

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: EL PASO NATURAL GAS COMPANY, ET AL.,

Petitioners v. LAURA NEZTSOSIE, ET AL.

CASE NO: 98-6 CA

PLACE: Washington, D.C.

DATE: Tuesday, March 2, 1999

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Supreme Court U.S.

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EL PASO NATURAL GAS COMPANY, :

4 ET AL., :

5 Petitioners :

6 v. : No. 98-6

7 LAURA NEZTSOSIE, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, March 2, 1999

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

14 APPEARANCES:

15 JAMES R. ATWOOD, ESQ., Washington, D.C.; on behalf of the
16 Petitioners.

17 JONATHAN E. NUECHTERLEIN, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the United States, as amicus curiae, in
20 support of the petitioners.

21 H. BARTOW FARR, III, ESQ., Washington, D.C.; on behalf of
22 the respondents.

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1 PROCEEDINGS

2 (11:12 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number -- in 98-6, El Paso Natural Gas Company v.
5 Laura Neztosie.

6 Mr. Atwood.

7 ORAL ARGUMENT OF JAMES R. ATWOOD

8 ON BEHALF OF THE PETITIONERS

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

11 The two consolidated courses -- cases here arose
12 from uranium mining and milling activity that occurred on
13 the Navajo reservation some 40 years ago. The petitioners
14 or their predecessors produced this uranium under licenses
15 and contracts with the Atomic Energy Commission and sold
16 it to the Government under the Government's uranium
17 procurement program. All of the uranium was used for
18 military purposes.

19 Some decades after the uranium operations closed
20 down, my clients were sued in Navajo Tribal Court by the
21 respondents. The respondents are members of the Navajo
22 Tribe, and they claim that from long-term exposure to
23 uranium and other hazardous properties produced by the
24 petitioners' operations, they suffered injury. The claims
25 in tribal court were pleaded entirely under tribal law.

1 It is our basic contention in this case that
2 claims of nuclear tort such as those raised by respondents
3 must be heard under Federal law and that, under the
4 relevant Federal law, the defendants are entitled to a
5 Federal forum.

6 Congress visited this issue of nuclear torts on
7 more than a half-dozen occasions over the last 40 years,
8 and in the Atomic Energy Act itself, in the Price-Anderson
9 provisions of the Atomic Energy Act, Congress developed a
10 rather elaborate set of procedural and substantive rules
11 to govern how nuclear torts should be treated. And these
12 rules reflect a legislative judgment on how to balance the
13 public's need for safety, the public's need for
14 compensation if safety is lacking, on the one hand, and
15 the national need for a domestic uranium industry that is
16 not subject to uncontrolled, unstructured tort liability.

17 QUESTION: I'm concerned, Mr. Atwood, frankly,
18 with the procedural posture of this case. Now, the
19 district court entered kind of a two-part decision. It
20 said Price-Anderson Act claims could not proceed in tribal
21 court.

22 MR. ATWOOD: Correct.

23 QUESTION: But other claims could.

24 MR. ATWOOD: Claims under tribal law could, yes.

25 QUESTION: All right, and then an appeal was

1 taken to the Ninth Circuit.

2 MR. ATWOOD: By petitioners.

3 QUESTION: By you, by petitioners, and the Ninth
4 Circuit decided a question that wasn't appealed.

5 MR. ATWOOD: As well as a question that was
6 appealed, that's correct.

7 QUESTION: Well, and it didn't decide other
8 questions. Now, what should we do here? Should we just
9 decide that it had no authority, if you will, to decide a
10 question that wasn't appealed?

11 MR. ATWOOD: No. We would certainly hope --

12 QUESTION: I mean, I would think we would do
13 that.

14 MR. ATWOOD: I -- we agree the Court should
15 vacate that portion of the court of appeals decision that
16 allowed Price-Anderson cases to proceed in tribal court
17 because in our view --

18 QUESTION: That wasn't appealed.

19 MR. ATWOOD: -- that issue was not appealed.

20 QUESTION: Right.

21 MR. ATWOOD: That's correct.

22 But what was appealed, and which is therefore
23 proper -- the court had jurisdiction over, and this Court
24 has jurisdiction, over the question whether the tribal law
25 claims could properly proceed.

1 QUESTION: But the court, the Ninth Circuit
2 didn't really deal with that, did it?

3 MR. ATWOOD: It affirmed the denial of a
4 preliminary injunction that we requested. It -- so its
5 order does allow, incorrectly, in our view, the tribal law
6 claims to proceed in tribal court. That issue was
7 properly before the court of appeals jurisdictionally.
8 They decided it wrongly.

9 QUESTION: I thought it really didn't get to the
10 merits of that.

11 MR. ATWOOD: No, it -- it decided two issues.
12 It affirmed the denial of the injunction that we sought,
13 and it reversed sua sponte the grant of the other part of
14 the injunction that we sought. So there's clearly one
15 very important substantive issue that came up properly
16 jurisdictionally, and that is the question, were the
17 tribal law claims preempted by the Price-Anderson Act.

18 QUESTION: On the issue where the court of
19 appeals reversed and it was not appealed, in a sense, it's
20 not your fault. You don't have the duty to appeal a
21 favorable ruling.

22 MR. ATWOOD: Right.

23 QUESTION: On the other hand, the court of
24 appeals is in somewhat of a difficult position if it feels
25 that the unappealed ruling and its rationale are logically

1 necessary for its decision on the part that is appealed.
2 I'm not quite sure what the court of appeals should have
3 done.

4 MR. ATWOOD: Well, there -- I think there is a
5 distinction between what orders were before the court and
6 what orders are before this Court, and therefore what the
7 relief should be, with the question of how broad the
8 analysis needs to be to properly decide the issues that
9 are before the Court. And it is perfectly understandable,
10 I think, that the Ninth Circuit and this Court, in
11 deciding the preemption issues that are presented, would
12 want to analyze the totality of the relationship of the
13 Price-Anderson Act regime with what has happened in this
14 case.

15 So it is certainly possible that the substantive
16 analysis would be somewhat broad, but then when you get
17 down to an appropriate relief, in our judgment it should
18 be to reverse the court of appeals insofar as it allowed
19 the tribal court causes of action to go forward and to
20 vacate the court of appeals judgment insofar as it
21 prohibited Price-Anderson claims from going forward.
22 We --

23 QUESTION: Mr. Atwood, let me tell you my
24 problem with that. It seems to me that that asks us to
25 decide a question which, in the light of the question that

1 you want us to forego, may well be utterly academic.

2 That is to say, if Price-Anderson claims can be
3 brought in tribal court, contrary to the injunction here
4 that you want us to leave in place, if they can be brought
5 in tribal court, then it makes no difference -- it is
6 asking an academic question whether you will allow the
7 tribal court to consider and will allow it to exhaust
8 whether a particular claim is a Price-Anderson claim or
9 not a Price-Anderson claim.

10 That question is a nonquestion if both claims
11 can be brought in tribal court, and you don't want us to
12 reach the question of whether both claims can be brought
13 in tribal court. You say that's been decided, and that
14 injunction wasn't appealed, so forget about that question.

15 But unless that question is answered in the
16 opposite way from the way the district court answered it,
17 namely, answered to say you cannot bring -- I'm sorry, you
18 can -- you -- yes -- no -- the way the district court
19 answered it.

