

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

CAPTION: ARIZONA DEPARTMENT OF REVENUE, Petitioner v.  
BLAZE CONSTRUCTION COMPANY, INC.

CASE NO: 97-1536 *P.2*

PLACE: Washington, D.C.

DATE: Tuesday, December 8, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARIZONA DEPARTMENT OF :

4 REVENUE, :

5 Petitioner :

6 v. the United States, : No. 97-1536

7 BLAZE CONSTRUCTION COMPANY, :

8 INC. :

9 - - - - -X

10 Washington, D.C.

11 Tuesday, December 8, 1998

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 11:08 a.m.

15 APPEARANCES:

16 PATRICK IRVINE, ESQ., Assistant Attorney General of  
17 Arizona, Phoenix, Arizona; on behalf of the  
18 Petitioner.

19 BETH S. BRINKMANN, ESQ., Assistant to the Solicitor  
20 General, Department of Justice, Washington, D.C.; for  
21 the United States, as amicus curiae, supporting the  
22 Petitioner.

23 BRUCE C. SMITH, ESQ., Scottsdale, Arizona; on behalf of  
24 the Respondent.

25

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

2 (11:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 97-1536, Arizona Department of Revenue v. the  
5 Blaze Construction Company.

6 Mr. Irvine.

7 ORAL ARGUMENT OF PATRICK IRVINE

8 ON BEHALF OF THE PETITIONER

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

11 This Court should adopt a categorical bright  
12 line rule that nontribal members who work as Federal  
13 contractors on Indian reservations are subject to  
14 nondiscriminatory State taxes unless Congress expressly  
15 provides otherwise. This rule will clarify existing law,  
16 recognize a uniform rule that applies throughout the  
17 country, and provide certainty and predictability to  
18 contractors, the Federal Government, and to States.

19 This rule is consistent with this Court's  
20 precedents regarding Federal contractors and will not  
21 require the Court to rule -- overrule any of its decisions  
22 concerning taxation of persons doing business with Indian  
23 tribes or tribal members.

24 This is the rule that the United States itself  
25 argues here should apply. If --

1 QUESTION: Let me ask you a question. There's  
2 something, legislation, called the Self-Determination Act  
3 under which, if I understand it correctly, an Indian tribe  
4 could opt to accept Federal money to build roads and  
5 projects like this using that money but itself  
6 administering the program.

7 Now, if the tribe had done so and had awarded  
8 the contract in question here, could -- could the State  
9 have been able to impose the tax then, do you think?

10 MR. IRVINE: No, Your Honor. Under the  
11 authority of the Ramah Navajo School Board case, if a  
12 contractor -- a nontribal member contractor deals directly  
13 with a tribal entity, then there is no State tax.

14 QUESTION: So, it was open to the tribe to  
15 protect itself had it wanted to do so --

16 MR. IRVINE: That's correct, Your Honor. None  
17 of the --

18 QUESTION: -- and its -- and its contractors.

19 MR. IRVINE: None of the contracts at issue were  
20 -- were taken over by tribes pursuant to self-  
21 determination, but each and every one of them could have  
22 been.

23 QUESTION: Thank you.

24 MR. IRVINE: In fact, if Congress decides that a  
25 different rule, a different preemption rule, should apply,

1 it can certainly enact one. It has the authority to  
2 provide that there is no State tax in almost any  
3 circumstance and certainly in -- in circumstances dealing  
4 with Indian reservations.

5 QUESTION: The -- the tax here amounts to quite  
6 a bit of money all told, doesn't it? How much is at  
7 stake?

8 MR. IRVINE: The assessment, including interest,  
9 was approximately \$1.2 million. The tax, as a percentage  
10 of the gross receipts for every contract, is 3.5 percent  
11 of the gross receipts.

12 QUESTION: And yet, in fact, the State has  
13 provided very little in the nature of services, I guess,  
14 in connection with this contractor.

15 MR. IRVINE: We don't argue that there are any  
16 direct services directly to these contracts or the  
17 particular geographic location. As we cite in the brief,  
18 the State has not ignored these reservations and does  
19 provide numerous general services to the reservations and,  
20 indeed, to Blaze both on and off the reservation. We have  
21 not argued that there have to be direct services.

22 And that's consistent with the rule that applies  
23 to any Federal contractor. Almost any Federal contract,  
24 whether it be on a military base or in a national forest,  
25 may involve little in the way of State services, and the

1 State may have very little authority to regulate the  
2 contract.

3 But Congress --

4 QUESTION: Well, but I thought that we had made  
5 a special inquiry into the extent the State has provided  
6 services when Indian sovereignty is at stake, as opposed  
7 to whether or not the State can just tax a Federal  
8 contractor without added complication of an Indian  
9 reservation.

10 MR. IRVINE: That's correct, Justice Kennedy.

11 QUESTION: In other words, the Cotton Petroleum  
12 case requires us to make this sort of inquiry.

13 MR. IRVINE: That's correct, Your Honor, but  
14 this issue of Federal contractors has never been addressed  
15 by the Court. The existence of the Federal Government as  
16 a party to the contract really changes the nature of the  
17 analysis because the Federal sovereign is such an  
18 overwhelming presence. The Federal Government does not  
19 need the courts to protect it from States. It hasn't  
20 hesitated to -- to sue States when it felt that the taxes  
21 were not -- not supported by the law.

22 The categorical test that we argue for would  
23 apply just to Federal contractors as it does with any  
24 Federal contractor throughout the country.

