ORIGINAL

In the

Supreme Court of the United States

WHITE MOUNTAIN APACHE TRIBE ET AL.,

PETITIONERS

V.

ROBERT M. BRACKER, ET AL.

No. 78-1177

Washington, D. C.
January 14, 1980

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v.	:	No. 78-1177
ROBERT M. BRACKER, ET AL.	:	

Washington, D. C.

Monday, January 14, 1980

The above-entitled matter came on for oral argument at 11:06 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

NEIL VINCENT WAKE, ESQ., Jennings, Strouss & Salmon, 111 West Monroe, Phoenix, Arizona 85003; on behalf of Petitioner Pinetop Logging Company

MICHAEL J. BROWN, ESQ., 222 North Court Avenue, Tucson, Arizona 85701; on behalf of Petitioner White Mountain Apache Tribe

ELINOR HADLEY STILLMAN, ESQ., Office of the Solicitor General, Department of Justice, Washingtn Washington, D.C.; on behalf of the United States as amicus curiae

APPEARANCES (Cont.):

IAN A. MACPHERSON, ESQ., Assistant Attorney General Arizona, State Capitol--West Addition, 1700 West Washington, Phoenix, Arizona 85007; on behalf of the Respondents

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Wake, I think you may proceed whenever you are ready now.

ORAL ARGUMENT OF NEIL VINCENT WAKE,

ON BEHALF OF THE PETITIONERS

MR.WAKE: Mr. Chief Justice, and may it please the Court:

This case deals with the permissibility of certain State taxation concerning use of tribal and Bureau of Indian Affairs roads on the reservation when use is made by a non-Indian logger as a part of a tribal forestry enterprise.

The White Mountain Apache Tribe and its logger Pinetop Logging Company, actually one of its loggers, submits that the State taxes are barred by two separate principles of Federal law.

The first ground for a claim of defense to these taxes is that they are preempted by comprehensive Federal regulation of the fields of managing and harvesting Indian reservation timber.

Our second defense is the doctrine that State laws may not be applied even to non-Indians with respect to their dealings with Indians on the reservation where to do so would infringe on the tribal self-government.

QUESTION: I am not saying it is entirely immaterial, but it isn't in the case.

MR. WAKE: Yes, it is, Your Honor.

QUESTION: Is there any reason why you didn't take it as an appeal?

MR. WAKE: I considered either option available, and was not entirely sure, and filed to serve petition.

QUESTION: Well --

MR. WAKE: My co-counsel Mr. Michael Brown will address himself to the claim of infringement of tribal self-government.

The facts upon which this case arised can be stated summarily as follows:

Over a hundred years ago President Grant set aside a reservation for the White Mountain Apaches in a remote and mountainous part of Arizona. Virtually the only significant resource on that reservation is the timber that grows in the mountains. Fortunately for this tribe, that resource holds out the potential for a perpetually renewable resource if wisely managed. And, indeed, the tribal timber enterprise is the principal financial support for the entire tribal government in all other tribal programs.

In addition, the tribal timber enterprise is a major on-reservation employer of members of the tribe.

Obviously an essential part of the program of harvesting this timber is getting the trees from off the mountain down to the tribal mill in White River, Arizona.

That process requires the building and the maintenance of an extensive road system throughout the reservation and, indeed, there are literally thousands of miles of roads throughout this reservation. Most of these roads, almost all of these roads are built and maintained by the tribe itself either directly or through its loggers.

I have brought with me and intend to submit to the Clerk's Office for illustrative purposes only, the most recent U.S. Geological Survey map of the reservation which gives some indication of the extent of the road system that is to be found thereon.

QUESTION: But do they use the State road to some degree?

MR. WAKE: Your Honor, the loggers have occasion to cross the State roads and to use them from time to time and, indeed, the Pinetop Logging Company keeps precise records of all of its use of State roads and it pays taxes with respect to those uses.

This lawsuit does not involve an attempt by the State of Arizona to obtain tax payments with respect to the use of its own roads that it owns or builds or maintains or polices. Rather, this lawsuit has to do with intent by the State of Arizona to derive windfall profits for the benefit of its State road system, not from the use of those roads but from the use of wholly different roads which are built and maintained

and owned solely by the tribe and by the Bureau of Indian Affairs.

QUESTION: Well, you don't contend, do you, as a matter of general tax apportionment law that a State could not exact a license fee for the use of a vehicle and devote the proceeds of that tax to maintenance of roads and base it on the value of the vehicle; and that the owner of a vehicle could nonetheless say, well, I only drive my car to church on Sunday, so although your tax would come out to be computed $100 I am paying you $3, which I think is the value that I use your road.