20 MR. ATWOOD: Yes, the -- right.

21 QUESTION: You cannot bring Price-Anderson
22 claims in tribal court, then the question of whether a
23 particular claim is Price-Anderson or not Price-Anderson
24 never arises, and why should we sit here and deliberate on
25 that question, and ask whether the tribal court can decide

1 that question, and it must be exhausted, when it may well
2 be a question that never arises?

3 MR. ATWOOD: Well, there certainly are
4 differences, though, substantively, in how a tribal law
5 claim would proceed and how a Price-Anderson claim would
6 proceed.

7 Also, let me say we're not --

8 QUESTION: What are -- are you going to tell us
9 what they are?

10 MR. ATWOOD: Yes, I'd be happy to. Well,
11 assuming you could have a Price-Anderson claim in tribal
12 court?

13 QUESTION: Yes.

14 MR. ATWOOD: Which we don't think you can have.

15 QUESTION: Right, but assume --

16 MR. ATWOOD: If there could be Price-Anderson
17 claims in tribal court, again which we do not agree with,
18 Federal standards of care would be relevant. In other
19 cases, not this one, there would be indemnity issues that
20 would be relevant.

21 QUESTION: So you're saying that borrowing --
22 borrowing in tribal law does not explain all that's going
23 on. If you're going to have a Price-Anderson claim,
24 you're going to have something beyond just borrow tribal
25 law so the two actions are not identical.

1 MR. ATWOOD: Not -- no. They are not -- indeed,
2 you would not borrow tribal law under Price-Anderson. You
3 would borrow State law.

4 QUESTION: So the issue --

5 MR. ATWOOD: Arizona law would apply in tribal
6 court, not tribal law.

7 QUESTION: So the issue will arise in tribal
8 court even if -- even if Price-Anderson actions are
9 allowable in tribal court, tribal courts will still have
10 to decide whether a particular claim is Price-Anderson or
11 not Price-Anderson?

12 MR. ATWOOD: If Price-Anderson claims were
13 properly held in tribal court, that would be a judgment
14 the tribal court would have to reach. We do not think
15 tribal courts --

16 QUESTION: Yes, I understand.

17 MR. ATWOOD: -- do have authority, and we're
18 not --

19 QUESTION: I just don't want to decide
20 something, you know, that may be irrelevant if Price-
21 Anderson can be brought in tribal court.

22 MR. ATWOOD: And it may be that what is
23 necessary because of the procedural errors of the Ninth
24 Circuit -- we're not opposed to this Court deciding all
25 the substantive issues it feels it has an adequate record

1 for.

2 We're not opposing a full resolution of the
3 preemption and jurisdictional issues, but we did think it
4 was necessary to bring to the Court's attention what we
5 perceive to be a jurisdictional error in the court of
6 appeals, and that obviously can have implications for the
7 scope of the ruling of this case.

8 QUESTION: Well, could the court of appeals have
9 said, we're going to resolve the tribal claim issues, and
10 in light of that resolution the district court must have
11 been wrong in its injunction, assuming it came out that
12 way.

13 Then what does it do? We're remanding to the
14 district court so that it has the opportunity in the first
15 instance to reconsider its ruling or something? It's a
16 preliminary injunction. It's not really a --

17 MR. ATWOOD: It is a preliminary injunction.

18 QUESTION: -- the case for all time, if --

19 MR. ATWOOD: That's right.

20 QUESTION: -- the case at all.

21 MR. ATWOOD: And respondents make the point that
22 the issue would come back up to the court of appeals
23 eventually on a permanent injunction. That's absolutely
24 right, but I -- you know, we do think it is a matter of
25 concern that the court of appeals felt it had the

1 authority to reach down and take -- and rule upon, and
2 indeed rule upon it incorrectly, an order that wasn't
3 before it.

4 QUESTION: Well, it may not come back. I mean,
5 you don't know for sure that it can come back to the court
6 of appeals. It depends on the outcome of the trial, I
7 suppose.

8 MR. ATWOOD: Well, and also it depends on what
9 the --

10 QUESTION: And on who wins.

11 MR. ATWOOD: And what the respondents want to
12 do. They have so far, at least up until this phase of the
13 litigation, eschewed Price-Anderson claims. They were
14 very clear in saying, we want to proceed solely under
15 tribal law, we're not interested in pursuing under Price-
16 Anderson, and they demonstrated that by not appealing the
17 injunction against proceeding under Price-Anderson, so we
18 are dealing with potential future events.

19 But it does seem to us clear under the statute
20 that Price-Anderson preempts the tribal law claims. The
21 congressional language is absolute in saying, any claim
22 for nuclear torts such as this may be brought only under
23 the terms of Price-Anderson, and four courts of appeals
24 have all decided that that language preempts State law
25 claims.

1 And now, indeed, for the first time in this
2 Court, respondents concede that it preempts tribal law
3 claims, and they now are arguing something a little
4 different. They're saying their claims are not Price-
5 Anderson because they involve mining and because there's
6 no indemnification agreement.

7 We don't think those arguments were properly
8 preserved, but we also think, as does the Solicitor
9 General, that they are clearly wrong.

10 QUESTION: But they weren't passed on below,
11 those -- the argument that it's not Price-Anderson because
12 it involves mining, and -- or there's no indemnification
13 in this picture, the Ninth Circuit didn't touch those.

14 MR. ATWOOD: In fact, the mining issue wasn't
15 even raised with the Ninth Circuit. The indemnification
16 issue was, but not decided.

17 QUESTION: I'm -- now, I thought I understood
18 it, and now I realize I don't. That is, I thought that
19 initially the -- your -- the plaintiff files a claim in
20 the tribal court.

21 MR. ATWOOD: Right.

22 QUESTION: And it says, now, my relatives or
23 others were killed, and -- because of the nuclear waste,
24 the nuclear mining, and we -- we're entitled, as a result
25 of negligence law, four other laws -- and I don't think

1 they mentioned Price-Anderson, did they?

2 MR. ATWOOD: They did not.

3 QUESTION: All right -- they didn't even mention
4 it. All right. Now it comes to the district court, and
5 the district court says, your motion for an injunction --
6 that is, yours -- is denied. They denied it.

7 MR. ATWOOD: In part.

8 QUESTION: Well, they denied it, and then he
9 adds the words to the order, except insofar as the
10 defendant seeks relief under the Price-Anderson Act in
11 tribal court, which he hadn't done.

12 So since he'd never -- since -- the only way I
13 can imagine to read that is that the exception's
14 irrelevant, because he didn't. Nowhere in the complaint
15 does it assert -- does it -- nowhere does he seek relief
16 under the Price-Anderson Act in tribal court. He didn't.

17 MR. ATWOOD: Well, I think what that --

18 QUESTION: And then it comes to the court of
19 appeals, and the court of appeals goes into the discussion
20 of whether or not a negligence claim is preempted, and
21 whether you can assert whether it's preempted or not in
22 the tribal court of the district court, the kind of issue
23 that's been briefed here.

24 So once -- isn't -- I mean, there's a lot of
25 briefs here about whether the Price-Anderson Act covers a

1 negligence claim, and it makes a very strong claim that it
2 does, because it's a claim of negligence that arises out
3 of nuclear waste. You know, we know those arguments that
4 are being made.