25 QUESTION: And -- and you would say the Cotton



1     Petroleum inquiry then is -- is not necessary when there's  
2     a Federal contractor involved?

3             MR. IRVINE: That's correct, Your Honor.

4             And if it -- if a contract still involved a  
5     contract with someone other than the Federal Government,  
6     the Court's analysis, the balancing test, the  
7     particularized inquiry would still be effective, though as  
8     we argue in our brief, the lower court misapplied that  
9     analysis as well just because it didn't take into account  
10    that tribal sovereignty, tribal interests are not really  
11    affected in any significant way when it's a contract  
12    between a nontribal member and a nonmember such as the  
13    United States itself.

14            QUESTION: What about the argument that it will  
15    reduce the total amount available for road building if  
16    some money has to be spent in paying State taxes, that  
17    that money that could be spared would otherwise be  
18    available to build more roads inside the reservation?

19            MR. IRVINE: Your Honor, I think the -- this  
20    Court has consistently held, both in the context of  
21    Federal contractors and even contracts on reservations,  
22    that the very fact that there may be economic effects are  
23    not sufficient to preempt the tax. In the case involving  
24    a Federal contractor, that's even more applicable. As  
25    this Court held in the United States v. New Mexico, even

1 if the cost is directly passed on to the Federal  
2 Government, that's not ground for preemption. In U.S. v.  
3 New Mexico, I believe it was a cost-plus contract, so  
4 there was no doubt that the cost was passed on to the  
5 Federal Government. Economic effects themselves are not  
6 sufficient to -- to preempt the tax.

7 As the United States points out in its brief,  
8 merely because there's a tax on the Federal contractor  
9 does not necessarily mean that there will be an impact on  
10 the -- the number -- the amount of roads built or the  
11 amount of work done because it will hinge on what the  
12 agency does, what Congress does in their appropriations.  
13 There's no evidence that Congress hasn't appropriated  
14 funds taking into account the full amount of the taxes and  
15 equally could reduce the appropriation if there's a less  
16 -- 5 percent less because of the tax.

17 So, the economic effects are a difficult  
18 standard to apply and this Court has generally rejected it  
19 in the Federal -- Federal contractor context, as well as  
20 tribal -- reservation transactions.

21 QUESTION: Are these contracts subject to  
22 Federal wage laws?

23 MR. IRVINE: I believe they would be. They are  
24 direct contracts with the Federal Government.

25 QUESTION: So, there may be no economic impact

1 at all if indeed the wages are -- happen to be set  
2 according to what the rest of the industry is doing in  
3 that area no matter -- and the rest of the -- and the rest  
4 of the industry is paying taxes if the market is operating  
5 properly anyway. This contract wouldn't necessarily be  
6 reduced by the amount of the tax.

7 MR. IRVINE: That's correct, Justice Scalia.

8 And, indeed, by looking at economic effects,  
9 that's always a difficult test to apply because it's very  
10 unpredictable. This is a tax which means that both the  
11 contractors and the Federal Government benefit by having  
12 certainty and predictability knowing when the contract is  
13 issued whether it's subject to tax, which is why we focus  
14 on who the contracting parties are as opposed to a more  
15 amorphous standard, which may very well apply in the  
16 context when tribal interests are affected but where the  
17 Federal sovereign is a party to the contract and can  
18 certainly protect itself from overreaching State taxes.  
19 Those considerations just aren't an issue.

20 There really is no reason to apply a different  
21 rule than the categorical bright line test for reservation  
22 transactions because the cases this Court has -- has  
23 decided involving reservation transactions that apply a  
24 different test have all involved effects on tribes and  
25 tribal members, contracts with tribes or tribal members,

1 costs that are directly passed on to tribal treasuries.  
2 The Court has repeatedly drawn the line, saying that  
3 protecting tribal sovereignty, tribal interest is really  
4 what the key is in -- in applying a different test.  
5 Indian sovereignty, as the Court has described, provides  
6 the backdrop against which the applicable treaties must be  
7 read.

8 Here tribal sovereignty is not endangered by a  
9 tax on a Federal contractor because if there is any  
10 danger, it's to the Federal Government which, as I've  
11 stated, can protect itself.

12 Merely because the cost is passed on to the  
13 Federal Government or even to a tribe is not sufficient in  
14 and of itself. There must be essentially the State  
15 reaching into the reservation and trying to regulate a  
16 transaction with a tribe. Applying State laws to tribal  
17 members on the reservation is what this Court has  
18 consistently sought to protect. It has not sought to  
19 protect nonmembers or the Federal Government from the  
20 reach of State laws anywhere within the State.

21 The Court has, over the past 150 years or so,  
22 tried to develop different analysis, the intergovernmental  
23 tax immunity doctrine that the Court discussed in detail  
24 in Cotton Petroleum, but the Court has come around to the  
25 idea that that is just too difficult. The standard should

1 be is the legal incidence of the tax on the Federal  
2 Government. If it is not, the tax should be sustained.  
3 If you try to look through the transaction, you do end up  
4 with a fairly free-wheeling balancing test which is  
5 difficult to apply certainly in advance, sometimes even at  
6 all.

7 Even if the Court doesn't apply a categorical  
8 test, as we've argued under the implied preemption  
9 analysis, the lower court erred because it didn't give  
10 sufficient weight to the State's interest in regulating  
11 activities throughout the State, including on  
12 reservations. In this case, State law does not -- is not  
13 imposed on any transaction involving a tribal member or a  
14 tribe. There's no impact on tribal sovereignty. Cotton  
15 Petroleum certainly held that State taxes are permissible  
16 if they do not directly and substantially affect tribal  
17 interests.