MR. WAKE: Your Honor, we certainly do not make that contention and the principles to which you refer are general principles of municipal and public law with respect to taxing authorities of various taxing entities.

What we are discussing in this case is a different body of law which is a body of Federal law which has to do with when a specific congressional regulatory scheme dealing with specific subject matters preempts interfering State laws. So the answer to your question is "No," but I submit that does not answer the question before the Court.

QUESTION: Well, then why does Pinetop keep specific records of its use on Arizona State highways?

MR. WAKE: Your Honor, the reason for that is very simple. First, our client as a practical matter thought it

fair to pay those taxes, and as a practical matter we choose not to bring that lawsuit.

QUESTION: So, in effect, you say that you might be able to challenge those laws but you are electing to pay a part of the tax that is levied.

MR. WAKE: Your Honor, we do not choose to challenge the State's collection of taxes with respect to the use of its own roads. We do not admit liability, we simply have no case or controversy before the Court with respect to that question.

QUESTION: How about the licenses on the trucks?

MR. WAKE: The trucks are licensed, Your Honor.

QUESTION: And they pay license fees?

MR. WAKE: I believe that those license fees are paid and I would point out that they are de minimis in amount so far as my understanding. That again is another lawsuit not --

QUESTION: Mr. Lake, can I ask you another question. With respect to the 8-cent-per-gallon fuel tax, the statute says "For the purpose of partially compensating the State for the use of its highways," and so forth, the 8-cent tax is imposed.

Supposing the statute said in order to generate general revenues for the State, the tax in this amount is imposed and went into the general funds. Would your case be the same?

MR. WAKE: Your Honor, that would be a slightly different case. I submit that the answer would probably be the same. And let me elaborate on that answer for a moment.

Again, the fundamental concern which we submit the Court must address itself to is what the subject matter and the purposes of the Federal regulation is and whether those purposes require the exclusion of these State taxes. Now, in this case the Federal Government has regulated the entire field, we submit, of managing and harvesting Indian timber. These particular State taxes are offensive not because of what they are used for but because of how they bear upon the Federal scheme.

We submit that the fact that these State taxes are used for the building of unrelated State roads is part of what makes these taxes worse, it is not necessarily what makes them bad. What makes them bad is the fact that the attempt of the State of Arizona to derive tax revenues out of the tribal forestry program runs at cross purposes to the specifically identified and articulated Federal purposes of the management and harvesting of tribal timber.

Therefore, whether the State uses these taxes for other purposes or not, is not necessarily controlling.

QUESTION: How is that different from charging a tax say -- sales taxes or something like that on the purchase of the vehicles which are used exclusively in the logging

business?

MR. WAKE: Your Honor, I would submit that in order to draw the boundaries of the reach of the preemptive force which we submit must be recognized here, one would have to look to a number of considerations. And there is no bright line test but there are a number of overlapping considerations that are adequate for purposes of identifying the specific needs to protect against specific State intrustions into the regulatory scheme. I may list a few of them.

One is the nexus of the State assertion of jurisdiction with the direct subject matter of the Federal regulation. Here Federal regulation deals specifically and directly with the process of getting the trees off the mountain down to the mill. That is the core of the entire statutory and regulatory scheme. And these taxes are an attempt to derive revenues off of that very subject matter.

Now --

QUESTION: Except that the taxes imposed on the gas is pumped into the tank, I suppose.

MR. WAKE: Your Honor, the tax is imposed under State law on the conjunction of two incidents. One is the burning of fuel to move a motor vehicle; and the other is the moving of it on a highway or road, as it is defined.

QUESTION: But isn't the tax just added to the price per gallon of gasoline?

MR. WAKE: Not in this case, Your Honor. Our client Pinetop Logging Company purchases its diesel fuel in

QUESTION: Diesel fuel.

MR. WAKE: -- in interstate commerce and does not pay taxes to its seller in interstate commerce. It brings the fuel on the reservation where it is stored and ultimately used.

QUESTION: Would this tax be imposed -- and maybe I am echoing my brother Stevens' question -- on the operator of a timber company, say, Weyerhauesur Company or something that used its fuel and used its vehicles exclusively on its own private property?

MR. WAKE: Off of an Indian reservation?

QUESTION: Yes, but never on State or tax-supported roads.

MR. WAKE: In that particular situation I believe the State tax would be properly collectible because there are no implications of Federal Indian laws or policies in that situation. There would be no due process objection to the State's right to tax that.