5 MR. ATWOOD: Right.

6 QUESTION: All right. So now I don't know what
7 to do.

8 MR. ATWOOD: But Justice Breyer, I think there
9 was an injunction issued --

10 QUESTION: Oh, it says except -- yes, you're
11 right, except to the extent the defendant seeks relief --

12 MR. ATWOOD: Yes.

13 QUESTION: -- under the Price-Anderson Act.

14 MR. ATWOOD: And we were required -- we posted a
15 bond, so all the elements of the normal preliminary
16 injunction.

17 I think -- it is true they were not then
18 seeking, but that is an injunction against an effort for
19 them to try to convert tribal law claims under Price-
20 Anderson.

21 QUESTION: All right. Suppose we issue the
22 following order, which I think would take one paragraph.
23 Suppose you said, very well, you considered, court of
24 appeals, a claim that had never been raised. You can't.
25 End of the matter. Now go consider the rest. All we'll

1 get is the same opinion back, but --

2 MR. ATWOOD: Well, but -- no, that leaves out a
3 series of important errors that the court of appeals made
4 with respect to the injunction that did not issue. They
5 concluded that it was necessary for us to exhaust tribal
6 remedies on the question of whether or not tribal law
7 claims were proper, and that's where we and the United
8 States strongly disagree.

9 Price-Anderson clearly preempts those claims,
10 and with respect to those claims there should be no
11 exhaustion requirement because it would be very wasteful
12 and it would frustrate this congressional scheme of having
13 Price-Anderson nuclear tort claims, that is, all of which
14 must be Price-Anderson claims, handled in a coordinated,
15 operative fashion, so that's a critical element of the
16 court of appeals decision.

17 QUESTION: But that's only if we assume that all
18 their claims are preempted by Price-Anderson.

19 MR. ATWOOD: But -- that's correct, but it is
20 clear that on the face of what they allege, those are
21 Price-Anderson claims. They are claiming injury from
22 radioactive consequences of uranium, uranium --

23 QUESTION: But that gets us into all these
24 issues about what Price-Anderson preempts, and whether it
25 covers uranium mining at all, and these have not been

1 decided by a lower court.

2 MR. ATWOOD: Well, it is --

3 QUESTION: And all of a sudden you want --

4 MR. ATWOOD: Yes.

5 QUESTION: -- us to decide all of this. I don't
6 understand.

7 MR. ATWOOD: One option available to this Court
8 is to tell the district court and the court of appeals,
9 you should address the substance of the preemption
10 argument, that your decision on exhaustion was wrong. You
11 should not require 6 years of litigation in tribal court
12 before any Federal judge decides the preemption issue.
13 You should -- this Court could decide the issue, or it
14 could remand the preemption issue and simply tell the
15 court of appeals, your exhaustion ruling was incorrect.

16 QUESTION: Was there any suggestion or any
17 possibility of interlocutory determination in the tribal
18 court of the preemption issue, just as a matter of law,
19 before the trial on the merits?

20 MR. ATWOOD: That was --

21 QUESTION: In Strate there was actually a
22 jurisdictional ruling all the way through the tribal
23 system, and then the Federal courts --

24 MR. ATWOOD: It was not attempted in this case.
25 There's another case somewhat predating ours in tribal

1 court, the Kerr-McGee case, where an interlocutory review
2 on the preemption issue was sought in tribal court. It
3 was denied, so the judgment of these people was it was
4 futile, and as the Solicitor General argues, we think that
5 under a complete preemption statute, that preemption issue
6 should be decided by the Federal court, not by the tribal
7 court.

8 QUESTION: Mr. Atwood, as I understand it, what
9 you are trying to do essentially is to make a substitute
10 for the removal that Congress didn't provide with respect
11 to tribes.

12 If exactly the same case involved a State court
13 action and the plaintiff had said, my action is State law
14 and nothing to do with Price-Anderson, you could wrench
15 that out immediately and have the Federal court decide
16 that, not possible because Congress didn't provide that
17 mechanism.

18 Is there any clue why the tribal courts were
19 left out of the removal when all the State courts in the
20 land were included?

21 MR. ATWOOD: It was -- obviously the statute is
22 silent. It was not addressed anywhere that we've seen in
23 the legislative history, but I think the answer is, you
24 don't need a removal provision when a claim is improperly
25 brought in tribal court, because you have available under

1 the National Farmers Union case, under the Strate holding,
2 you have available a Federal cause of action under 1331
3 because the tribe has exceeded its authority. You don't
4 have --

5 QUESTION: But with Farmers, that's at the end
6 of the line, but the removal takes the case out of the
7 State court and, indeed, there's a transfer provision if
8 you bring it in any Federal court, other than the one
9 where the site is.

10 MR. ATWOOD: Farmers says you can sue
11 immediately in Federal court. It then says you then have
12 to engage in an analysis of whether or not exhaustion is
13 appropriate, but you can go to Federal court, and there is
14 no equivalent to 28 U.S.C. 2283. There's no anti-
15 injunction provision that acts, that prevents the Federal
16 court from acting, so we were properly before Federal
17 court.

18 There is the relevant question, should we have
19 to exhaust first. And there I think you have to engage in
20 the kind of analysis that we and the Solicitor General do
21 as to what is the prudential rule for a Federal cause of
22 action where there is no meaningful role for the tribe to
23 play in informing about the relevant law. We think in
24 that situation the Federal court should decide the issue
25 before it.

1 QUESTION: Thank you, Mr. Atwood.

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

3 ORAL ARGUMENT OF JONATHAN E. NUECHTERLEIN

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

5 IN SUPPORT OF THE PETITIONERS

6 MR. NUECHTERLEIN: Mr. Chief Justice, and may it
7 please the Court:

8 The parties agree that the Federal courts have
9 Federal question jurisdiction to decide at some point
10 whether these nuclear tort claims brought initially under
11 tribal law fall within the preemptive scope of the Price-
12 Anderson Act. The question here is whether the prudential
13 rule of tribal court exhaustion delays the date on which
14 the Federal courts will decide that issue, even though, as
15 Justice Ginsburg points out, if this suit had been filed
16 in State court, the Federal courts would indisputably
17 decide that issue now.

18 The answer is that the tribal exhaustion
19 doctrine does not have that anomalous consequence, and the
20 reason is specific to the Price-Anderson Act.

21 The act deems any claim for public liability
22 brought under any source of law to be a Federal claim
23 arising directly under Price-Anderson. Congress designed
24 that complete preemption regime to make Federal court
25 review available from the inception of any nuclear tort

1 suit.

2 Congress took that step because it wanted to
3 make nuclear tort litigation more predictable, more
4 uniform, and more efficient, because it wanted to ensure
5 consolidation of any related cases, and because it wished
6 to ensure centralized control over compensation claims.
7 Application of the --

8 QUESTION: Well, respondents now put forward an
9 argument that the personal injury claims under tribal law
10 are not preempted, that in the case of uranium mining and
11 where there is no indemnity, that that isn't the scheme.

12 MR. NUECHTERLEIN: We disagree.

13 QUESTION: Nobody has addressed that in the
14 lower courts, presumably.

15 MR. NUECHTERLEIN: That is correct, and we
16 dis --

17 QUESTION: In this case.

18 MR. NUECHTERLEIN: That is correct. We disagree
19 with that argument on the merits, but the initial point is
20 that there -- there is a dispute about which court will
21 resolve that issue in the first instance.

22 Respondents claim that the tribal exhaustion
23 doctrine requires the tribal courts to decide that issue
24 in the first instance. Our position is that that would be
25 inconsistent with the point of this statutory scheme,

1 which is to ensure that the defendant has an absolute
2 right to a Federal forum for the resolution of any dispute
3 about the effect of the Price-Anderson --

4 QUESTION: Yes, but why isn't the --

5 QUESTION: So what do you advise that this Court
6 do in the face of the kind of curious posture in which the
7 case comes here?