18 Other cases of this Court hold the same,  
19 particularly the tobacco cases -- excuse me -- where the  
20 Court has consistently found that the State has an  
21 interest in taxing sales to nonmembers of cigarette  
22 products and other products even though it has economic  
23 impact on the tribe, even though the tribe, indeed, is the  
24 seller. So, in those cases, the tribe or the tribal  
25 member is actually a party to the transaction, but the

1 Court has said that the State has an interest in taxing  
2 them.

3 The State has not looked at any specific  
4 services that are required in those tobacco cases. It  
5 sort of accepted the fact that nonmembers receive  
6 services. It hasn't required a direct connection with  
7 those -- with the taxed activities, and consistently  
8 applying those precedents leads to the line again that the  
9 Court will seek to protect taxes that directly impact on  
10 tribes but will not seek to protect nonmembers merely  
11 because they do business on reservations.

12 These transactions do take place within the  
13 State of Arizona, and that's the key element here. And  
14 just because they're on a reservation does not mean  
15 different rules should apply if tribal sovereignty is not  
16 implicated, and the Court has required that that really be  
17 the test.

18 QUESTION: What about the argument that  
19 sovereignty is implicated because you're steering -- the  
20 State by taxing the contractor, when the contract is with  
21 the United States, is steering the tribe's decision not to  
22 do the -- be the contracting party itself?

23 MR. IRVINE: That's a very indirect impact, Your  
24 Honor, and I think if -- every tax will have an effect on  
25 decision making. The absence of a tax will have an effect

1 on decision making. And if the change -- the effect on  
2 decision making is the test, it becomes almost impossible  
3 to apply.

4 In this case, the decisions are made by the  
5 Federal Government which has accepted tribal input, but  
6 ultimately the burden of the tax rests on the contractor  
7 which does business with the Federal Government which,  
8 under its own sovereign powers, has the right to make the  
9 decisions that it chooses to make. And so, there really  
10 is no direct or substantial effect on tribal decision  
11 making because the State is taxing parties that the tribe  
12 does not -- or that the contractor does not even do -- do  
13 business with.

14 And the Federal Government in this case, because  
15 of its own sovereignty, is not -- is the major party here.  
16 To the -- even under the implied preemption analysis, if  
17 there is a passing on of the tax to anyone, it's to the  
18 Federal Government. It's not the tribe. This Court's  
19 decisions upholding the tax -- the taxes on nonmembers  
20 would really govern here, and as I mentioned, the lower  
21 court just gave too little weight to the very fact that  
22 the State does have sovereign interests throughout the  
23 State, including on Indian reservations. The only  
24 limitation is when there is an impact on tribal  
25 sovereignty.

1           In this case, the contract takes place on a  
2 reservation, but the direct impact of the tax is on that  
3 contract between Blaze and the Federal Government. Any  
4 effects on tribal sovereignty are very indirect, and  
5 therefore, even under the implied preemption analysis,  
6 there should be no -- there should be no preemption here.

7           If the Court has no further questions, I will  
8 reserve the remainder of my time.

9           QUESTION: Very well, Mr. Irvine.

10          Ms. Brinkmann, we'll hear from you.

11          ORAL ARGUMENT OF BETH S. BRINKMANN

12          FOR THE UNITED STATES, AS AMICUS CURIAE,

13          SUPPORTING THE PETITIONER

14          MS. BRINKMANN: Mr. Chief Justice, and may it  
15 please the Court:

16          We believe that under United States v. New  
17 Mexico, respondent Blaze as the Federal contractor is  
18 subject to the nondiscriminatory State tax at issue here  
19 because Congress has not expressly acted to provide  
20 otherwise. The fact that the contracts involved building  
21 and maintenance of roads on Indian reservations should not  
22 alter that analysis.

23          The Blaze company's invocation of the Indian  
24 preemption doctrine is misplaced. That doctrine has been  
25 applied by this Court in cases where nontribal members



1 engage in direct commercial dealings with Indian tribes or  
2 members of tribes. But here, the nontribal members  
3 engaged in direct dealings with a Federal agency. Thus,  
4 the three primary concerns that trigger application of the  
5 Indian preemption doctrine are not present.

6 First, State taxes on Federal contractors will  
7 not unduly interfere with tribal sovereignty because the  
8 United States is the contracting party, not the tribe.  
9 The tribe's involvement in the making and performance of  
10 the contract is far less significant than if the tribe was  
11 a party to the contract.

12 Second, State taxes on Federal contractors have  
13 only an uncertain and indirect effect on a tribe's  
14 economic self-sufficiency because that effect depends on  
15 the United States' response to the State tax. The tribal  
16 treasury is not directly involved. The United States may  
17 choose not to pass the State tax on to the tribal entity.  
18 The United States may increase appropriations, or the  
19 United States may change the allocation of the funds.

20 QUESTION: Ms. Brinkmann, what if the tribe had  
21 elected under the Self-Determination Act to take the money  
22 and -- and award the contracts?

23 MS. BRINKMANN: We believe that the Indian  
24 preemption doctrine then would be applied, and there would  
25 be a balancing analysis under that because in that

1 situation, Your Honor, these concerns about direct  
2 relations with the tribe, tribal sovereignty, and economic  
3 self-sufficiency of the tribe would be at issue because  
4 the tribe would be a party to the contract.

5 With regard to the third major reason we think  
6 that the State taxes on Federal contracts don't call for  
7 the application of that doctrine, though, is because the  
8 core concerns about the regulation of direct relations  
9 with Indians is not present because the tribe is not a --  
10 a member to the contract. Those kinds of Federal  
11 concerns are found in the Indian Commerce Clause, the  
12 Federal Government's ability to regulate commerce directly  
13 with Indian tribes, and in statutes such as the Indian  
14 trader statutes and the Self-Determination Act statute,  
15 which Justice O'Connor asked about. The interests  
16 underlying those statutes would come into play if the  
17 Indian tribe were a direct party to the contract.

