

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CASS COUNTY, MINNESOTA, ET AL., Petitioners v.
LEECH LAKE BAND OF CHIPPEWA INDIANS

CASE NO: 97-174

PLACE: Washington, D.C.

DATE: Tuesday, February 24, 1998

PAGES: 1-48

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Supreme Court U.S.

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CASS COUNTY, MINNESOTA, :

4 ET AL., :

5 Petitioners :

6 v. : No. 97-174

7 LEECH LAKE BAND OF CHIPPEWA :

8 INDIANS :

9 - - - - -X

10 Washington, D.C.

11 Tuesday, February 24, 1998

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:12 a.m.

15 APPEARANCES:

16 EARL EDWIN MAUS, ESQ., County Attorney, Walker, Minnesota;
17 on behalf of the Petitioners.

18 JAMES M. SCHOESSLER, ESQ., Minneapolis, Minnesota, on
19 behalf of the Respondent.

20 BARBARA B. McDOWELL, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the United States, as amicus curiae,
23 supporting the Respondent.

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1 PROCEEDINGS

2 (11:12 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 97-174, Cass County, Minnesota v. Leech
5 Lake Band of Chippewa Indians.

6 Mr. Maus, you may proceed whenever you're ready.

7 ORAL ARGUMENT OF EARL EDWIN MAUS

8 ON BEHALF OF THE PETITIONERS

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

11 It's Cass County's position in this case that
12 the alienable land patented in fee by the Federal
13 Government and subsequently reacquired in fee by the
14 Indian tribe is subject to State and local taxation absent
15 treaty or statutory exceptions to the contrary.

16 In 1889, Congress passed the Nelson Act, which
17 provided for the complete cession and relinquishments of
18 lands to the Federal Government. The Federal Government
19 in turn, pursuant to section 3 of the Nelson Act and in
20 conformity with section 5 of the General Allotment Act,
21 issued individual allotments to Indians in conformity with
22 the section 5.

23 Pursuant to sections 4 and 5 of the Nelson Act,
24 they sold pinelands, which were basically timberlands, on
25 the open market to individuals.

1 Pursuant to section 6, they issued homestead
2 patents, or gave patents in fee under the Homestead Act to
3 various individuals, again on the open market.

4 In 1993, Cass County began taxing all of the
5 above lands and that was following the 1992 Yakima
6 decision which was set forth by this case -- 1992, Yakima
7 County v. Yakima Indian Nation.

8 At that time, there were 21 parcels, 13 of those
9 parcels involved a lot of land, and that issue has already
10 been resolved in the Eighth Circuit, and it was a petition
11 for further review of that, and that was denied on cross-
12 petition for that.

13 So at issue here today are the pinelands
14 parcels, seven of those, and one homestead parcel.

15 These various parcels, I'd point out to the
16 court, are now -- the ones that are left, they're all in
17 trust at the present time, have been placed in trust and I
18 believe it's a matter of public record since about 1995.

19 Why we're here today, there's still the issue of
20 back taxes that were sued for. In addition, obviously,
21 both sides want to know how to deal with lands --

22 QUESTION: Are these parcels within the
23 boundaries of the tribal reservation here?

24 MR. MAUS: For purposes of this lawsuit we have
25 stipulated that the lands are within the reservation

1 boundaries. Whether or not they're within accepted
2 reservation boundaries based on some of the Court's recent
3 cases or not --

4 QUESTION: But --

5 MR. MAUS: -- is a matter for another day.

6 QUESTION: Right. They're within the
7 reservation boundaries and held in trust for the benefit
8 of the tribe, by virtue of the reacquisition by the tribe?

9 MR. MAUS: That's correct. They've subsequently
10 been put in the trust, and in -- obviously the period that
11 we were taxing them was while they were being held in fee,
12 up and until they were put in the trust, and once they're
13 put into the trust there's no dispute that we cannot tax
14 them.

15 QUESTION: And if they had never been sold off
16 as pinelands and homesteads, you concede that no county
17 tax would have been possible?

18 MR. MAUS: That's correct. If they hadn't been
19 placed on the open market, and it's our contention that
20 the Nelson Act did that and, indeed, they have been taxed
21 since their inception or their sale on the open market
22 back in the early 1900's --

23 QUESTION: And there were additional parcels
24 that were reacquired pursuant to the lands covered by the
25 Dawes Act as amended by the Burke Act, but they're not at

1 issue here?

2 MR. MAUS: They're no longer at issue, that's
3 correct.

4 QUESTION: And as to those parcels the tax is
5 being levied and the Burke Act expressly says that
6 taxation is possible, I take it?

7 MR. MAUS: Well, the Burke Act says that but we
8 believe that the Court went a step farther than that in
9 the Yakima case in finding that the Burke Act made it more
10 clear, but that section 5 of the General Allotment Act
11 made it clear and made those lands taxable as they were
12 alienable following the logic, basically, of Goudy v.
13 Meath, which was decided in 1906, and decided also by this
14 Court.

15 QUESTION: May I be sure I understood something
16 you said? When the land was reacquired by the tribe, did
17 you tell me that you seek to tax it while it was owned by
18 the tribe, but you say you cannot tax it after the tribe
19 had it put back in trust?

20 MR. MAUS: That's correct.

21 QUESTION: And who's the trustee? Is the United
22 States the trustee?

23 MR. MAUS: Yes, they are. Under the trust
24 process, pursuant to the Reorganization Act, which was
25 passed in 1934, there's a trust process where the band can

1 acquire lands, apply to put them into trust, and the
2 Department of Interior makes a decision based on whether
3 or not they're to be put in trust, and one of the criteria
4 for that decision is basically the effect on local units
5 of government.

6 QUESTION: I don't quite understand why it
7 should make a difference whether the land is owned
8 outright by the tribe or held for the tribe in trust by
9 the United States. I don't understand why that should
10 make a difference.

11 MR. MAUS: You know, basically that's -- the
12 difference being this, is that's what Congress decided to
13 do, and they did a balancing test, obviously, when they
14 did the -- passed the Indian Reorganization Act, and
15 wanted to look at land as --

16 QUESTION: The answer in other words is, that's
17 required by the 1934 statute.

18 MR. MAUS: That's correct, and there is specific
19 language that says, once it's put into trust, that it's
20 not taxable.

21 QUESTION: I see.

22 QUESTION: Is it also not alienable if it's in
23 trust?

24 MR. MAUS: That's correct. That's correct. It
25 could not be sold. It would have to go back through --

1 the Department of Interior would have to approve any sale.