8 MR. NUECHTERLEIN: One option this Court has is
9 to reverse the Ninth Circuit on the threshold exhaustion
10 issue, and to remand to the lower courts for a substantive
11 determination as to whether respondents' claims in fact
12 fall within the preemptive scope of the Price-Anderson
13 Act.

14 If they do, then those claims are properly
15 litigated in Federal court. If they do not, then it may
16 be that the tribal courts would retain jurisdiction over
17 the suit.

18 QUESTION: I was going to -- you may have
19 touched on what I was going to ask, but I'm not sure that
20 I understand your argument for complete preemption,
21 because I thought your argument for complete preemption
22 was, Congress has clearly decided that these things ought
23 to be resolved in Federal forums, and yet one of the
24 issues before us, albeit one that was not passed on by the
25 lower courts, was whether this particular -- whether the

1 claims here fall within the concept of public liability.

2 I mean, I was going to say, isn't the argument
3 essentially circular, because there's no way we can deal
4 with the exhaustion issue without -- or any court can,
5 without first dealing with the issue of whether the claims
6 here are within the umbrella of public liability.

7 MR. NUECHTERLEIN: I disagree with that.
8 Congress anticipated there would be circumstances where
9 the parties would disagree about whether the Price-
10 Anderson Act is applicable, and whether Price-Anderson
11 rules would therefore apply. Congress wanted any dispute
12 like that to be in Federal court from -- if -- at the
13 election of the defendant.

14 QUESTION: Why didn't -- if it's as simple as
15 that, why didn't it simply provide for a broad removal
16 provision?

17 MR. NUECHTERLEIN: It did provide a removal
18 provision for State courts, and it also --

19 QUESTION: Yes, but I mean, not for tribal
20 courts.

21 MR. NUECHTERLEIN: That's correct, and it is
22 probably the case that Congress was simply not thinking
23 about tribal courts when it enacted this law, so the
24 question then is, would it -- would it violate
25 congressional intent to permit Price-Anderson suits to

1 persist in tribal court, despite what appears to be a
2 clear statutory preference for having all Price-Anderson
3 claims litigated in Federal court.

4 QUESTION: Of course, if we -- in answering that
5 question, if we say, well, Congress is presumed to know
6 the way, you know, the courts do business, I think your
7 position would run up against this difficulty, and that is
8 that the instances that you point to outside of Price-
9 Anderson for the concept of what you call complete
10 preemption in your brief were, I think -- and correct me
11 if I'm wrong -- all instances in which there was an
12 express removal provision.

13 MR. NUECHTERLEIN: That's correct, but by
14 enacting a complete preemption statute Congress signals
15 its intent to have all litigation within a particular
16 sphere to occur in Federal court and also --

17 QUESTION: Yes, but your examples of complete
18 preemption prior to this case are all examples in which
19 there is a removal provision, is that not correct?

20 MR. NUECHTERLEIN: But the point here is that
21 there is no need for a removal provision, because
22 everybody agrees the Federal courts have Federal question
23 jurisdiction to address --

24 QUESTION: Sure, but that begs the question of
25 exhaustion.

1 MR. NUECHTERLEIN: No, it doesn't beg the
2 question of exhaustion, because again, the very process of
3 exhausting tribal remedies in this context would frustrate
4 this statutory scheme.

5 The whole point of the statutory scheme is to
6 give defendants an absolute right to choose a Federal
7 forum for litigation, not just of claims that are deemed
8 to be within Price-Anderson, but also of any threshold
9 dispute about whether claims in fact fall within Price-
10 Anderson. That is clearly the congressional intent, and
11 the question here --

12 QUESTION: And you say this is the congressional
13 intent without reference to this background set of cases
14 that exemplify complete exhaustion under other statutory
15 regimes. You say that conclusion can be drawn from the
16 Price-Anderson Act alone.

17 MR. NUECHTERLEIN: That conclusion clearly
18 follows from the Price-Anderson Act, and you can tell that
19 but not just from the enactment of a removal provision,
20 but also from Congress' taking the extra step of deeming
21 any action asserting public liability to be a claim
22 arising within the scope of the Price-Anderson Act itself.

23 QUESTION: Mr. Nuechterlein, is there any clue
24 that Congress contemplated tribes at all, because when it
25 talked about how the substantive law would be shaped, it

1 mentioned State law.

2 MR. NUECHTERLEIN: That is correct.

3 QUESTION: It provided for removal, but it seems
4 that it just wasn't thinking about the tribes.

5 MR. NUECHTERLEIN: That is correct, and it is
6 significant that Congress provided that substantive State
7 law would apply in Price-Anderson suits. That, of course,
8 may be different from the law that tribes would apply, and
9 on top of that, it's also important to remember that the
10 removal statute itself was originally enacted in 1966.

11 The 1988 amendments expanded the scope of the
12 removal statute to extend beyond extraordinary nuclear
13 occurrences to include all nuclear incidents, of which we
14 claim these suits are an example, but there's no
15 indication anywhere in the legislative history that
16 Congress contemplated that tribal courts would adjudicate
17 these claims.

18 And the important point also is that tribal
19 court adjudication of these claims without any mechanism
20 for transfer to a Federal court which would have
21 centralized control over the litigation and centralized
22 control over compensation funds would present all of the
23 problems that motivated Congress in 1988 to expand the
24 removal provision at issue here. It would clearly
25 frustrate this statutory scheme to permit suits to proceed

1 in tribal court over the objection of the defendant.

2 Ultimately, on the merits issue the parties
3 address, we agree with petitioners that these tort suits
4 do, in fact, fall within the scope of the Price-Anderson
5 Act. That follows from the plain language of the
6 definitions of nuclear incident and public liability as
7 they appear in section 2014.

8 QUESTION: But you agree that that question
9 should get a first view by a lower court.

10 MR. NUECHTERLEIN: I think that is one
11 appropriate disposition, although the answer to the
12 question is clear enough to us that I think that it would
13 also be appropriate for this Court to decide it in the
14 first instance.

15 QUESTION: If we reverse on the ground that
16 exhaustion is not required, what does the Ninth Circuit do
17 with reference to the unappealed order?

18 MR. NUECHTERLEIN: Well, that -- that unappealed
19 order would remain intact if this Court were to apply
20 ordinary jurisdictional rules, so ultimately what might
21 happen is, respondents would return to district court to
22 claim that, notwithstanding any answer to the question of
23 whether these claims fall within Price-Anderson, that a
24 tribal court may nonetheless adjudicate Price-Anderson
25 claims. They would ask the district court at that point

1 to lift that preliminary injunction and would then
2 litigate that issue on the merits.

3 QUESTION: And what's the Government's position
4 on the merits question of whether you can bring Price-
5 Anderson claims in the tribal courts?

6 MR. NUECHTERLEIN: Our position is that it would
7 be inconsistent with the whole point of the scheme to
8 allow these suits to proceed over the objection of a
9 defendant in tribal courts, because that would present
10 exactly the same litigation problems that motivated
11 Congress to enact the 1988 amendments.

12 QUESTION: But absent objection, do they have
13 jurisdiction?

14 MR. NUECHTERLEIN: Yes, in the same way that
15 State courts would have jurisdiction in the absence of an
16 objection from the defendant.