QUESTION: Well, I would think that there might well be. You don't represent that client, but --

MR. WAKE: Well --

QUESTION: Mr. Wake, just to go back for a second, and I think it is the same point Justice Stewart asked you,

you point out that here the fuel is bought in large quantities and actually pumped on the reservation. I take it your case would be precisely the same if it were bought at retail from local gas stations off the reservations.

MR. WAKE: That would be our position, Your Honor, precisely.

If it please the Court, I do anticipate the need for some rebuttal today and therefore I would like to yield to my co-counsel, Mr. Brown.

MR. CHIEF JUSTICE BURGER: Mr. Brown.

ORAL ARGUMENT OF MICHAEL J. BROWN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BROWN: Mr. Chief Justice, and may it please the Court:

The taxation which the State seeks to reimpose in this case is an infringement upon the sovereignty of the White Mountain Apache Tribe and its right of tribal self-government. It interferes with a fundamental purpose, as well as the basic nature of the reservation.

One of the most basic principles of Indian law is that those powers vested in an Indian tribe are not delegated but are rather inherent powers of limited sovereignty. They are inherent in that that sovereignty preexisted both the sovereignty of the State of Arizona as well as the United States of America itself.

Williams v. Lee has said that the test of sovereignty when you are dealing with the affairs of non-Indians on reservations is that the tribe and the State law, that each have legitimate interests but that the right of reservation Indians to make their own laws and be ruled by them shall remain inviolate.

Congress has --

QUESTION: Has violated -- if it so chooses, can it not under --

MR. BROWN: Yes, sir, Congress has the power of defeasance to take away the sovereignty which the Indian tribes retain, but it has not yet done so. And the indications from Congress of course are quite to the contrary.

The Congress has given, for example, in 1953 five States the right to extend both their civil and criminal jurisdiction to Indian reservations, and to allow those States to accept the benefits of that as well as the responsibilities for the tribes in Public Law 280. Arizona, while not one of the five delegated States, had the right and the power by several means to ascribe to Public Law 280 and accept the responsibilities for the White Mountain Apache Tribe and the other tribes with reservations within the State of Arizona and refused to do so.

This lawsuit is essentially about roads and trees. The State would like to say that it is about taxes.

But it is about the fact that the White Mountain Apache Tribe's reservation, which is the Fort Apache Reservation, -- it is in northeastern Arizona and it is 1,600,000 acres, it is rural and it is mountainous and it is widespread and with people all over that reservation. It is not an urban area and the major rural or urban area is White River and it has maybe 1,000 to 1,500 people living in it.

One of the designed secondary purposes of the tribal timber industry is the creation of roads. The timber industry must in fact create roads to get to the trees so that they can be logged, the forests can be logged. But also it is necessary to create adequate roads into those rural and remote areas so that we can have the ability to deliver food and essential services to remote areas of the reservation and to maintain communications with those areas. And that is a direct and design product of the roadbuilding and the maintenance program of the tribe and the Fort Apache Timber Company and the loggers who are agents to create a good number of the roads and by contract of course maintain the roads pursuant to the Bureau of Indian Affairs criteria and regulations of the Federal Government.

In Moe this Court said that States in dealing with actions on reservations involving Indians and non-Indians that the State would be allowed to tax those kinds of transactions. If there was a significant interest that the State had in some

real economic benefit was going not to the Indian party involved in the transaction but to a non-Indian. And that essentially what was happening was that this transaction, or attempt to cloak this transaction in immunity was merely an end run by the non-Indian around legitimate taxing interests of the State.

We would submit to the Court that that is a valid test and that there ought to be some way that this Court can draw a line quite apart from the preemption argument made in Warren Trading Post along the infringement of tribal sovereignty and the infringement of tribal self-government.

QUESTION: Mr. Brown, I notice from the outlet that State Highway 73 itself goes through White River. What is the source of the State's authority to build a highway on an Indian reservation? Was that --

MR. BROWN: An easement from the Federal Government and the tribe. We believe that the tax infringement test ought to consider at least four things.

Number one, the location. Obviously the Indian reservation itself is historically the locus where Federal Indian policy is effectuated. Historically all of this, and actually in this litigation all of the activities involved take place within the confines of the Fort Apache Reservation on the White Mountain Apache's land held in trust for them by the Federal Government.

Another issue is: Does it interfere with the fundamental purpose or nature of the reservation. And it is inconceivable to me that with the geographical make-up of the reservation that Congress and the President in making up the reservation could not have anticipated that a tribal timber industry was going to be necessary.

Number three, where does the burden truly fall,on the Indian or the non-Indian. Clearly it doesn't make any difference what you call a tax. You can call it a sales tax, a privilege tax, an excise tax, a motor carrier tax. The question is where does the burden fall. That is just what the State wants to do with the taxing scheme.