2 QUESTION: And so --

3 QUESTION: And that's the second 465 procedure
4 that you said, if they want to get tax-exempt -- it
5 doesn't happen automatically. I think when Justice
6 O'Connor asked you when the tribe reacquires it, does it
7 then gain exemption, and I think your answer is no, not
8 unit there is this 465 procedure to put it back in trust,
9 at which point it's neither alienable nor taxable.

10 MR. MAUS: That's correct.

11 QUESTION: So how many years are we talking
12 about that it was in this state where it was reacquired by
13 the tribe but not yet put in trust?

14 MR. MAUS: Okay. All of the parcels in issue,
15 all 21 of them, have been purchased -- were purchased
16 since 1980. That was the earliest of those.

17 14 out of those original 21 had been purchased
18 in 1993. We began taxing them in 1993. I guess there was
19 some confusion in the -- within the State, you know, can
20 this land be taxed or not, you know, prior to being put
21 into trust, and after the Yakima decision came out, at
22 least at the county level we received one of the State
23 memos basically saying that it appears that this land is
24 taxable and we put it on the tax roll.

25 QUESTION: So we're talking about 2 years.

1 MR. MAUS: We're talking about -- well,
2 basically if we -- if it went on the tax rolls in 1993 it
3 would have been taxes payable in 1994, and the lawsuit was
4 commenced in '95, and towards the latter part of '95 all
5 of these parcels, or at least the remaining parcels were
6 put into trust, so we're talking about a year-and-a-half,
7 basically, I guess of actual, payable taxes for most of
8 the parcels, maybe more or less for some of them.

9 QUESTION: Does the provision of the law which
10 enables these parcels to be put in trust, does that say
11 that when they go into trust they are no longer taxable?

12 MR. MAUS: Yes. Section 465 specifically says
13 that once lands are in trust they are not taxable.

14 QUESTION: That probably wouldn't be necessary
15 if they're not taxable anyway so long as the tribe
16 acquires them.

17 MR. MAUS: That's correct. It's our belief that
18 the legislature could have, had they wanted to with the
19 Indian Reorganization Act clearly made all lands that were
20 acquired by the tribe not taxable, or reacquired, but they
21 didn't do that. They stopped short of that, in effect set
22 forth that process to give us some input. Now --

23 QUESTION: But your point is that there's a
24 distinction because if it's not put into trust the tribe
25 can sell it and do whatever it wants to with it, but if

1 they put it in a trust they have to get the consent of the
2 United States to do something with it.

3 MR. MAUS: That's correct.

4 QUESTION: Yes.

5 MR. MAUS: And I -- you know, I point out to the
6 Court that I know that the tribe in this particular case
7 and United States is taking an opposite position saying,
8 well, we just can't sell the land, and I would submit to
9 this Court that that -- I don't believe that that's the
10 case, and that's not our position.

11 QUESTION: You're talking about the Indian
12 Nonintercourse Act --

13 MR. MAUS: Correct.

14 QUESTION: -- argument?

15 MR. MAUS: It --

16 QUESTION: Well, that -- what is your answer to
17 the Indian Nonintercourse Act? I mean if you read it, it
18 does say that, doesn't it?

19 MR. MAUS: But it's real simple. It -- one of
20 the parts that it says early on -- you know, it's passed
21 in 1834, okay, and --

22 QUESTION: I thought it was earlier than that.
23 Is that when it started? I thought it was --

24 MR. MAUS: Yes. It was actually before then,
25 but the latest version, I guess --

1 QUESTION: Oh --

2 MR. MAUS: -- that Congress had addressed was
3 1834, and it provided that lands couldn't be sold without
4 the permission of Congress. In other words, Congress was
5 to sell lands. In other words, States couldn't take lands
6 and start ceding them to individuals.

7 Well, the simple answer to that, the real short
8 one is, along comes the Nelson Act. There's Congress'
9 authority. In fact, they take the land, they cede it and
10 relinquish any title of it and give it to the Federal
11 Government, who then puts it on the open market, so is
12 there authority to get around the Nonintercourse Act?
13 Absolutely.

14 In addition to that --

15 QUESTION: Well, there was at the time of the --
16 there was at the time of the allotment and the other
17 distributions, but the question is, doesn't the term --
18 don't the terms of the act cover it now that it is back in
19 Indian or tribal ownership?

20 MR. MAUS: Two basic answers to that, I guess.
21 There's one -- you know, if you look at the logic of
22 reacquired lands, if you're looking at that pure logic,
23 you have the Indian Reorganization Act, which deals with
24 the reacquisition of lands and a determination of whether
25 or not they should be taxable or not, whether or not they

1 should be put into trust or not, and second of all --

2 QUESTION: The point that there would have been
3 no point in making that, the taxability a consideration
4 when it went into trust if -- unless it were taxable
5 before it goes into trust.

6 MR. MAUS: Correct.

7 QUESTION: Right, okay.

8 MR. MAUS: And second of all, with respect to
9 that, you know, the Court couldn't have decided the Yakima
10 case the way it did had that been the case, because in
11 Yakima I believe that there were some parcels of land that
12 were due to go tax-forfeited and that was at issue also,
13 because there was some government lands and some
14 individual.

15 QUESTION: That may imply that alienability
16 simply is not the sole criterion.

17 MR. MAUS: Correct.

18 QUESTION: Why -- what -- is this -- it seems to
19 me if we're talking about these particular parcels,
20 they're the same as any other parcels that have been out
21 there, occupied and owned by people who are not Indians in
22 fee simple. There could be many such parcels, and it
23 could have ended up in the hands of non-Indians for many
24 such -- many reasons.

25 And so one day a tribe comes along and buys a

1 parcel of land that previously didn't belong to the tribe,
2 on the reservation, and isn't the issue whether, once the
3 tribe acquires that, whether it ever -- whatever it is,
4 it's in the reservation. They bought it. Now, is it
5 taxable or not?

6 And if the principle is, well, it's not taxable
7 only because it's in the tribe's hands, however it got
8 there, unless Congress clearly says so, where did Congress
9 clearly say so?

10 MR. MAUS: We believe that Congress clearly said
11 that the land was taxable first, I guess, looking at the
12 Nelson Act itself. I mean, it gave absolute fee title to
13 everyone.

14 QUESTION: Yes, but that has nothing to do with
15 the issue. The issue -- that's an issue of what happens
16 when the tribe owns the land and gets rid of it.

17 MR. MAUS: Okay.

18 QUESTION: Now, that's not our issue. Our issue
19 is, there's some land out there that doesn't belong to the
20 tribe. We don't care how or why it doesn't belong to the
21 tribe. It doesn't.