17 QUESTION: What's the basis for the objection?
18 I don't --

19 MR. NUECHTERLEIN: The basis -- it would --

20 QUESTION: Sort of a cheap removal provision?

21 MR. NUECHTERLEIN: Well, it's not a removal
22 provision.

23 QUESTION: You just object to its presence
24 there?

25 MR. NUECHTERLEIN: It's taking advantage of this

1 Court's holding in National Farmers Union that there is a
2 Federal common law cause of action to challenge the
3 jurisdiction of tribal courts.

4 QUESTION: Well, I'm sure there is a cause of
5 action to challenge it, but that doesn't say that there
6 isn't any jurisdiction. It just says there is available a
7 cause of action to challenge it. What is the basis for
8 saying there's no jurisdiction?

9 MR. NUECHTERLEIN: The cause of action would be
10 that the exercise of jurisdiction over the objection of
11 the defendant would be inconsistent with the structure of
12 the Price-Anderson Act and therefore inconsistent with
13 Federal law.

14 QUESTION: Thank you, Mr. Nuechterlein.

15 Mr. Farr, we'll hear from you.

16 ORAL ARGUMENT OF H. BARTOW FARR, III

17 ON BEHALF OF THE RESPONDENTS

18 MR. FARR: Thank you, Mr. Chief Justice, and may
19 it please the Court:

20 Before turning to the jurisdictional question
21 that makes this case, I think, particularly perplexing as
22 it comes to this Court, I would like just to take a moment
23 at the outset to explain why I think the decision below,
24 assuming for a moment that the court of appeals had the
25 power to render it, was, in fact, a proper accommodation

1 of the Price-Anderson Act and the doctrine of tribal
2 exhaustion.

3 First of all, the decision below carried forth
4 both Congress' policy of respecting the jurisdiction of
5 tribal courts and also, in particular, its policy of
6 allowing tribal plaintiffs to choose tribal courts as a
7 forum. That policy is reflected in the absence of removal
8 provisions generally from tribal courts.

9 QUESTION: By the decision below, you don't mean
10 the unappealed order. You mean --

11 MR. FARR: I mean the entire decision below, in
12 fact.

13 QUESTION: The entire -- so -- all right.

14 MR. FARR: That's correct. I think the court of
15 appeals -- and I will obviously get to the point of
16 whether it had the power to render it, but I think in fact
17 by addressing both the unappealed part of the order and
18 the appealed part of the order the Ninth Circuit came out
19 in the right place.

20 In addition to this respect for the right of
21 tribal courts and tribal plaintiffs, what the court did
22 was avoid the problem of having litigants running back and
23 forth between the Federal and the tribal courts, which is
24 a central idea behind the idea --

25 QUESTION: Well, you could avoid that at the

1 other end of the spectrum, too.

2 MR. FARR: I'm sorry.

3 QUESTION: I say, you could avoid running back
4 and forth between tribal courts and Federal courts at the
5 other end of the spectrum, too, and say that the -- rule
6 against your contentions in all respects.

7 MR. FARR: That would be true, but the fact is
8 that the tribal exhaustion doctrine in its basic core
9 element is intended to say, unless there is a clear lack
10 of jurisdiction in the tribal courts, the idea is that the
11 issues with respect to jurisdiction are considered first
12 by the tribal court and then subsequently by the Federal
13 court, and that's exactly the regime that the Ninth
14 Circuit decision restores in this case.

15 At the end of the district court proceedings,
16 essentially you had a case that was half in Federal court
17 with the issue that petitioners were appealing being left
18 essentially to the tribal courts, and half in Federal
19 court with the issue that the respondents did not appeal
20 being part of the Federal decision-making.

21 So in the end it seems to me that, confronted
22 with a split case, the Ninth Circuit did what would make
23 the most sense, assuming it had the power to do it, which
24 is to say, let's let the tribal courts decide both of
25 these issues in the first place.

1 And one particular point I think that bears on
2 that is that if, in fact, the district court is incorrect
3 that tribal courts lack power over Price-Anderson actions,
4 then, in fact, the other question, the question that
5 petitioners were asking the Ninth Circuit to consider, is
6 irrelevant to jurisdiction. It doesn't make any
7 difference whether this is a public liability action or
8 not for purposes of determining tribal court jurisdiction,
9 if, in fact, tribal courts have a jurisdiction, whether it
10 is or not.

11 QUESTION: Well, how could they? That is to
12 say, what possible reason could Congress have if --
13 suppose a nuclear power plant leaks, you know, so it's
14 quite clearly the kind of thing that Price Anderson is
15 concerned about. The nuclear power plant leaks, and now
16 every State action, of which there would be thousands, the
17 defendants can remove to Federal court immediately.
18 That's absolutely clear Congress wants that to happen.

19 Now, what reason could Congress have for saying
20 in such a case that although we got all these actions in
21 Federal court and out of State court, nonetheless we want
22 them to proliferate over in the tribal courts?

23 I mean, I grant you, somebody could logically
24 say that, but what practical reason or other reason would
25 there be for that?

1 MR. FARR: Justice Breyer, I think we have to
2 look at two things. The first is that tribal court
3 jurisdiction by its nature is very limited. It only
4 arises in situations in which there are activities on
5 tribal land, with very few exceptions, activities that
6 arise on tribal land that injure tribal members, or
7 perhaps in certain cases where non-Indians essentially are
8 required to bring their suits under Williams v. Lee.

9 But the basic idea is that tribal courts only
10 have jurisdiction in a very narrow territorial area, and
11 of course there aren't any nuclear power plants on
12 tribal --

13 QUESTION: No, what we have is a leak, you know,
14 and there's a cloud, and it goes and hurts some people.

15 MR. FARR: Right, but that I think would not be
16 a case that's subject to tribal court jurisdiction,
17 because in fact --

18 QUESTION: Well, once you say that, what's
19 the --

20 MR. FARR: The activity did not occur on the
21 tribal reservation, so --

22 QUESTION: Well, what if they find there's a
23 truck that goes through, the truck, and the truck leaks
24 nuclear material, so -- all I'm looking for is an example
25 which clearly is within Price-Anderson. Now, once we have

1 the example, and it happened there was a truck -- we can
2 imagine -- just -- it's not that hard to think of a case.

3 MR. FARR: I understand, but I think --

4 QUESTION: Now, what reason could there possibly
5 be that Congress would have wanted to take all those cases
6 out of State court, which, by the way, are very used to
7 dealing with all kinds of litigation, but nonetheless are
8 brought into Federal court for consolidation purposes, and
9 yet nonetheless Congress would have wanted to let those
10 cases proliferate in the tribal courts. That's where I'm
11 having difficulty.

12 Once you say that you want -- Congress really
13 wanted them out of State court into Federal court, I can't
14 find a good, convincing reason why they would have wanted
15 them to stay in the tribal court. That's why I'm asking
16 the same question.

17 MR. FARR: This is why I think the example does
18 make a difference. The general practice of Congress is to
19 allow tribal plaintiffs to choose the tribal court forum
20 for events that arise on tribal lands, so if you look at
21 any of the other cases in which there are Federal
22 jurisdiction, Federal question jurisdiction under section
23 1331, diversity jurisdiction situations in which the same
24 argument could be made that Congress has provided for
25 removal from State courts, Congress in fact has not

1 provided --

2 QUESTION: Do you think, Mr. Farr, that was a
3 deliberate decision by Congress not to allow removal from
4 tribal courts, or do you think they just overlooked it at
5 the time they enacted the removal statute?