18 Also, regarding the economic self-sufficiency,  
19 as United States v. New Mexico makes clear, in a case  
20 where the United States is the contracting party, the  
21 United States has the authority to alter the imposition of  
22 that State tax by legislation. Here, of course, the tribe  
23 would not have that authority if they were the direct  
24 party to the contract. And as the Court made clear in the  
25 Montana v. Crow case and the Cotton Petroleum case, the

1 Indian preemption doctrine in those situations protects  
2 against extraordinarily high taxes, protects the tribe.

3 Respondent, nonetheless, invokes the Indian  
4 preemption doctrine based on purported interference with  
5 Federal interests, particularly the Self-Determination  
6 Act, which we were just discussing. As we discussed, that  
7 statute authorizes tribes to make the choice whether to  
8 take over Federal Government projects, enter into their  
9 own relationships with contractors.

10 But in response to your question, Justice  
11 Ginsburg, to my co-counsel, we believe there's nothing in  
12 that statute that suggests that it was intended to preempt  
13 all aspects of a State law that could somehow indirectly  
14 affect a tribe's decision whether to enter into a Self-  
15 Determination Act contract. Rather, that statute  
16 reinforces the fact that there is a distinction between a  
17 contract with the Federal Government and a contract with a  
18 tribe, reinforcing the fact that when there's a tribal  
19 contract and the contract is directly with the tribe,  
20 questions of tribal sovereignty and self-determination are  
21 at issue.

22 QUESTION: May I just ask something out of  
23 curiosity? I'm not familiar with the statute that Justice  
24 O'Connor cited. Does that statute provide for waiver of  
25 tribal sovereign immunity?

1 MS. BRINKMANN: No, it does not, Your Honor.

2 QUESTION: So that a contractor conceivably  
3 might say, well, I don't want to do business with you  
4 because I might not be able to collect.

5 MS. BRINKMANN: That may be, Your Honor. There  
6 were some provisions on -- in regulations also concerning  
7 requirements for liability insurance, for example, in some  
8 instances. Also though, you would have to take into other  
9 concerns about whether or not the contractor would engage  
10 in a relationship with the tribe and that way perhaps the  
11 tax instance that's at issue here would make a significant  
12 difference in --

13 QUESTION: How do we describe the State's  
14 interest in taxing? Simply because the reservation is  
15 within the sovereign borders of the State?

16 MS. BRINKMANN: Yes, Your Honor. The Court has  
17 made clear that that land is within the State and that the  
18 State would still have interest in taxing the land within  
19 its geographic boundaries, and we think under United  
20 States v. New Mexico as a Federal contractor, the Court  
21 has made clear that there is no bar to that tax unless  
22 Congress provides otherwise expressly.

23 QUESTION: And --

24 QUESTION: Well, Ms. Brinkmann, you say that it  
25 would have interest in taxing that land. Actually they're

1 taxing a transaction --

2 MS. BRINKMANN: Yes.

3 QUESTION: -- that took place on the land.

4 MS. BRINKMANN: I'm sorry. I misspoke.

5 Certainly, Your Honor, it's that transaction privilege  
6 tax. It's that relationship, that contract between the  
7 contractor and the United States.

8 QUESTION: And is this against the background of  
9 the fact that the State always provides certain services  
10 or, again, is it just this geographic location within the  
11 sovereign borders of the State?

12 MS. BRINKMANN: I think it's both, Your Honor.  
13 I mean, I think that the idea that it's within the  
14 geographic boundaries of the State calls into fact the  
15 question that a State provides services to the entire  
16 geographic entity. I think it's what the Court talked  
17 about in Cotton Petroleum, the general services that are  
18 -- anyone is entitled to in an organized community.

19 QUESTION: Well, certainly it wouldn't be open  
20 to me, say, if I live in Arlington, Virginia, to refuse to  
21 pay my property tax because they're not fixing a pothole  
22 in my road, would it?

23 MS. BRINKMANN: No, Your Honor. It certainly  
24 would not.

25 If there's nothing further, Your Honor, we

1 believe that the decision of the Arizona Court of Appeals  
2 should be reversed. Thank you.

3 QUESTION: Thank you, Ms. Brinkmann.

4 Mr. Smith, we'll hear from you.

5 ORAL ARGUMENT OF BRUCE C. SMITH

6 ON BEHALF OF THE RESPONDENT

7 MR. SMITH: Mr. Chief Justice, and may it please  
8 the Court:

9 In 1980, the State of Arizona came to this Court  
10 and admitted that it wanted to tax a nonmember use of BIA  
11 roads, and this Court in White Mountain v. Bracker told  
12 the State of Arizona, you cannot tax when a nonmember uses  
13 those same BIA roads.

14 Now the State is here to say when a nonmember is  
15 building those same BIA roads, we are entitled to tax it.  
16 Under the implied preemption analysis for Indian cases,  
17 this Court should affirm the decision of the Arizona Court  
18 of Appeals and hold that this tax is preempted.

19 The central issue in this case is, I believe,  
20 what test should this Court apply. Should it apply the  
21 United States v. New Mexico rule, or should it apply  
22 Indian preemption analysis?

23 There are several reasons why United States v.  
24 New Mexico simply does not work here. United States v.  
25 New Mexico is a decision of this Court based on the clash

1 of only two sovereigns, that is, State authority and  
2 Federal authority, and whether States can tax contractors  
3 with the Federal Government. That two-sovereign dispute  
4 is not at issue when you are dealing with Indian tribes.  
5 This Court has recognized on a number of occasions that  
6 Indian tribes and their relationship to States and the  
7 Federal Government is a unique one in our constitutional  
8 system.