22 Now, the tribe acquires it.

23 MR. MAUS: Okay.

24 QUESTION: All right, once it's acquired, is it
25 now no longer taxable, and if the principle is, it's no --

1 not taxable once it's in the hands of the tribe, however
2 it got there, unless Congress clearly says so --

3 MR. MAUS: Mm-hmm.

4 QUESTION: -- where did Congress clearly say so?

5 MR. MAUS: We believe that Congress clearly said
6 so by making it alienable, and again I don't want to pound
7 on the Nelson Act, but that's what -- what made alienable,
8 and then looking at the logic of Goudy v. Meath and the
9 Yakima case, which basically are allowing for the
10 taxability of the land because it's alienable, the tax is
11 on the land itself, and I think that Congress has
12 specifically acted in the area of lands and addressed
13 that, you know, both in the Nelson Act and then later, of
14 course, in the Indian Reorganization Act.

15 And if you look at the intent of Congress -- and
16 clearly we have to put up unmistakably clear intent, and
17 that's a burden we accept, and we do think that's the
18 correct burden of proof here.

19 We think that is all met when you add up, you
20 know, the way it's put into fee, okay, the logic of the
21 alienability of the Yakima and Goudy decisions -- Congress
22 clearly made it taxable -- and if you look at, you know,
23 the allotted lands, you know, they made them taxable after
24 25 years as opposed to immediately. You know, that was
25 part of the General Allotment Act.

1 So clearly, you know, you could look at that and
2 say, well, in the case we have here, would it make sense
3 to tax people that reacquired lands that were originally
4 allotted to them and not tax lands that were put open in
5 the general market? I mean, that kind of logic doesn't
6 make much sense.

7 QUESTION: And of course, then they have the
8 trust thing you were talking about. So, why do they need
9 the trust thing if they're not taxable in -- I mean, you
10 know, if it isn't nontaxable once they reacquire it.

11 MR. MAUS: That's correct, and obviously it --
12 well, there's been a history of abuse of getting it into
13 trust, and so one could look at it and say, well, you
14 could always apply for trust. Well, what are you going to
15 do to stop that? Well, we don't know what will happen in
16 the future.

17 More recently the Department of Interior has
18 changed some rules which now allow for 30 days after they
19 decide to put land into trust for counties or local units
20 the Government to appeal under the Administrative
21 Procedures Act if we feel that the decision was not
22 appropriate, so we do have that ability now.

23 QUESTION: Mr. Maus -- I'm not sure we have to
24 reach it, but maybe we do. I'm really troubled by the
25 Indian Nonintercourse Act. Suppose the tribe -- suppose

1 this is land that was never tribal land? It was never
2 allotted. It was never opened to homesteading or
3 anything. It was just never Indian land.

4 And the tribe, as a tribe, buys this parcel of
5 land that used to be owned by the Duke of Albemarle.

6 MR. MAUS: Okay. Sure.

7 QUESTION: It was never tribal land. Why isn't
8 that land covered by the Indian Nonintercourse Act, so
9 that once the tribe has it, the tribe cannot again resell
10 it without a treaty or authority from Congress?

11 MR. MAUS: So in your scenario you'd be talking
12 about land that was acquired for the first time outside
13 the reservation?

14 QUESTION: Yes. Yes.

15 MR. MAUS: Okay. I think the Reorganization Act
16 deals with land acquisitions by the tribe in general,
17 either reacquired or acquired, and I think that those same
18 provisions would apply, and it could certainly be argued
19 that --

20 QUESTION: What provisions, the provisions
21 that --

22 MR. MAUS: The trust provisions under 465.

23 QUESTION: And which imply, according to you,
24 that if they are not put into trust they are taxable,
25 right?

1 MR. MAUS: Correct. Now --

2 QUESTION: And then you would reason, and since

3 they are taxable, you'd sort of go backwards from your

4 reasoning for the purposes of this case, you're saying.

5 MR. MAUS: Sure.

6 QUESTION: Since they're taxable, they must be

7 alienable, just as for this case --

8 MR. MAUS: Sure.

9 QUESTION: -- you'd say if they're alienable

10 they must be taxable. That's how you get there?

11 MR. MAUS: Well, I --

12 QUESTION: That's ingenious.

13 (Laughter.)

14 MR. MAUS: Well, I don't know about that, but

15 the alienability results in taxability absent treaty or

16 statutory exceptions.

17 Now, there may be some treaties that make land

18 that might be alienable. Maybe you can sell it, but it's

19 not necessarily taxable because it specifically says it's

20 not taxable.

21 And also, in addition to that, you know, the

22 tribe also has the ability to apply for State exemptions

23 without even going through the trust process, maybe to

24 keep their land alienable, and maybe it's exempt for

25 some -- if it's for some governmental type purpose that's

1 viewed by the States as being exempt.

2 For example, maybe a highway maintenance garage,
3 or similar, like, you know, local units of government are
4 exempt from taxation, just like cities are exempt from
5 county taxation unless they have investment type
6 properties. Those would probably be found taxable.

7 So there is a difference there.

8 I would submit to the Court that deciding this
9 decision to say alienability results in taxability absent
10 treaty or statutory exceptions to the contrary would
11 establish a bright line rule that could be applied. It
12 doesn't go too far, in that if there are individual
13 treaties out there, or individual statutes with some of
14 the various tribes or States that prohibit this, that they
15 couldn't be taxed, and I think that would be fair for all.

16 I think that this would certainly allow the --
17 both units of government input in the decision-making
18 process which it appears clear that Congress has given
19 through the trust process, to allow the local units of
20 government at least to have their say.

21 Second, you know that as a -- or another point,
22 as I also indicated, they have the ability to apply for
23 State exemptions. I mean, that's part of the overall rule
24 too, and if they're appropriate they can do that.

25 An adverse ruling in this case to the county and

1 other local units of government could have an adverse
2 ruling, or an adverse effect on local units of government
3 in particular by shrinking what has been heretofore a tax
4 base that encompassed these lands by taking, you know,
5 these off in a large fashion or in a regular fashion,
6 which --

7 QUESTION: But you told us that's in fact what
8 happened. It's only a year-and-a-half we're talking about
9 because the Government did put this land back in trust,
10 and -- which made it exempt, so the argument that the
11 counties are losing all this revenue, it wouldn't have had
12 the opportunity to get any if the Government had moved
13 fast enough on the 465, right?

14 MR. MAUS: Well, I would submit to the Court
15 that if we're looking at the future, you know, the trust
16 process has changed, and will the tribes be able to get
17 land into trust in the future the way they have in the
18 past? Basically, throughout the history of the county
19 we've opposed them all and never been successful, but now
20 there's a new appeal process and we haven't -- we haven't
21 tried that yet, and that may result in the slowing down of
22 lands put into trust, or at least give us some input, or
23 more input into that process.