6 MR. FARR: In the Price-Anderson Act
7 specifically, or generally?

8 QUESTION: Generally, because you make the
9 general point that, unlike most plaintiffs, tribal
10 plaintiffs don't have to worry about the defendant
11 removing even if there's diversity jurisdiction.

12 MR. FARR: That's right. I'm not sure that the
13 decision at first was deliberate, Justice Stevens. But I
14 think that by now the idea that cases are not removable
15 from tribal court is a familiar principle, and certainly
16 Congress has not revisited that.

17 And also in the most specific example that we
18 have, after a Federal court of appeals held that a suit
19 against a Federal officer in tribal court was not
20 removable, the Justice Department asked the Congress, in
21 fact, to amend the removal statute to provide -- that
22 would be 1442 -- to provide for removal in those cases,
23 and Congress did not enact it, so I think the idea that
24 Congress --

25 QUESTION: Which proves what, which proves that

1 Congress did not -- that Congress thought it was a bad
2 idea?

3 MR. FARR: It doesn't necessarily prove that.

4 QUESTION: It doesn't.

5 MR. FARR: What I'm suggesting, though, is that
6 Congress seems, by not providing in any situation for
7 removal from tribal court, in the end to be suggesting a
8 special solicitude for tribal plaintiffs to choose tribal
9 courts as their forum.

10 Congress has demonstrated a concern for the
11 tribal courts themselves, of course, and then in addition
12 to that it seems to me that in the cases where you have
13 injuries arising on tribal lands, and the injured parties
14 are tribal members, that Congress reasonably would think,
15 consistent with that policy, that those suits should be
16 brought in tribal court.

17 QUESTION: So that's --

18 QUESTION: When you say, injuries on tribal
19 lands, what particularly was the allegation of the
20 complaint here, that there was some activity of the
21 defendants on tribal lands?

22 MR. FARR: That's correct. The defendants in
23 these cases were on tribal lands. These are lands that
24 are owned in trust for the tribes.

25 QUESTION: Mining uranium, or --

1 MR. FARR: That's correct. In one -- in both
2 cases they are open pit uranium mines. In one situation,
3 the injuries are said to arise from the -- essentially the
4 abandonment of the pits, and they're filling up with
5 water, and then families using the water as drinking water
6 and other -- for other reasons which caused injury. In
7 the other, it's a situation essentially of particulate in
8 the air as a result of the mining operations.

9 But all of this occurs on tribal land in
10 essentially the core part of the Navajo reservation, so
11 back to Justice Breyer's question for a moment. First of
12 all, I begin with the proposition then that Congress has
13 generally allowed tribal plaintiffs --

14 QUESTION: Wait, I can put you on easier ground,
15 I think, and I think you may have this -- because suppose
16 I thought -- let's assume I do think this, which I think I
17 do basically, that if Congress had a statute, that statute
18 says, look, this is a certain kind of action, we do not
19 want this ever brought in a State court. We want this
20 brought in Federal court no matter what. Never, never,
21 never bring it in a State court, and they simply happen to
22 forget saying, and by the way, we mean tribal courts, too.

23 If I saw a statute like that, it wouldn't take
24 me long to say, they want it brought in Federal court,
25 period. They just forgot about tribal courts, or didn't

1 mention it.

2 But that isn't our case, because our case is a
3 case where there's one set of things that fall within the
4 statute that we'll imagine says that, but the question, I
5 take it, here is, and if you have some instances where it
6 isn't clear whether you have this kind of an action or not
7 this kind of an action, who's to decide that?

8 MR. FARR: Well, that's true, and --

9 QUESTION: And so what's your argument there?

10 Assume with me, in other words, contrary to your
11 interests, that in the clear case, a Price-Anderson case,
12 that's the district court's position. You have something
13 everybody agrees in the Price-Anderson Act, it goes to
14 Federal court.

15 You have something that there's disagreement
16 about whether it goes to tribal -- whether it's in the
17 Price-Anderson Act or not, as to that one the question is,
18 who is to decide whether it's within or without, and on
19 that question you say go to tribal court.

20 MR. FARR: That would still be in the tribal
21 court.

22 QUESTION: The SG disagrees with you. The SG
23 says that will wreck the act. That will wreck the act on
24 the assumption that I'm talking about, that you say, and
25 that's my question.

1 MR. FARR: Well, I don't think it will, Your
2 Honor, for several reasons. First of all, it only wrecks
3 the act on the assumption that the answer to the question
4 is that the claim is a Price-Anderson claim, which we
5 think is, in fact, the wrong answer to that question.

6 But secondly, the fact is that the tribal
7 exhaustion doctrine is not some novel principle. The
8 tribal exhaustion doctrine is basically a representation
9 of the usual principle of comity that says, when you have
10 a pending proceeding in another court, it's not the
11 business of the Federal court to jump in and tell that
12 court it can't adjudicate the --

13 QUESTION: Well, that would be the same thing in
14 a State court situation. If the mining occurred on -- in
15 the jurisdiction of the State, not tribal law, one would
16 normally let the State courts decide that, if that's where
17 the plaintiff sued.

18 MR. FARR: That's correct, Justice O'Connor.

19 QUESTION: But Congress has said no, has
20 provided for removal, right?

21 MR. FARR: That's correct.

22 QUESTION: And here, no similar language is
23 included for removal from tribal courts.

24 MR. FARR: Correct.

25 QUESTION: So we have to figure out what to do

1 in the absence of such language.

2 MR. FARR: That's correct, but the point that
3 I'm making, and back again to Justice Breyer's question,
4 is that it seems to me instructive that the failure to
5 provide for removal from tribal courts in this case is not
6 an exception to the Congress' normal practice of providing
7 for removal from tribal courts. To the contrary.

8 If, in fact, one thought removal was necessary
9 in this case, either directly or through some sort of
10 second-hand removal creation by a combination of the 1331
11 lawsuit, that would be the first time, in fact, that it
12 was ever attributed to Congress an intention to allow a
13 defendant to remove a case that was otherwise properly,
14 under all principles of Federal Indian law, within the
15 jurisdiction of the tribal court.

16 QUESTION: We do have those cases. I mean,
17 there they are.

18 MR. FARR: Well --

19 QUESTION: We've done it in other areas, and
20 you're saying it's shocking here. I mean, what's the
21 difference?

22 I mean, the argument you're making is an
23 argument against all of the cases which say that you have
24 a 1331 cause of action to get it out of the tribal court.

25 MR. FARR: No, I'm not arguing that there isn't

1 a cause of action. What I'm suggesting, though, is that
2 the second part of the National Farmers decision is that
3 even though there is jurisdiction under 1331, essentially
4 it's not exercised unless the lack of jurisdiction in the
5 tribal court is clear.

6 QUESTION: But don't make a comparison to how we
7 treat State courts, because you couldn't have a 1331
8 action to yank a case out of a State court that way, could
9 you?

10 MR. FARR: No, you could not, but what I'm
11 suggesting, it's not a -- it's not the difference between
12 the way this Court treats State courts, it's the way the
13 Congress treats removal from State courts and tribal
14 courts. It provides generally for removal from State
15 courts.

16 QUESTION: But the 1331 cause of action isn't
17 yet filled in. I mean, it's entirely made by this Court,
18 really. Granted, 1331 provides the basis for it, but
19 Congress might well have thought that that is the, you
20 know, adequate substitute for removal.