9 And the other thing that is important to  
10 consider is that the agency here that is dealing with  
11 these Indian tribes is the BIA. It's not the Department  
12 of Energy or the old Atomic Energy Commission in United  
13 States v. New Mexico. We are dealing here with the Bureau  
14 of Indian Affairs, an agency whose sole obligation is to  
15 satisfy a trust obligation that it has toward Indian  
16 tribes.

17 The other important consideration here that is  
18 not present in United States v. New Mexico analysis --

19 QUESTION: Mr. Smith, I -- I suppose that the  
20 Government is speaking here for -- for the BIA, don't you  
21 think?

22 MR. SMITH: I would submit, Your Honor, that the  
23 Government is speaking on behalf of the BIA at the highest  
24 levels, but I think if you carefully read the Government's  
25 brief and you look at the record in this case, most

1 notably the testimony of Mr. Ward that is in the joint  
2 appendix and the full transcript that is an appendix to  
3 our appellate brief, you'll see that there are differences  
4 between what the Government says and what Mr. Ward said in  
5 his testimony. Mr. Ward recognized that one of my  
6 obligations is to do the most that we can on behalf of  
7 these tribes. The Government says, we -- there -- excuse  
8 me -- there is no interest that the tribes have once we  
9 have them contracted. That is simply not true in this  
10 case.

11 QUESTION: What was Mr. Ward's position in the  
12 Bureau of Indian Affairs?

13 MR. SMITH: Mr. Ward was the contracting officer  
14 for all of the Navajo contracts that are at issue in this  
15 case. Mr. Ward put the contracts out for bid. He  
16 reviewed the contracts. He went to the Federal Government  
17 and got a comparison bid to make sure that the bids were  
18 in line, and he ultimately awarded the contracts. The  
19 record shows that he signed all of these contracts.

20 QUESTION: And he himself is a Federal employee,  
21 I take it.

22 MR. SMITH: He himself is a Federal employee.  
23 Mr. --

24 QUESTION: Of the Bureau of Indian Affairs?

25 MR. SMITH: Yes, that's true.



1                   And now, the Government's position here is,  
2 well, this is not going to interfere in tribal  
3 sovereignty. I believe that it will interfere in tribal  
4 sovereignty because if this Court upholds Arizona's taxes,  
5 what it's going to do is it's going to send a message  
6 maybe not to the people down the street who are making  
7 broad policy statements, but it is going to interfere with  
8 the way Mr. Ward will do his job tomorrow and the way in  
9 which the Navajos, the Gila River reservations, and the  
10 other tribes interact with Mr. Ward. Mr. Ward will now  
11 have to go to these tribes and say, if you want a hundred  
12 percent of your Federal dollars under these contracts, you  
13 should do the contracts yourself, but if you can get by  
14 with 95 percent of the budget for your contracts, then we  
15 can do that. That is fulfilling the trust obligation, and  
16 -- and under the contracts that were at issue in this  
17 case, that was his regulatory obligation, to tell the  
18 tribes the financial impacts of these tribal self-  
19 determination decisions.

20                   This Court has repeatedly said --

21                   QUESTION: Well, certainly in White Mountain  
22 Apache Tribe, it was the tribe that entered into the  
23 contract with the logging company, was it not?

24                   MR.. SMITH: Yes, it was, Your Honor.

25                   QUESTION: And that isn't the case here. This

1 comes much closer to the New Mexico case, does it not?

2 MR. SMITH: I don't believe that it comes closer  
3 to the New Mexico case, Justice O'Connor, for this reason.  
4 Congress has given to tribes the right to make these what  
5 are called 638 decisions, the self-determination contract  
6 decision. Congress has said, when you decide to contract  
7 or when you decide not to contract, those are both equal  
8 self-determination decisions. You are -- we are not going  
9 to --

10 QUESTION: Well, the tribe could have opted  
11 under the act to ask for the money and do its own  
12 contracting.

13 MR. SMITH: Yes, it could have, Your Honor. But  
14 you must recognize the realities of our Indian tribes and  
15 their particular situations. Some tribes like the Navajo  
16 Nation may have expertise in an area, for example, road  
17 construction, and they may have the ability to contract.  
18 But the policy of Congress here is we're not going to  
19 prejudice you if there's a decision about perhaps building  
20 a -- a jail for the tribe or building a clinic if you  
21 don't have the expertise in that area. You should get the  
22 same amount of money. We're not going to interfere, and  
23 Congress has specifically told the Government in 1994 when  
24 it amended the tribal Self-Determination Act, we don't  
25 want the BIA to interfere when Indian tribes make these

1 decisions.

2 Now, if we have a situation where Congress is  
3 responding to Indian tribes about interference with tribal  
4 self-determination decisions, Congress has responded,  
5 clarified its intent, has mandated that the BIA promulgate  
6 Self-Determination Act regulations, and those regulations  
7 say, we are not going to interfere with tribal  
8 sovereignty, then you have a situation where the decision  
9 process itself, whether or not to contract, is heavily  
10 regulated by statutes and regulations. You have that  
11 preemptive effect. You have those -- you have the  
12 situation like Ramah Navajo and the Bracker case where the  
13 congressional policies are preempted by State law.

14 And like the Ramah Navajo case and like the  
15 Bracker decision, we have a case here in which Arizona  
16 does not have any interest in the construction activity at  
17 issue.

18 QUESTION: But unlike those two cases, it's a  
19 U.S. contractor contract, and is there any precedent,  
20 other than this Arizona Appeals Court, that says that the  
21 State can tax when the contract is between the United  
22 States and the contractor as distinguished from the two  
23 cases on which you rely where the contract was with the  
24 tribe itself?

25 MR. SMITH: No, Justice Ginsburg. I am not

1 aware of any such case.