24 You know, is it going to hurt the tax base, for
25 example? For example, putting -- one of these parcels

1 involved a casino. You know, is taking a casino and
2 putting it into trust going to hurt the county's tax --
3 taxing authority, or will it hurt the county?

4 Because you know, obviously when you have larger
5 parcels, or larger investments, you're certainly talking
6 about more Government services that are needed for those
7 parcels.

8 QUESTION: How close is Cass County to the Twin
9 Cities?

10 MR. MAUS: Cass County is about 200 miles north.
11 It's actually in the north central part of the State of
12 Minnesota. It's a large county, as counties go. It's
13 probably close to the size of Rhode Island, out here, and
14 the portion where the reservation is located certainly in
15 there is a large lake. That's probably 20 miles by 20
16 miles, with a lot of bays. It's kind of shaped like a
17 maple leaf.

18 QUESTION: Is that Leech Lake?

19 MR. MAUS: Yes, and then there's some other
20 large lakes around it, and the economy up there, just so
21 you've got a picture of that, is basically one of tourism.
22 That's the number 1 business up there, and there are a lot
23 of parcels of land up there, obviously, that are owned by
24 nonresidents that come up there and they have seasonal
25 cabins up there, and reside there for the summer, and so

1 the increase of services is obviously, I suppose, almost
2 three or fourfold in the summer than it is during the
3 regular part of the year.

4 QUESTION: Can I ask you if -- you've called our
5 attention to section 465, about the land going into trust.
6 Did the courts below give any attention to that section,
7 or has it been briefed at all? Or did it just come out of
8 the blue this morning?

9 MR. MAUS: Well, we certainly raised it all
10 along, and I would say in the Eighth Circuit court that
11 the decision basically gave us the -- you know, the
12 allotted lands similar to what was in Yakima -- didn't --
13 the holding was there basically didn't find for the
14 pinelands and the homestead lands, saying that they
15 believed that this Court relied on the Burke Act.

16 QUESTION: The proviso --

17 MR. MAUS: -- to find that language, and it's
18 our position that court, you know, looked at Goudy v.
19 Meath and in fact didn't find the Burke Act necessary but
20 did say that it made it more clear.

21 I guess if something's clear they make it more
22 clear, so it had to have been clear all along, so --

23 QUESTION: Do you wish to reserve the balance of
24 your time?

25 MR. MAUS: Yes. Thank you.

1 QUESTION: Very well.

2 Mr. Schoessler, we'll hear from you.

3 ORAL ARGUMENT OF JAMES J. SCHOESSLER

4 ON BEHALF OF THE RESPONDENT

5 MR. SCHOESSLER: Mr. Chief Justice, and may it
6 please the Court:

7 As a preliminary matter I'd like to address a
8 question that was raised about the Indian Reorganization
9 Act and 25 U.S.C. section 465, which is the section that
10 allows the United States Government to take land into
11 trust for Indian tribes.

12 I think there was an implication made to the
13 Court that that section somehow granted taxing
14 jurisdiction to States and counties over land by negative
15 implication.

16 QUESTION: Well, what it says, the negative --
17 it does expressly say that if the Secretary does acquire
18 the land in trust for the Indians, the land shall
19 therefore be tax-exempt, which one assumes that before it
20 was acquired it was not tax-exempt. That's the argument,
21 as I understand it.

22 MR. SCHOESSLER: Yes.

23 QUESTION: Yes.

24 MR. SCHOESSLER: It's basically a negative
25 implication, to which I think two responses are required.

1 The first one probably is that that kind of a
2 negative implication would be completely antithetical to
3 the philosophy that was behind the adoption of the Indian
4 Reorganization Act and the promotion of tribal
5 independence and self-sufficiency that forms the basis of
6 the act and the rebuilding of the reservation land base
7 that, at least partially, that act was all about.

8 The second thing I would point out is that, in
9 fact, this Court has addressed the negative implication
10 question in the past in a decision that was issued in
11 1973, Mescalero Apache Tribe v. Jones.

12 The Court had an opportunity to look at the
13 legislative history and the wording of the trust
14 provisions of the Indian Reorganization Act and the Court
15 there specifically said that there was nothing in that act
16 or its history which indicated an intent on the part of
17 Congress to remove the traditional tax exemptions that
18 tribes had within reservations.

19 QUESTION: Well, but that leaves open the
20 question, doesn't it, because the question here is whether
21 this particular tax exemption in fact would -- is of the
22 traditional variety, or whether, because of the history
23 traced in Yakima, it's in a different position.

24 MR. SCHOESSLER: Yes, Your Honor --

25 QUESTION: So I think what the Court said really

1 leaves the question right where we find it.

2 MR. SCHOESSLER: The point that I was simply
3 making is that there is no authority within the Indian
4 Reorganization Act and section 465 to find a grant of
5 jurisdiction, even by negative implication to counties or
6 States to tax tribal lands.

7 QUESTION: That may be. I think -- I thought
8 the point was simply that it confirms a conclusion that we
9 might reach on other ground.

10 MR. SCHOESSLER: It does bring up, I think, what
11 the basic point of this case is anyway, and the basic rule
12 of law that should govern this case. It's a rule of law
13 that even the county agrees with. It's not disputed. It
14 was cited as authoritative by the county, and it's well-
15 known to this Court. It's the unmistakably clear intent
16 rule, what's called the per se rule, against taxation of
17 Indians and tribes in Indian country.

18 QUESTION: The trouble is we say that on the one
19 hand and we also have language very similar to that. That
20 is, that it's almost irrefutable implication that where
21 there is alienability there is taxability. You've also
22 said something along those lines, and these two absolutes
23 seem to be clashing head on in the present case.

24 MR. SCHOESSLER: Your Honor, I would suggest
25 that the unmistakably clear intent rule, or the per se

1 rule, if you will, has a long and honorable history in
2 this country's jurisprudence. It's about 150 years old.
3 It has been --

4 QUESTION: Well, but Goudy v. Meath also has a
5 long and, I suspect, equally honorable -- and it seems to
6 me if Goudy v. Meath controls in this case, you lose.
7 Maybe you can see a way to distinguish it. I can't.

8 MR. SCHOESSLER: Give me an opportunity to do
9 that now, Your Honor.

10 QUESTION: By all means, yes. Yes.

11 MR. SCHOESSLER: I would like to talk about
12 Goudy v. Meath --

13 QUESTION: Yes.

14 MR. SCHOESSLER: -- because, after all, it is
15 probably the foundation of the county's argument here.
16 It's the case which the county asserts set forth an
17 alienability equals taxability rule, and I'd like to make
18 a few observations about that case.