In this case it is admitted that the economic -- the total economic burden and direct economic burden falls on the tribe and the tribal timber industry in that dollar for dollar the tribe must pay to planter all the money the money they expend for the tax.

In this case, another issue and thing that I think that the Court ought to look at in formulating a test is the legitimate interests of the State in the tribe.

QUESTION: What about the tax on the purchase of the trucks. Suppose that Pinetop buys some trucks off the reservation and a tax is added to the purchase price and Pinetop says, we are only going to use these on the reservation.

MR. BROWN: Yes, sir. I know that clearly that is not

a case of --

QUESTION: Well, it is clearly a case there that the burden -- where the burden, the ultimate burden would fall --

MR. BROWN: I think that is not a direct burden. I think that is an indirect burden because whether they pay the tax on the purchase of --

QUESTION: Well, it may be a little larger shell in the sense that that -- in the sense that that --

MR. BROWN: Well, that --

QUESTION: The Indians are going to pick up the tab, aren't they?

MR. BROWN: Not necessarily.

QUESTION: What do you mean?

MR. BROWN: I mean it is speculative that they will pick up the tab. The purchase of the trucks doesn't mean that it is going to cost us, that the tribe less --

QUESTION: Well, Pinetop doesn't do any business except on the reservation, I am told, I read in the brief.

MR. BROWN: That is true.

QUESTION: And so sooner or later they are going to have to get their money back from somebody.

MR. BROWN: Well, the fact that they may amortize the price of the trucks as an indirect cost, if at all, and the fact that they must pay a tax on the use of tribal roads is a direct cost.

QUESTION: And you make the same argument about repairs to the trucks?

MR. BROWN: Yes, sir, I do.

QUESTION: Tune-ups at the garage?

MR. BROWN: Yes, sir; I do.

The other thing that I think the Court is interested in and I think --

QUESTION: Call it a tax on the use of the roads or is it a tax on the gross receipts of their entire business?

MR. BROWN: It is a tax that is measured by use of our roads.

QUESTION: Miles traveled, or --

MR. BROWN: Yes, sir, it is. And therefore you have to have two things come together. You have to have the use of the roads as to a vehicle and the use of the roads. The roads are -- you can't separate them from the tax. If you don't have the roads, they don't have a tax.

QUESTION: We are not talking about the motor fuel tax, we are talking about the other one now.

What is the tax?

MR. BROWN: It is 8 cents a gallon.

QUESTION: Well, that is not --

MR. BROWN: That is --

QUESTION: That would be 8 cents a gallon wherever the gas was burned.

MR. BROWN: Right.

QUESTION: Yes.

But now what about the other tax?

MR. BROWN: It is 2-1/2 percent of the gross proceeds measured by the --

QUESTION: But that is not per mile.

MR. BROWN: No.

QUESTION: That would depend on how much logs they carried and how much money they made, and so forth.

MR. BROWN: Yes, it is 2-1/2 --

QUESTION: It is really not a tax on the use of the road.

MR. BROWN: That is right. We have to give them 2-1/2 logs out of every hundred that we cut. That is what that tax is.

QUESTION: And that is no matter how far they have to haul the logs?

MR. BROWN: Yes.

QUESTION: So it is not really a tax on the use of the roads or tax --

MR. BROWN: If they don't haul the logs, they don't get the tax.

QUESTION: Yes.

Well, I understand that but it is the same I am buying a truck and all the other elements of doing business.

MR. BROWN: I understand.

The other thing that I think that the Court wants to look at is the potential for abuse of the tax. And because this tax and the transaction that you are dealing with is wholly on the reservation that there is no potential for abuse. We are not dealing with Montana chain smokers or any of that sort of thing. This tax is wholly on the reservation and it is directly on a tribal enterprise.

Mrs. Stillman.

ORAL ARGUMENT OF MRS. ELINOR H. STILLMAN,

ON BEHALF OF THE UNITED STATES

DEPARTMENT OF JUSTICE

Mrs. Stillman. Mr. Chief Justice, and may it please the Court:

It is the position of the United States that the State of Arizona may not impose its motor carrier license tax or its use fuel tax on the logging and hauling activities of petitioner Pinetop Logging Company on the reservation of the White Mountain Apache Tribe.

That position rests we believe on a number of mutually reinforcing considerations and it is no answer to our argument to examine anyone in particular and to say that it is insufficient to validate the taxes. Before discussing those particular considerations in this case, however, I would like to examine or identify the barter principles that underly

our analysis, hoping to show the Court that in fact it rests securely on priciples that this Court has recognized in recent Indian tax decisions.

QUESTION: May I ask you just one preliminary question and then I won't interrupt any more.