21 MR. FARR: Well, I think in a situation where it
22 was clear that the tribal court did not have jurisdiction,
23 that it would properly serve through a lawsuit brought
24 under 1331 an injunctive power to bring the case, at least
25 foreclose it in tribal court, if not bring it into Federal

1 court.

2 The 1331 action, of course, is a different
3 action from what you get with a removal petition. If you
4 file a removal petition, what the Federal court is asked
5 to decide is its own jurisdiction, does it have
6 jurisdiction over this claim, and the question will be
7 whether it arises under Federal law. Complete preemption
8 principles may be relevant to that.

9 But here the question is not, does the Federal
10 court have jurisdiction over this case. It's whether the
11 tribal court lacks jurisdiction over the case, and that --
12 an order that precedes that says, to --

13 QUESTION: But, of course, the reason the tribal
14 court lacks jurisdiction, if it does, is because Congress
15 has said all these cases belong in Federal court.

16 MR. FARR: Well, to begin with, Congress has not
17 said that they all belong in Federal court as such. They
18 certainly may remain in State court. At most --

19 QUESTION: If the defendant wants them there.

20 MR. FARR: At most what Congress would have said
21 is, if the defendant wants them there, and the point I'm
22 making about the lack of provision for removal from tribal
23 courts generally is that that's exactly what all removal
24 statutes do.

25 All removal statutes say, if it's a Federal

1 question case, and the defendant wants it in Federal
2 court, it goes to Federal court. If it's a diversity case
3 and it meets the requirements, the defendant wants it in
4 Federal court, it goes to Federal court.

5 What's different about the Price-Anderson Act?
6 That's all --

7 QUESTION: Mr. Farr --

8 MR. FARR: That's all they're pointing to here.

9 QUESTION: I think there is something different,
10 and that's what I'd like to get down to.

11 I understand talking in these abstract
12 categories, but you have conceded, if I read your brief
13 correctly, that if the tribal court plaintiffs claims are,
14 indeed, as Mr. Atwood tells us they are, public liability
15 claims, they cannot survive as something else. If the
16 Price-Anderson covers the waterfront, you cannot
17 characterize it as something else. I believe that you
18 have said that a few times in your brief.

19 MR. FARR: That's correct.

20 QUESTION: So if the question is, how sweeping
21 is the Price-Anderson Act, does it cover mining, does it
22 cover situations where there's no indemnification, why
23 isn't it logical that a Federal court should decide that
24 purely Federal question?

25 If we look at the Farmers and LaPlante, there

1 were some things that involved, maybe fact determination,
2 maybe some input from tribal law, but here, the question
3 is, the sweep of the Price-Anderson Act has nothing to do
4 with anything other than how broad Congress wanted to make
5 that, and so why should the exhaustion requirement apply
6 to a question of what is the scope of a law passed by
7 Congress to govern nuclear incidents?

8 MR. FARR: I think the answer to that, Justice
9 Goldberg, goes back to the basic idea why the exhaustion
10 doctrine exists at all.

11 I do not think that it is necessary that the
12 issue that is -- the jurisdictional issue that is part of
13 exhaustion be one that tribal courts have particular
14 expertise with regard to. I think it is sufficient to
15 justify the tribal exhaustion doctrine under traditional
16 principles of comity that the suit was originally filed in
17 tribal court, and the tribal court has asserted
18 jurisdiction over it.

19 QUESTION: But you can't get all the way there
20 just from Farmers and LaPlante, because, as the Chief
21 pointed out, those were decisions not -- where we weren't
22 guided by anything Congress said. The Court essentially
23 created that.

24 MR. FARR: I'm not saying that those decisions
25 necessarily foreclose any evolution, essentially, in the

1 1331 cause of action.

2 What I'm saying is that I think the proper
3 application of the tribal exhaustion doctrine is
4 essentially to leave matters affecting the jurisdiction of
5 a tribal court to the tribal court in the first instance
6 when there is a pending tribal court proceeding. And what
7 is being asked in the 1331 proceeding is that a Federal
8 court take the highly unusual step of declaring that
9 another court lacks jurisdiction over the claims it's
10 presently hearing.

11 It seems to me that, unless that lack of
12 jurisdiction in the tribal court is clear, then Federal
13 courts are really overstepping the proper bounds of
14 injunctive power under usual principles of comity.

15 Also, it does seem to me that one runs the risk
16 of having just what you have here. As Justice Kennedy
17 pointed out earlier, you essentially have a case which
18 then goes up to a court of appeals essentially in a mixed
19 condition, because in our view the district court should
20 not have decided that tribal jurisdiction is foreclosed
21 over -- under public liability actions. We think under a
22 proper demonstration of the principles of National
23 Farmers, that question was also properly left to the
24 tribal court.

25 QUESTION: But that wasn't appealed, was it?

1 MR. FARR: That was not appealed, and let me
2 just say for one moment, I actually think that the court
3 of appeals did have jurisdiction to consider the
4 unappealed part of the order and to reverse that part.

5 That is a jurisdiction that should be sparingly
6 exercised, but I think the usual principles that say, once
7 a court acquires jurisdiction independently over a part of
8 a case, it then has jurisdiction over the entire case, and
9 the power to dispose of the entire case is essentially the
10 controlling principle here.

11 The decision in Morley is, I think, probably the
12 biggest obstacle to that point, but I think there are a
13 couple of responses to that. First of all, if one looks
14 at the cases cited in Morley, although Morley itself
15 certainly talks in terms of power, a number of the cases
16 talk in terms of waiver, or something amounting to a
17 waiver, or a loss of the right to insist on the appeal,
18 language which suggests really more about the loss of a
19 litigant's right to insist upon a decision and less --
20 goes less to the question of the power of the court.

21 QUESTION: Oh, but they're all categorical,
22 whether it's based on jurisdiction or not. What they say
23 is -- and they're certainly as categorical as Morley was,
24 which was -- I mean, it couldn't have been more
25 categorical.

1 MR. FARR: Well, to begin with, the case that
2 deals with the issue most directly, Langes, is categorical
3 the other way.

4 QUESTION: Langes doesn't deal with the issue.
5 Langes, its discussion of this issue is dictum, because
6 what was involved was in fact not the failure to raise an
7 issue, but the failure to make an argument. It wasn't --

8 MR. FARR: Right. I understand it's dictum.

9 QUESTION: So anything it said was dictum, and
10 it has dictum on both sides. As I read our prior cases,
11 they are all categorical when they say that you simply
12 can't do it.

13 MR. FARR: Well, but the question is, are they
14 saying you can't do it because you lack the power to do
15 so? If so, those cases, it seems to me, have not
16 explained the answer to the point I just made.

17 If courts generally can exercise pendent
18 jurisdiction, ancillary jurisdiction, supplemental,
19 whatever the right term is, over parts of a case over
20 which there is no independent basis of jurisdiction, once
21 it does have a basis of jurisdiction over the initial part
22 of the case, what is there that is so different about the
23 notion of a cross-appeal that would take it out of that
24 rule?

25 QUESTION: I don't know, but we've said so.

1 (Laughter.)

2 MR. FARR: I don't think that one has said so as
3 a matter of binding authority. I don't think that --

4 QUESTION: We have a case in point, like Morley.
5 Certainly one thing about jurisdiction, it ought to be
6 clear. It ought not to have a lot of -- you know,
7 somebody we feel sorry for and make a little exception to
8 it. Certainly Morley is dead against you in this case.