19 Number 1, the unmistakably clear intent rule was
20 even at that time a fairly longstanding principle in the
21 law going back to the Kansas Indians and probably Russo v.
22 Georgia for that matter, so the Goudy court was well aware
23 of that principle.

24 The Goudy opinion, it seems to us just on the
25 face of it, is a somewhat odd decision on which to base a

1 fairly major shift from that per se rule against taxation.
2 The opinion itself was only two pages long. There was a
3 one-page statement of facts and a less-than-one-page
4 opinion by Justice Brewer.

5 The opinion does not examine in detail prior
6 Indian law precedent relating to jurisdictional matters.
7 The opinion does not seem to indicate that new Indian law
8 ground is being plowed, or is intended to be plowed in
9 that short opinion, and there's no indication, it seems to
10 us, that the Court is clearly establishing a new generic
11 rule of law that says alienability equals taxability.

12 QUESTION: Was the Indian Nonintercourse Act in
13 effect, or its predecessor, at the time of Goudy?

14 MR. SCHOESSLER: Yes, it was, Your Honor.

15 QUESTION: And what are we to make of that
16 nonintercourse act as part and parcel of --

17 MR. SCHOESSLER: I think the Court in Goudy did
18 not address or consider the Indian Nonintercourse Act and
19 I think it was for this reason, and it's probably I think
20 the most critical factor in Goudy and perhaps one of the
21 more misunderstood factors in Goudy, and that is the fact
22 that the Goudy court treated the plaintiff in that case,
23 James Goudy, not as an Indian but as a non-Indian citizen.

24 It was stipulated to in that case that Goudy was
25 to be treated as a non-Indian citizen. That was referred

1 to by the Court and I think it was terribly important to
2 the decision in that case. It was terribly important
3 because it reversed presumptions.

4 As a non-Indian citizen Goudy was presumed
5 already to be subject to State law unless he could show an
6 express Federal exemption from that law. If he were
7 treated as an Indian, he would have been presumed
8 protected from State jurisdiction unless the county could
9 have shown an unmistakably clear delegation of authority
10 over him.

11 What the Goudy court did is rule on the
12 exemption question. It ruled that James Goudy could not
13 demonstrate an unmistakably clear exemption from the
14 taxation that was presumed valid over him as a non-Indian
15 citizen.

16 The court did not decide and declare that the
17 alienability of his land provided the jurisdiction over
18 him. That jurisdiction already existed because he was a
19 non-Indian citizen within the boundaries of the State.

20 QUESTION: If we did distinguish Goudy along the
21 lines you suggest, or said it doesn't really apply any
22 more, what would prevent an Indian tribe from buying 5
23 acres of downtown Minneapolis and setting up some hotels,
24 restaurants, and various other things and saying, all
25 right, yes, they're casinos, and saying we're immune from

1 taxation?

2 MR. SCHOESSLER: Then I think, Your Honor, you
3 have the on-reservation-off-reservation --

4 QUESTION: Yes, but I mean, you've now -- where
5 did that come from? I mean, why suddenly is it so
6 inherently absolutely clear that Congress wanted to permit
7 Minneapolis to tax the casino owned by the tribe but not
8 indisputably absolutely clear that Congress wanted Cass
9 County to tax the five alienable acres owned by the tribe
10 on the reservation? I --

11 MR. SCHOESSLER: Your Honor, to answer that I
12 think you have to go back basically to the foundations of
13 the country and the beginning of the per se rule against
14 taxation of Indians --

15 QUESTION: I see where you're --

16 MR. SCHOESSLER: Indian reservations.

17 QUESTION: I see where you're going, so let me
18 then, ask you, is it, although in this case quite clear
19 what's on a reservation and what isn't on a reservation,
20 it seems to me we've had quite a few cases where that's
21 not at all clear, and how will we manage that kind of
22 distinction, which is another one you tried to draw, where
23 we have Indian tribes in Alaska or other places where
24 there is a lot of dispute as to what the boundaries of the
25 reservation are?

1 MR. SCHOESSLER: That kind of a distinction goes
2 far beyond the taxation questions in this case, and
3 frankly it's always going to be with us in the context of
4 the --

5 QUESTION: It's not going to be with us if the
6 rule is alienability means taxability.

7 MR. SCHOESSLER: If the rule turns out to be
8 alienability equals taxability, what has been said
9 essentially is that the only land or property on
10 reservations that is exempt from State jurisdiction is
11 trust property, property actually owned by the United
12 States in trust for individual Indians or tribes. That --
13 excuse me.

14 QUESTION: You don't rely on the Indian
15 Nonintercourse Act?

16 I mean, the argument -- I thought that both you
17 and the United States made the argument that that in fact
18 renders everything held by the tribe not freely alienable.

19 MR. SCHOESSLER: Your Honor, we certainly do
20 argue that, but our most serious concern is the
21 alienability equals taxability rule. Certainly the
22 nonintercourse act we believe would prevent the lands from
23 being taxed if there was such a rule in this country's
24 jurisprudence, so we seriously argue about the validity of
25 the rule itself, and that's our primary concern.

1 QUESTION: But the broad statement you just made
2 that if we adopted that rule all Indian land would be
3 taxable except trust land is not true if we accept your
4 INA argument, right?

5 MR. SCHOESSLER: Yes, that's correct.

6 The other point that I would make about that is
7 by adopting such a rule you have essentially de facto
8 disestablished reservations, because the rule of Indian
9 country generally is, as you well know, is that State
10 jurisdiction is limited in Indian country. It's limited
11 over both Indians and tribes within Indian country.

12 QUESTION: Let me go back a minute,
13 Mr. Schoessler, to your comment about the Indian
14 Nonintercourse Act. It seems to me if we held that to
15 mean what you and the Government say it should mean here
16 that a tribe today or tomorrow seeking to convey land in a
17 business transaction is up against a very real burden.
18 How would a tribe that wished to convey some land that it
19 owned today go about it if the Indian Intercourse Act
20 means what you say it means?

21 MR. SCHOESSLER: Mr. Chief Justice, you're
22 correct, it does, in fact, impose a burden on the
23 potential transfer of lands that are purchased in fee by
24 Indian tribes. We understand that, and we would hope that
25 if not now, in the future, rules for allowing such

1 transfer under perhaps more flexible circumstances than
2 exist now for allowing transfers of trust lands would be
3 developed and the tribes could obtain that permission.

4 QUESTION: So that would --

5 MR. SCHOESSLER: We understand it's a two-edged
6 sword.

7 QUESTION: And that would take an amendment by
8 Congress, I take it --

9 MR. SCHOESSLER: Yes, it would.

10 QUESTION: -- of the Indian Intercourse Act.

11 MR. SCHOESSLER: Yes, Your Honor.

12 QUESTION: Gee, I don't think it's a -- I mean,
13 it's a sword on the one side and a pen-knife on the other.
14 I think it's a good deal for the tribes. They just ought
15 to buy up all land in sight and they have a great economic
16 advantage over all other landholders.