2 But what I am aware of is prior decisions of  
3 this Court like in the Colville case where it addressed a  
4 -- an argument of tribal self-determination and the Court  
5 applied the same preemption balancing test to determine  
6 whether the State tax was preempted by Federal law. Now,  
7 in the Colville case, the Court applied that balancing  
8 test and upheld the State tax because what was at issue  
9 there was they -- as the Court characterized it, they're  
10 simply marketing a tax exemption and making cheaper  
11 cigarettes available to non-Indians. That's not --

12 QUESTION: Well, why -- why couldn't one take  
13 the positions -- your big point is that there are three  
14 sovereigns in this picture -- that the tribe, whenever it  
15 chooses to act as sovereign, that is, make the contract  
16 itself, its tribal sovereignty is respected, but when it  
17 chooses to let the United States act as kind of patriarch  
18 for it, then it isn't exercising its sovereign capacity?  
19 It's more in the position of -- of the ward of the United  
20 States who is acting for its benefit.

21 MR. SMITH: If we were dealing with a clean  
22 slate and simply as a matter of Federal common law, I  
23 might agree with you, Justice Ginsburg -- Ginsburg, but  
24 what we have here is the Court looks to Congress to tell  
25 it what is -- how Congress is exercising its plenary

1 authority. And in this instance, Congress has told the  
2 United States that self-determination decisions whether or  
3 not to contract are both equal self-determination  
4 decisions. So, you can't simply presume that it's not  
5 exercising its sovereign decision making process.

6 One of the issues that has come up in this case  
7 is whether there's going to be any interference with the  
8 tribal decision making process, and it will have a direct  
9 impact on that decision making process.

10 QUESTION: Well, what if the Indian tribe were  
11 to lease property to a non-Indian business entity? The  
12 business entity sets up operation and does business on the  
13 reservation on the -- from the leased premises with non-  
14 Indians. The State wants to tax. You could make the same  
15 argument, that to allow the State to tax would interfere  
16 with tribal sovereignty.

17 MR. SMITH: The -- those kinds of commercial  
18 relationships, Justice O'Connor, have been dealt with by  
19 the Court in the past. If you look at the cases that were  
20 cited by one of the amici, those kinds of commercial  
21 relationships --

22 QUESTION: Do you say there the State is free to  
23 impose its taxes?

24 MR. SMITH: I think that what the Court should  
25 do is apply its implied preemption analysis, look at the

1 situation, and see whether there's an overriding Federal  
2 and tribal interest that should preempt this kind of tax.  
3 The beauty of this Court's implied preemption analysis is  
4 that it takes into consideration the interests of all  
5 three parties who are being affected by --

6 QUESTION: And it makes it very difficult to  
7 apply any general principle. It's a case-by-case analysis  
8 every time so that people really don't know what the  
9 outcome is going to be until perhaps it gets to this  
10 Court.

11 MR. SMITH: This Court in many factual  
12 situations does not apply a bright line rule. This Court  
13 in free speech cases, religion cases, and discrimination  
14 cases applies tests. It applies factors. And if you look  
15 at State taxation of interstate cases or State taxation of  
16 foreign commerce clause cases, this Court still applies  
17 factors, determines whether those factors are satisfied,  
18 and then determines whether the State nondiscriminatory  
19 tax will be upheld. I submit that the Federal preemption  
20 analysis that this Court has adopted, while it does  
21 require case-by-case analysis, is not a difficult and is  
22 not an unduly burdensome test.

23 QUESTION: But it's certainly more difficult  
24 than the United States v. New Mexico doctrine. I mean, I  
25 don't think we've had a case on State taxation of Federal

1 entities since our decision in United States against New  
2 Mexico, which is a signal that it's a readily understood  
3 and applicable doctrine in the lower courts.

4 MR. SMITH: I agree, Your Honor. It is a  
5 readily understood test. However, that test does not take  
6 into consideration the Federal and tribal interests that  
7 are at issue in cases like this.

8 QUESTION: Well, certainly the Federal  
9 Government here is saying it does take into consideration  
10 the Federal interest.

11 MR. SMITH: I would disagree with -- with the  
12 United States' position on whether it's going to interfere  
13 with their relationships with Indian tribes. I think when  
14 you get down to the Mr. Wards of this world in the BIA, it  
15 is going to have a direct and it is going to have a  
16 substantial impact on the way in which they are  
17 interacting with these Indian tribes.

18 The Court must keep --

19 QUESTION: Well, the idea that we should be  
20 concerned about a BIA employee when the BIA itself isn't  
21 concerned strikes me as -- as -- as rather unusual, to say  
22 the least.

23 MR. SMITH: This Court in many of its criminal  
24 procedure cases takes into consideration what the effect  
25 of its rulings will be for the police officers on the

1 street. Will this rule be difficult to apply? How easy  
2 will this rule be to apply? That is the same  
3 consideration that the Court should take into  
4 consideration for Mr. Ward because it is not the Solicitor  
5 General's office that on a day-to-day basis carries into  
6 effect the United States' trust responsibilities to this  
7 Nation's Indian tribes.

8 QUESTION: What do we do with -- with  
9 contractors with the Federal Government itself? We don't  
10 apply this case-by-case weighing as to -- to what extent  
11 the -- the State's imposition of a tax upon this contract  
12 with the Federal Government will affect the sovereignty  
13 interests of the Federal Government, blah, blah, blah. I  
14 mean, you know, we -- there would be no end to litigation  
15 if we did that. We simply have a flat rule. You can do  
16 it.