9 MR. FARR: Well, let me suggest two things if I
10 may, Mr. Chief Justice. First of all, while I don't
11 generally dispute the idea that jurisdictional rules ought
12 to be clear, one of the difficulties is, in fact, that the
13 more rigorous the cross-appeal becomes, the more
14 difficult, in fact, it is for litigants, because they wind
15 up being unsure of what issues they can in fact raise in
16 defense of the parts of the case that they won below and,
17 indeed --

18 QUESTION: Well, why not just cross-appeal when
19 in doubt?

20 MR. FARR: Well, that is a possible solution to
21 the rule, but I think -- in the first place I don't think
22 litigants typically -- for example, this case is not a bad
23 example. As a result of the injunction against
24 petitioners, they were not able to proceed with claims
25 deemed to be Price-Anderson in tribal courts, but at the

1 time, none of the claims that they had brought in tribal
2 court had yet been deemed to be --

3 QUESTION: You said petitioners. You mean
4 respondents.

5 MR. FARR: I'm sorry. Excuse me. I do mean
6 respondents. None of the claims that they had brought had
7 been deemed to be Price-Anderson claims, so in terms of a
8 practical effect, the injunction had none at that point.

9 It was a preliminary injunction. It was subject
10 to review when made final, so in fact a cross-appeal here,
11 and obviously in retrospect it would have been much wiser
12 to have taken one, but a cross-appeal here would have
13 essentially caused them to go up to the court of appeals
14 and complain about an order that was causing them no
15 immediate harm.

16 QUESTION: Why do you care? I mean, you have
17 nothing in the complaint, or virtually nothing that
18 alleges violation of Price-Anderson. I mean, almost all
19 your -- I thought all of them, but maybe there's one that
20 isn't -- that you seem to allege things like negligence,
21 et cetera, which you're saying don't fall within Price-
22 Anderson.

23 MR. FARR: Well, I think --

24 QUESTION: So why do you care?

25 MR. FARR: Justice Breyer, I think there are two

1 points, and I think it's important to keep them clear.
2 Our -- we have a basic position which is, these claims are
3 simply not Price-Anderson claims. They are not within the
4 scope of the claims --

5 QUESTION: You want to say even if they were.
6 Okay. I see that. Let me -- can I ask you one other
7 question?

8 MR. FARR: But may I make --

9 QUESTION: Yes.

10 MR. FARR: -- just one final point. I think if,
11 in fact, they are within the scope of Price-Anderson
12 claims, then I think there is a little bit of a
13 misunderstanding about what the effect of that is.

14 I don't think there is any requirement for
15 claims to be Price-Anderson claims, that they be pled as
16 Price-Anderson claims. The act deems them to be Price-
17 Anderson claims if they're within the terms of the act.
18 We say they're not, but if they are, the act, by its own
19 force, turns them into Price-Anderson claims.

20 QUESTION: Could you say one word on that, just
21 what -- I mean, I just don't want you to sit down without
22 saying one other thing. I'll put it specifically so you
23 have a chance to say it, but that the -- you look at the
24 Price-Anderson Act and it says, with respect to any public
25 liability action resulting from a nuclear incident,

1 Federal courts have jurisdiction.

2 Then it defines a public liability action really
3 to be any action where somebody is claimed to owe money to
4 a member of the public arising out of a nuclear incident.
5 Then it defines nuclear incident to mean any occurrence
6 that causes sickness or death or injury arising from the
7 radioactive properties of nuclear material.

8 Well, QED. What is there for them to decide if
9 we send it back? What they're saying is, QED. All the
10 claims in this complaint are Price-Anderson claims,
11 because they all allege injury arising -- to a member of
12 the public arising out of radioactive material. End of
13 the matter. Now, what's your response to that?

14 MR. FARR: I think there are two real
15 problems -- excuse me -- with reading the language the way
16 that that would, frankly, naturally seem to be read. You
17 wind up with two linguistic anomalies. First of all, you
18 wind up with, under petitioner's reading, a public
19 liability action against defendants, who are not liable
20 for public liability.

21 The linchpin of a public liability action is
22 that it asserts public liability, but it isn't asserting
23 public liability against anybody who is responsible for
24 public liability in this case.

25 QUESTION: Public liability meaning liability to

1 a human being, namely, a member of the public.

2 MR. FARR: Right. That's what --

3 QUESTION: All right, so why don't we say that?
4 If you put it in that language, what's the problem?

5 MR. FARR: But it has to be public liability --
6 the liability has to be on behalf of a defendant who is
7 liable for public liability.

8 QUESTION: Well, they're saying there is a
9 defendant here. They say, the El Paso Natural Gas Company
10 is liable to me, a member of the public.

11 MR. FARR: But the fact is, under the definition
12 of persons indemnified, which is 2014(t), which includes
13 all persons who are possibly liable for public liability,
14 there has to be an indemnification agreement or financial
15 protection where that doesn't apply.

16 QUESTION: Mr. Farr, do you argue -- I just want
17 to be sure I get this question in. Do you challenge the
18 fact that there's a nuclear incident alleged?

19 MR. FARR: The -- in general I think not, but
20 the question is --

21 QUESTION: I understand your argument about the
22 public liability action, but --

23 MR. FARR: Reading it in -- the language as it
24 moves through the definitions seems to lead to one
25 conclusion. Our position is, if it's read in context, you

1 cannot come to the conclusion that you can have a public
2 liability suit against persons who aren't liable for
3 public liability and furthermore --

4 QUESTION: But you're saying that even if one
5 assumes it's a nuclear incident.

6 MR. FARR: That would still be our position,
7 right.

8 And our second point, though, which also goes to
9 the language, is that the claim has to -- is deemed to
10 arise under section 2210. The question is, what is there
11 in section 2210 that this claim arises under?

12 Section 2210 is a compensation scheme which
13 covers public liability, it channels public liability to
14 those persons having indemnification and in -- and
15 required insurance, and then it provides for suits to
16 recover within that scheme. That's what section 2210
17 does. None of that applies here. There's no required
18 insurance. There's no indemnity by the Government.

19 QUESTION: Those are the questions about the
20 scope of Price-Anderson, and the question before us is,
21 who decides, and the very good argument that you are
22 making now, you're saying should be addressed in the first
23 instance to a tribal court and not to a Federal court.

24 MR. FARR: If it's jurisdictional at all --

25 QUESTION: Even though it's a very intricate

1 question of Federal statutory interpretation, and has
2 no -- that part of it has no tribal law element to it at
3 all.

4 MR. FARR: Regardless of the fact that it
5 doesn't have a tribal court element, we still think that
6 when a litigant goes into Federal court and says, stop the
7 jurisdiction that is being exerted by this other court,
8 that unless the lack of jurisdiction in that other court
9 is clear both from jurisdictional and from substantive
10 provisions, it is the role of the other court to make the
11 initial determination about jurisdiction, and that's all
12 we're asking here. That is the tribal court here in the
13 first instance that is subject to later review after that
14 decision has been made.

15 Thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Farr.
17 The case is submitted.

18 (Whereupon, at 12:12 p.m., the case in the
19 above-entitled matter was submitted.)
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CERTIFICATION

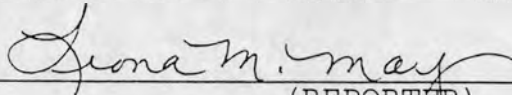
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EL PASO NATURAL GAS COMPANY, ET AL., Petitioners v. LAURA NEZTSOSIE, ET AL.

CASE NO: 98-6

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