17 Maybe they don't have to pay taxes and what they
18 ought to do is acquire vast, you know, acreage and then
19 lease it out to other people, which can be done very
20 profitably because the scheme just exempts the real estate
21 from taxes. It's really a wonderful opportunity for the
22 tribes.

23 MR. SCHOESSLER: Your Honor, two points on that.
24 Number 1, we still have to maintain the distinction
25 between on-reservation and off-reservation. It certainly

1 would not allow the tribes to go off-reservation, purchase
2 land --

3 QUESTION: Why not?

4 MR. SCHOESSLER: -- and then essentially say
5 they're not taxable.

6 QUESTION: Why not?

7 QUESTION: Why not? There's nothing in the
8 statute that suggests there's any distinction between
9 reservation or nonreservation lands.

10 MR. SCHOESSLER: Your Honor, I would suggest
11 that the nonintercourse act would prevent conveyance of
12 lands that were purchased off-reservation but not
13 necessarily the taxability of those lands.

14 QUESTION: Well, why is that?

15 MR. SCHOESSLER: I would base it actually on the
16 plain wording of the act. The wording of the act does not
17 talk about taxation. The wording of the act talks about
18 conveyance, and I think there is nothing that is
19 necessarily mutually exclusive or improper about a piece
20 of land being purchased off-reservation that the United
21 States would not allow to be conveyed without its approval
22 as differentiated from land being purchased off the
23 reservation that might be taxable.

24 QUESTION: But if you're right about the
25 intercourse act, it isn't just a question of the Secretary

1 of Interior approving a conveyance. It's a -- it has to
2 be done either pursuant to treaty or convention, so that
3 some administrative approval in the Interior Department
4 isn't going to help you.

5 MR. SCHOESSLER: Your Honor, unless Congress
6 passed a procedure which allowed that to happen.

7 QUESTION: Right. Right.

8 MR. SCHOESSLER: Which is what we presume would
9 occur in that kind of instance.

10 QUESTION: Mr. --

11 QUESTION: -- a couple of hundred years? I
12 mean, it's been around since 1790. Isn't that when the
13 thing first came up? I don't know why they're going to
14 suddenly pass a statute.

15 MR. SCHOESSLER: It is -- Your Honor, it's only
16 been very recently that tribes have been in any sort of
17 position to attempt to rebuild their tribal land bases on
18 their own reservations.

19 QUESTION: Mr. --

20 QUESTION: Why wouldn't that act apply to the
21 Indian allottees, because one of the curiosities about the
22 Eighth Circuit decision is the land that was allotted to
23 homesteads then reverts to the tribe and becomes
24 nontaxable, but the land that was allotted to Indians
25 doesn't acquire that status when it goes back to the

1 tribe, so what would a rational legislature be thinking
2 about saying if the land went to a non-Indian then it
3 immediately reacquires its tax-exempt status, but if it
4 went to an Indian, then it stays subject to tax?

5 MR. SCHOESSLER: Your Honor, you're referring to
6 the Indian Nonintercourse Act implications?

7 QUESTION: Yes. Why doesn't that cover the --
8 why wouldn't that take care of the whole case, not just
9 the parcels that went to homesteaders?

10 MR. SCHOESSLER: If my recollection is correct
11 and it -- I believe it is, the original versions of the
12 Indian Nonintercourse Act included language relating to
13 individual Indians, the last version did not, so the
14 nonintercourse act as it reads now only applies to tribes,
15 to tribal lands, not individual lands.

16 QUESTION: But you know, ironically, if you read
17 it literally I think it would have foreclosed a transfer
18 from the tribe to the United States in trust for the
19 tribe.

20 MR. SCHOESSLER: Your Honor, except for the
21 proposition that Congress established a procedure to allow
22 that to happen.

23 QUESTION: But it hadn't. I mean, nothing in
24 the statute authorized that, as I read it. Maybe I'm
25 missing something. Nothing in the nonintercourse act

1 authorizes conveyances by Indian tribes to the United
2 States in trust for the tribe.

3 MR. SCHOESSLER: That is correct, Your Honor.
4 That was authorized later by act of Congress when it
5 passed the Indian Non -- or the Indian Reorganization Act
6 and provided for repurchases of tribal land base --

7 QUESTION: Not from the tribes necessarily. It
8 provided that the United States could acquire land in
9 trust for the tribes, but they could acquire it from
10 private -- and indeed, I think that's mainly what was
11 envisioned, acquiring it from private sources so it
12 wouldn't collide with the nonintercourse act at all.

13 MR. SCHOESSLER: You're correct, Your Honor, in
14 terms of -- in terms of the purchases of land, as opposed
15 to the conveyancing away of land.

16 QUESTION: Right.

17 MR. SCHOESSLER: The purchase of land has really
18 only become an issue probably in the last couple of
19 decades as tribal governments have built themselves up
20 enough to actually consider being able to rebuild some of
21 their tribal land bases.

22 Those land bases were devastated during the
23 allotment era. The Leech Lake Reservation is an example
24 of that, where over 90 percent of the land, 95 percent of
25 the land was lost to Indians and the tribe during the

1 allotment era.

2 The whole thrust of current -- of the current
3 attempts are for the tribes to attempt to rebuild some of
4 their reservations that were taken away during the
5 allotment era and it makes a great deal of difference to
6 them and it's very important to the tribes for several
7 reasons, not only for economic development and self-
8 sufficiency, but --

9 QUESTION: Well, they weren't taken away, they
10 were conveyed away, weren't they?

11 MR. SCHOESSLER: They were removed from tribal
12 ownership, I --

13 QUESTION: Yes.

14 MR. SCHOESSLER: -- suppose that's a more
15 correct --

16 QUESTION: By voluntary transaction.

17 MR. SCHOESSLER: Or by act of Congress.

18 But the last point that I was going to make is
19 that it's also important for the tribes to rebuild these
20 land bases because it is becoming increasingly apparent
21 that much of the jurisdiction that tribes have as semi-
22 sovereigns is being related to the land ownership that
23 they have within their reservations.

24 So it makes a great deal of difference, both
25 economically and in terms of self-government and in terms

1 of the sovereign jurisdiction that they can exert, that
2 lands within the reservations be rebuilt and that they be
3 reacquired by the tribes, and that's actually one of the
4 reasons we're here, is because the tribes are starting to
5 do that and the counties and States are objecting to that.

