact children of the
13 named plaintiff -- adult children -- who are tribal
14 members who have claims in this very case?

15 MR. WARD: There are adult children who have
16 consortial claims that they have asserted.

17 QUESTION: Yes. And they are tribal members?

18 MR. WARD: They are --

19 QUESTION: But their claims are not before us?

20 MR. WARD: That's correct, Your Honor, their
21 claims are not before us. Those are claims that are
22 derivative and they are essentially pending claims. And
23 they can adequately be pursued in the State courts, as
24 well, pursuant to the second Montana exception.

25 To the extent there is a tribal interest that

1 could be asserted here, however marginal, that -- that
2 interest could be adequately protected in the State court.
3 And not only is there -- is Petitioner conceding that
4 there is concurrent jurisdiction, but there is actually an
5 action pending in the State court.

6 And with respect to the community argument that
7 has been made by the Petitioners, the local courthouse,
8 the closest local courthouse -- and the State court is
9 actually closer to the area where this accident happened
10 then the reservation courthouse, which is across the lake
11 and around the highway. Since the lake was constructed,
12 you actually would have to go around the lake almost --
13 you would have to go far west and then cross a bridge to
14 get to the tribe courthouse and you'd just go a few miles
15 south to get to the county courthouse.

16 So it's not like there's any disadvantage to
17 Mrs. Frederick's being required to use a State court of
18 which she's a citizen and of which she has power to vote.

19 If there are no further questions, Your Honor --

20 QUESTION: Is Lake Sakakawea, is that a
21 corruption of Sakajawea?

22 MR. WARD: Well, the Native American people in
23 our part of the country would argue, Your Honor, that it's
24 not a corruption but the actual pronunciation of the name
25 is Sakakawea.

1 CHIEF JUSTICE REHNQUIST: Thank you.

2 MR. WARD: Thank you.

3 (Whereupon, at 12:06 p.m., the case in the
4 above-entitled matter was submitted.)
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