17 MR. SMITH: I agree but --

18 QUESTION: And why should we have a different  
19 rule for the Indian tribes?

20 MR. SMITH: The reason why we have a different  
21 rule and the Court should adopt a different rule for  
22 Indian tribes is because of that unique trust relationship  
23 because in these situations the Government doesn't deal  
24 with Indian tribes as a mere recipient of Federal money.  
25 It deals with them on a government-to-government basis.



1           QUESTION: But you can't demand more of a person  
2 than that he treats someone as well as he would treat  
3 himself, and if the Federal Government doesn't -- doesn't  
4 deem it a -- too much of an imposition upon its own  
5 sovereignty to have -- to have its contracts taxed by the  
6 States, why should it deem it an excessive imposition upon  
7 the tribes' sovereignty to have their contracts taxed by  
8 the States?

9           MR. SMITH: Because Congress has said that self-  
10 determination decisions are equal expressions, and what  
11 this does is it adds an additional factor into the tribal  
12 calculus of whether or not to make a self-determination  
13 decision.

14           QUESTION: Well, sure, but any tax is -- is  
15 going to affect how the tribe decides to do business to  
16 some degree. And -- and we're supposed to sit here and  
17 decide whether the degree is too much contract by  
18 contract? You'd have to do it contract by contract,  
19 wouldn't you?

20           MR. SMITH: In some situations, Justice Scalia,  
21 you may have to do that, but when you -- I think when you  
22 look at the broader issues that are involved here, I think  
23 that decisions by this Court or the lower courts can help  
24 clarify the issue. I think that decisions by the Ninth  
25 Circuit have clarified sales tax issues in Arizona law. I

1 think that decisions by this Court have clarified the --  
2 the smoke shop line of cases. However, in the contracting  
3 situation, if this Court adopts our rule, it will send a  
4 message and it will provide clarity to this situation.

5 We are talking about something that is crystal  
6 clear. It's the tax. It's the percentage of tax. And  
7 the Court, probably for the first time, has before it an  
8 actual record of the -- of the impact of this tax. Mr.  
9 Ward provided that testimony, and he said that a 5 percent  
10 tax will mean a 5 percent reduction in the amount of roads  
11 that are built. That is what is a very, very important  
12 and a very, very crucial decision for this Court to  
13 consider.

14 The tax itself affects tribal procurement  
15 processes. How much money are we going to have? If we  
16 decide after the planning stage to determine the scope of  
17 the road contract, well, what's going to be left? Is the  
18 -- is the Federal Government going to budget enough money  
19 for this project? We've designed it, and in many  
20 situations tribes have the right to take money from the  
21 Government and plan their own roads. Will there be enough  
22 money to build the road that we have planned? How much is  
23 going to be there? That is an important --

24 QUESTION: Well, if it's clear that the taxes  
25 can be imposed, then in the Federal budgeting and

1 appropriation process, that amount can be taken into  
2 consideration. I think it's very helpful to have a clear  
3 rule and not monkey around with some case-by-case  
4 analysis, and certainly the budgeting and appropriation  
5 processes can take into account all the expenditures that  
6 will be required and the costs, including applicable State  
7 taxes.

8 MR. SMITH: If the Court were to adopt that  
9 standard and send the message to Congress, I do not  
10 believe that it will still in -- in the future have the  
11 effect that -- that you desire, Justice O'Connor, because  
12 what is going to happen under the Transportation Equity  
13 Act for the 21st Century is that Congress is going to  
14 authorize money to Indian tribes on a tribe-by-tribe  
15 basis. Those Indian tribes are then going to be left with  
16 the position of knowing what money has been budgeted for  
17 them. They're going to be in the position of, as in this  
18 case, setting the priorities, working on the planning with  
19 the BIA, and then they have to decide whether or not to  
20 enter into the Self-Determination Act decision.

21 It's much like the decision that State  
22 legislatures and Congress make every year when they do tax  
23 projections. How much money are we going to have in our  
24 budget for us this year? What kind of projects --

25 QUESTION: May I ask, Mr. Smith? Your rule

1 isn't limited to road building, is it, the rule you  
2 advocate?

3 MR. SMITH: No.

4 QUESTION: No matter what -- if they build  
5 houses or sky resorts or casinos, anybody contracting with  
6 the tribe would have a tax exemption.

7 MR. SMITH: A contract with the tribe, Justice  
8 Stevens?

9 QUESTION: The Federal Government.

10 QUESTION: With the Federal Government doing  
11 anything for the tribe. Of course, a fortiori, if it's a  
12 contract directly with the tribe, of course, it would be  
13 totally exempt under your view.

14 MR. SMITH: Yes.

15 QUESTION: Yes.

16 MR. SMITH: I think in those situations, for  
17 example, looking at -- at gaming casinos, you'd have to  
18 look at the Federal, State, and tribal interests involved.  
19 That's a balancing test that -- that other folks have  
20 engaged in and we know how to apply it. I believe that  
21 it's very simple. You simply look at the State  
22 involvement with the on-reservation activity. You look at  
23 the Federal and tribal interests that are involved and you  
24 do the balancing test and you make the decision as to  
25 where it comes out.

1           Now, in some of the cases that have been cited  
2     in the briefs like the Gila River case, you had a  
3     situation in which the State or State agencies were  
4     actively involved in the on -- on-reservation activity.  
5     Policemen were provided for certain events. In that case,  
6     the Court was able to determine this is how the balancing  
7     test comes out.

8           Going back to the contracting situation, you  
9     would look at situations involving perhaps under the  
10    Indian Health Service a clinic or a medical facility and  
11    the other applicable Federal statutes to determine what  
12    kind of -- of balancing and how that test comes out.

13           The petitioners and the United States have  
14    argued that, you know, we -- we don't have to necessarily  
15    consider each and every factor. And this is just one  
16    factor and it's almost like a slippery slope here.