6 QUESTION: If I understand it, there is an out,
7 which you wouldn't like, but it prevents downtown
8 Minneapolis from becoming inalienable, and that is that
9 the Indian Nonintercourse Act only applies to lands that
10 have not been sold in fee simple and thereby become
11 alienable, but if the tribe reacquires land like that,
12 well, it remains alienable, and that kind of
13 interpretation applies on-reservation and off-reservation,
14 et cetera.

15 If you accept that, you don't get into this
16 problem of downtown Minneapolis, but of course, then, if
17 you also accept taxation follows alienability, it means
18 that this land would be taxable.

19 That's a long question. I'm sorry.

20 MR. SCHOESSLER: Your Honor, I would simply
21 suggest that if that kind of thing is read into the Indian
22 Nonintercourse Act, one could just as easily read into the
23 act that it applies only to Indian country and reservation
24 lands, and if we're reading words into the act that would
25 be a more acceptable way of doing it.

1 QUESTION: Thank you, Mr. Schoessler.

2 Ms. McDowell, we'll hear from you.

3 ORAL ARGUMENT OF BARBARA B. McDOWELL

4 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

5 SUPPORTING THE RESPONDENT

6 MS. McDOWELL: Mr. Chief Justice, and may it
7 please the Court:

8 QUESTION: Ms. McDowell --

9 MS. McDOWELL: Yes.

10 QUESTION: -- may I ask you, not necessarily
11 now, but at some point during your argument, to comment on
12 the argument that Mr. Maus made, and I understood it to go
13 basically like this.

14 He accepts the unmistakability doctrine. He
15 then says, look what you've done so far, look what you've
16 held so far. You've held that allotment lands that
17 ultimately are reconveyed, or ultimately end up at the
18 present time in the hands of an Indian or of a tribe are
19 taxable.

20 If those lands are taxable; how could you
21 possibly attribute to Congress an intent not to provide
22 the like treatment to lands that come back -- that come to
23 the tribe or the Indian after having been through the
24 pinelands conveyance process, or the process in --
25 pursuant to the Homestead Act?

1 It's an a fortiori kind of argument, and at some
2 point will you comment on that?

3 MS. McDOWELL: Yes. We would initially take the
4 position that there's been no statement here or clear
5 expression of congressional intent to tax --

6 QUESTION: Well, he -- but I think we accept,
7 and I mean I think the premise of his argument was, the
8 statement does not have to have an express reference to
9 the particular land or category of land. It's simply got
10 to be unmistakably clear.

11 And if it's unmistakably clear for allotment
12 lands, it's got to be -- you've got to have the same rule
13 for nonallotment lands that would convey out. I mean, it
14 would just be bizarre otherwise, and that's where the
15 unmistakability comes from, as I understand it.

16 MS. McDOWELL: We do not believe it's
17 unmistakably clear that Congress intended to tax even the
18 allotment lands in the hands of the tribe. There's only a
19 reference in the General Allotment Act to taxation of
20 lands in the hands of individual Indians. We would
21 submit, given the governmental status of a tribe, that
22 Congress would have needed to make a clearer statement of
23 an intent to --

24 QUESTION: Didn't we say that in Yakima? Didn't
25 we equate land in the hands of the tribes and of the

1 Indians?

2 MS. McDOWELL: The Court didn't draw the
3 distinction in Yakima. However, the distinction is not
4 based --

5 QUESTION: But it did expressly refer -- it
6 expressly referred to both, didn't it?

7 MS. McDOWELL: It expressly referred to the fact
8 that there were tribally owned lands there, as well.
9 However, neither --

10 QUESTION: Yes, which were an issue, as I
11 understand it.

12 MS. McDOWELL: Yes, that's correct.

13 QUESTION: All right. If you take that as your
14 starting place, that allotment lands which by whatever
15 process end up back in the hands of the tribe, or end up
16 in the hands of the tribe are going to be taxable, isn't
17 it a pretty strong argument that lands that went out by
18 way of the pinelands or the Homestead Act kind of
19 conveyances have got to be in the same position, or you're
20 attributing a certain sort of bizarreness to Congress.

21 MS. McDOWELL: This Court's rule is that there
22 must be some sort of unmistakably clear expression of what
23 Congress intended, and it's impossible to tell here what
24 Congress would have intended about land that came back
25 into the possession of the tribe.

1 QUESTION: But once the Court has determined
2 that it is clear with respect to land that was allotted to
3 individual Indians, once the Court has made that
4 determination that that is clear, then why isn't it, as
5 Justice Souter says, equally clear that no rational
6 Congress could have envisioned a different treatment for
7 the land that went out not under allotments to individual
8 Indians?

9 What rational Congress would say, yeah, we meant
10 that if it was allotted to Indians, it's reacquired by the
11 tribe tax-free, but if it went out under the Homestead
12 Act, then the tribe has its exemption?

13 MS. McDOWELL: Congress obviously would have
14 understood at the time that there were many different tax
15 statuses that might have occurred with respect to the
16 homestead lands and the pinelands, depending on whether
17 and how they were actually acquired.

18 The lands, after all, were ceded by the tribe to
19 the United States. It was possible that the lands would
20 never be sold by the United States and thus would never
21 become taxable at all.

22 QUESTION: Yes, but we're talking about land
23 that was sold by the United States. That's what we've got
24 here and, as I understand, the object of those two
25 categories of conveyances were either settlement or

1 exploitation of natural resources, and certainly those are
2 two paradigm examples of land uses that Congress would
3 have assumed would be taxable in the normal course and
4 that, if anything, makes the a fortiori argument all the
5 stronger.

6 MS. McDOWELL: Well, Congress doubtless would
7 have assumed that they would be taxable in the hands of an
8 ordinary non-Indian individual or business taxpayer, but
9 we cannot conclude what Congress would have intended had
10 the lands been reacquired by a tribe within the boundaries
11 of an existing reservation.

12 Congress was legislating in 189 -- 89 at the
13 time of the Nelson Act and subsequently, in light of this
14 Court's decision, for example, in the New York Indians,
15 which squarely held that tribally owned fee lands were not
16 taxable to the tribe, so there was the background there
17 that suggests that we cannot conclude what Congress would
18 have intended back then with the --

19 QUESTION: Is it part of your submission that we
20 overlooked the significance of tribal ownership in the
21 Yakima case?

22 MS. McDOWELL: Yes, Your Honor. It wasn't
23 raised by the parties, by the United States, or focused on
24 by the Court. There are a couple of reasons why I think
25 that might have been the case. One is that there was a --

1 QUESTION: Why did we take the trouble to
2 comment that there were both tribal and nontribal lands,
3 then?

4 MS. McDOWELL: Oh, that was certainly part of
5 the factual background of the case, Your Honor. Then you
6 would --

7 QUESTION: Oh, but if it was an irrelevant
8 portion, we shouldn't have mentioned it. I mean, we've
9 just created a lot of difficulty by mentioning that. You
10 don't have to mention stuff that has nothing to do with
11 your decision.