17           But what is important to consider is this  
18    Court's decisions in the New Mexico v. Mescalero Apache  
19    Tribe and in the White Mountain/Bracker case itself. In  
20    both of those decisions, this Court said, we need to  
21    consider whether this tax would affect the full objectives  
22    of the Federal legislation. Similarly in the New  
23    Mexico/Mescalero Apache case, the Court said, how is this  
24    going to affect the legislation?

25           And that's what we have here. We have a tax.

1 It's a set percentage of a tax. And the Court has to ask  
2 itself, is this going to interfere with Congress' stated  
3 objective, interfering with decisions on whether or not to  
4 enter into these Self-Determination Act decisions? It  
5 clearly will. Like in Bracker where the Court condemned  
6 the imposition of the tax, even though it was only \$5,000  
7 or \$6,000 in annual taxes, this Court said that that tax  
8 will add an additional factor for the parties to consider,  
9 and that is sufficient for us to find that the tax is  
10 preempted.

11 This road construction contract is no different  
12 than the construction contract at issue in the White  
13 Mountain/Bracker case. We believe that that case is on  
14 all fours with this case but for the issue of whether or  
15 not the Court should apply preemption analysis to Indian  
16 roads.

17 QUESTION: Mr. Smith, I gather that -- you said  
18 the contractor, but at least according to the petitioner's  
19 brief, the -- there are a number of contracts all over the  
20 State with different -- different tribes. Is that  
21 correct?

22 MR. SMITH: Yes, Your Honor, that is correct.  
23 What happened in this situation is Mr. Ward -- he is a  
24 Navajo representative of the BIA. Given the size of the  
25 Navajo tribe, they have their own special BIA office.

1 There's also evidence in the record that's alluded to  
2 regarding the Phoenix office. That is another BIA office  
3 and they administer Federal programs and interact with  
4 Federal tribes in the Phoenix office. There are a number  
5 of BIA offices and they deal with the tribes in their  
6 jurisdiction.

7 QUESTION: And so, your client did work not just  
8 on the Navajo reservation but on a number of other Indian  
9 properties, if one may call it that, in the State.

10 MR. SMITH: That's correct, Your Honor. Blaze  
11 built roads on the Navajo reservation. It built roads on  
12 the Hopi reservation, the Papago -- now it's called the  
13 Tohono O'odham -- reservation, the Gila reservation, and  
14 the Colorado River Indian reservation.

15 If there are no further questions, thank you.

16 QUESTION: Thank you, Mr. Smith.

17 Mr. Irvine, you have 7 minutes remaining.

18 REBUTTAL ARGUMENT OF PATRICK IRVINE

19 ON BEHALF OF THE PETITIONER

20 MR. IRVINE: Thank you, Your Honor.

21 I met Mr. Ward at the hearing. I think I've met  
22 a lot of Mr. Wards in different capacities. And I think  
23 officials at that level want a clear rule. Mr. Ward, I'm  
24 sure, wants to be able to tell the people, the  
25 contractors, whether it's taxable or not. If the test is

1 we don't know because it depends on whether the State  
2 provides services, we don't know because it depends on  
3 which statute authorizes the funding and what may apply,  
4 that's no help to Mr. Ward. It's no help to Blaze  
5 Construction. It's no help to the State of Arizona in  
6 deciding whether the tax is permissible. So, in terms of  
7 -- of the interest of -- of lower levels of the BIA, I  
8 would think a -- a clear bright line rule, as the United  
9 States itself argues here, should be the answer.

10 In terms of multiple sovereignties, here there  
11 is a clash between only two sovereigns, the State and the  
12 Federal Government. The tribe is not a party to the  
13 transaction. The transactions take place on the  
14 reservation, but the tribe is -- is not affected except  
15 indirectly through the Federal sovereignty.

16 The agency certainly is the Bureau of Indian  
17 Affairs which does have trust responsibilities to the  
18 tribes, but that's a function which is -- is between the  
19 tribes and the Federal Government. It's not something  
20 that the State is involved in. There's nothing in the  
21 record that shows that Congress expects the State of  
22 Arizona to help the BIA pay its bills by not imposing its  
23 taxes.

24 And certainly there can be interference with  
25 tribal decision making because of a State tax, but if



1 there is no tax on Federal contractors, there can equally  
2 be interference with Bureau of Indian Affairs decision  
3 making. Would the Bureau then have to decide whether to  
4 construct projects on the reservation or off the  
5 reservation because there might be some tax effect?

6 The Indian Health Service has a hospital in  
7 Phoenix, good transportation, good other health care. If  
8 there's a tax savings, should they be enticed to move 20  
9 or 30 miles to a reservation just because of the tax  
10 effects? As I mentioned earlier, there's always an effect  
11 of -- on -- there's always an effect on decision making  
12 whether there is or isn't a tax.

13 Finally, as far as the Self-Determination Act  
14 goes, that doesn't even apply to the contracts at issue.  
15 These contracts were not between the tribe and the  
16 contractor. Each of the tribes chose not to exercise  
17 their option under the Self-Determination Act. This Court  
18 has never preempted a tax on a reservation based on a  
19 statutory scheme that doesn't even apply to the regulated  
20 activity, and I suggest it shouldn't here either.

21 If there are no further questions, I'll conclude  
22 with that.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Irvine.  
24 The case is submitted.

25 (Whereupon, at 11:55 a.m., the case in the

1 above-entitled matter was submitted.)  
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## CERTIFICATION

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

ARIZONA DEPARTMENT OF REVENUE, Petitioner v. BLAZE CONSTRUCTION COMPANY, INC.

CASE NO: 97-1536

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

BY Donna Marie Federico

(REPORTER)