12 MS. McDOWELL: The distinction was not drawn
13 perhaps because the focus of the tribe was on the parcels
14 that was owned by individuals. Those were the only
15 parcels on which the county had been attempting to
16 foreclose in Yakima.

17 Also, there was a special statute in Yakima that
18 applied to at least some of the tribally owned lands that
19 provided that they would not be entitled to any special
20 tax status by virtue of their ownership by the tribe that
21 suggested that in the Yakima situation the only protection
22 that the tribe might have would be the same status, same
23 protections as would be available to individual Indians.

24 QUESTION: Could you possibly just quickly say
25 what your view is on the question of, if you followed

1 Goudy and followed the rule, taxability follows
2 alienability, you'd have to get to the question, is this
3 alienable, and then we'd get to the nonintercourse act, et
4 cetera? What's your view?

5 MS. McDOWELL: These lands are not alienable.
6 Goudy is --

7 QUESTION: Is downtown Minneapolis alienable?

8 MS. McDOWELL: We would take the position that
9 the nonintercourse act was intended to apply only within
10 Indian country. Downtown Minneapolis is not Indian
11 country. This is consistent with the legislative history
12 of the 1834 act.

13 The question arose about section 465 and its
14 meaning. It's not a clear statement, obviously, of
15 congressional intent with respect to the taxable status of
16 tribally owned reservation lands.

17 It should be emphasized that 465 was designed to
18 allow the United States to take in trust both lands on the
19 reservation and lands off the reservation, lands that
20 clearly would have been taxable prior to their being taken
21 into trust.

22 QUESTION: Why is this a big problem? I mean,
23 the United States, who argues here on behalf of the
24 Indians, can obviously achieve what it wants to achieve
25 simply by taking these lands into trust, can't it?

1 MS. McDOWELL: That's correct, but there are
2 many tribes that have held lands for over a century now
3 that have not -- never been taken into trust and have
4 always been recognized to be exempt from tax.

5 QUESTION: Taken into trust?

6 QUESTION: But they're protected by -- those
7 lands aren't -- they're protected by the rule, aren't
8 they, of alienability equals taxability?

9 MS. McDOWELL: Well, traditionally those lands
10 have been understood to be protected by the fact of Indian
11 tax immunity, the absence of a clear statement, and the
12 fact that those lands were within an existing reservation,
13 the New York Indians being an example of that case.

14 Certainly it's hard to attribute to Congress an
15 unexpressed intent to overrule the New York Indians and
16 other cases of that kind when it passed section 465.

17 QUESTION: Was 465 the source of the authority
18 exercised in this case to acquire the -- these lands in
19 trust by the United States to hold in trust for the
20 Indians, for the tribes?

21 MS. McDOWELL: That's my understanding, yes.

22 QUESTION: You say in your brief that Yakima --
23 it's evident that it rested primarily on section 6. I
24 guess Justice Scalia can -- is best equipped to respond to
25 that, but I read his decision to say when section 5

1 rendered the lands alienable it also rendered them
2 assessable.

3 MS. McDOWELL: But the decision then goes on to
4 say that it took section 6 and the Burke Act proviso to
5 make that implication clear.

6 QUESTION: To make it more clear. It said,
7 reaffirmed, made it more clear, reaffirmed, but reaffirmed
8 sounds to me like it was confirming what was already --

9 MS. McDOWELL: I think it's important to look at
10 section 3 of the Court's opinion in Yakima, where the
11 Court actually starts applying the clear statement rule to
12 the actual two taxes at issue in that case and there, when
13 the Court decides that the ad valorem tax in Yakima is
14 permissible, it is because it constitutes, quote, taxation
15 of property within the meaning of section 6 of the General
16 Allotment Act and the Burke Act proviso.

17 QUESTION: But if everything rides on the Burke
18 Act, then why didn't that protect only the parcels where
19 there was premature patenting?

20 MS. McDOWELL: May I answer, Your Honor?

21 QUESTION: Yes, you may.

22 MS. McDOWELL: The Court looked back at
23 section 5 of the Burke Act, of the General Allotment Act,
24 rather, to determine that Congress' intent, as clearly
25 expressed in section 6, also referred back to section 5.

1 Thank you.

2 QUESTION: Thank you, Ms. McDowell.

3 Mr. Maus, do you have rebuttal?

4 MR. MAUS: Real briefly, Your Honor.

5 QUESTION: Good.

6 (Laughter.)

7 REBUTTAL ARGUMENT OF EARL EDWIN MAUS

8 ON BEHALF OF THE PETITIONER

9 MR. MAUS: A couple of things, I guess, one just
10 on the Burke Act, just to comment on that.

11 The Burke Act needed to say that the land given
12 and early fee patented was taxable, because if it hadn't
13 said that, I submit to the Court, there was still that
14 provision out there that had the 25-year trust period, and
15 that would have meant that the land would have become
16 alienable, not taxable to the -- at the end of that 25
17 years, so the Court had to -- I mean, the proviso needed
18 to say that for the early fee patenting. I think that
19 clears that one up, and -- hopefully.

20 Also, she -- you know, the U.S. referred briefly
21 to section 3 of the Yakima decision. Well, that dealt
22 with the excise tax, and we're not here about that today.
23 We're here on land, and I think the rest of the Court's
24 decision dealt solely with land, and those taxes are
25 certainly distinguishable from this.

1 And one final thing, the New York case that was
2 cited several times here, that involved the nonintercourse
3 act, but in that New York case there was never any act of
4 Congress to sell those lands. Those lands were aboriginal
5 lands that were just merely put on the tax roll, and so --

6 QUESTION: Weren't those lands that had never
7 been alienated before?

8 MR. MAUS: That's correct.

9 QUESTION: They'd been Indian territory from the
10 beginning.

11 MR. MAUS: That's correct, and it would be our
12 position that the nonintercourse act applies to lands that
13 have never been alienable. In other words, Congress has
14 never made them alienable and they've kept them just as
15 they were.

16 I have nothing further, unless there's further
17 questions.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Maus.
19 The case is submitted.

20 (Whereupon, at 12:08 p.m., the case in the
21 above-entitled matter was submitted.)
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25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

CASS COUNTY, MINNESOTA, ET AL., Petitioners v. LEECH LAKE BAND OF CHIPPEWA INDIANS

CASE NO: 97-174

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

BY Donna M. Federico

(REPORTER)