Assume that the logging companies did half their business on the reservation. Would they be entitled to a 50 percent exemption from both taxes?

MRS. STILLMAN: Yes. I assume that this is very much tied to the reservation locus and I will explain --

QUESTION: It is apportioned on the basis of how much of their business --

MRS. STILLMAN: Yes. Yes.

Before discussing those considerations here, however, I wish to identify these broader principles. These principles have been summarized in this Court's decisions in Warren Trading Post, in McClanahan, in Mescalero Apache Tribe and in Moe v. Confederated Salish and Kootenai Tribes.

First, as Moe and Mescalero made quite clear, Federal instrumentality doctrine no longer answers questions in this area and we do not rely on Federal instrumentality doctrine at all, which is to say we don't say simply because a burden falls on a tribe which has a connection with the Federal Government that that alone invalidates a tax.

QUESTION: You are saying this is true of commerce,

I suppose.

MRS. STILLMAN: Excuse me?

QUESTION: And the same is true on the Indian commerce argument.

MRS. STILLMAN: The Indian -- I --

QUESTION: I mean just as such, unimplemented by any statutes.

MRS. STILLMAN: No, I don't concede that, Your Honor.

QUESTION: Well, you go ahead then anyway.

MRS. STILLMAN: I wish to adopt and rely on the remarks by Mr. Claiborne with respect to the Indian commerce clause. Our position does not rely on that doctrine.

Second, although the concept of tribal sovereignty is still relevant it is now defined to a large extent by treaties and by Federal law. And as the Court noted in McClanahan and in the year since Wooster v. Georgia notions of Indian sovereignty have been adjusted to take account of the State's legitimate interest in regulating the affairs of non-Indians. But to adjust something is not to eliminate it. And when you are talking about State regulation of affairs of non-Indians that take place upon a reservation you simply cannot automatically assume that they have impunity to do what they wish to the non-Indians.

The Court considering whether a particular exercise

OF State power on a reservation must take account of the claims of tribal sovereignty as well as the customary powers of the State in dealing with its residents.

Two tests for making this determination have been suggested by the Court's decisions in Warren Trading Post and in Williams v. Lee.

The first test is: Does the exercise of State power in some way -- is in some way preempted by Federal scheme.

And the second test is does it in some way infringe on tribal self-government.

The two tests are independent and the State's power may be defeated by either one. Nevertheless, the two are not necessarily unconnected and we believe that is in the circumstance of the present case Federal law may reflect a judgment of Congress concerning what conditions are essential to the continuing existence of tribal self-government.

QUESTION: You say they are independent.

MRS. STILLMAN: They are independent but they may at sometimes --

QUESTION; That is clear enough. But you say they are interrelated. It seems to me --

MRS. STILLMAN: Sometimes.

QUESTION: -- they are rather inconsistent with each other.

MRS. STILLMAN: No. No, I can understand that might

be a superficial analysis.

QUESTION: Well, maybe that is very superficial but superficially it sounds they seem inconsistent. If we are talking about tribal independence, that means independence from anything and everything.

MRS. STILLMAN: No. We are --

QUESTION: Including Federal control.

MRS. STILLMAN: No, I believe this Court has always talked about a quasi-sovereignty, a dependent sovereignty.

QUESTION: Quasi-independence,

MRS. STILLMAN: Quasi-independence.

QUESTION: Independence from State but not from Federal controls, is that it?

MRS. STILLMAN: That is correct; yes. And what I mentioned -- when I talk about tribal self-government and tribal sovereignty I am referring to that concept.

QUESTION: Right.

MRS. STILLMAN: State actions likely to undermine the conditions which would -- which Congress in its scheme has defined as essential to preserving the tribal government of its own relation within its reservation would fail both tests. Of course as the Court observed in Bryan v. Itaska County the Government can also authorize the State in derogation of this sovereignty; And if it does, you might have a situation in which the State fails the infringement test and then is saved

by some sort of congressional authorization.

We believe that the taxes at issue in the present case fail both of the first two tests and are not saved by the third.

First, as we have explained in our brief, a comprehensive network of laws and regulations governs the operation of tribal timber enterprises which are conceived of as a means of securing a secure economic base for the continued self-government of tribes having extensive timber lands on their reservations and for providing a source of employment for tribal members within their reservations. In other words, as we conceive the Federal scheme here it is not just a scheme for cutting down timber and supervising roads. It is a scheme for making these tribal timber enterprises a basis for making the tribe self-sufficient within their reservation for their members within their reservation and make it a going concern.

Now, the Arizona taxes at issue --

QUESTION: The tribal scheme totally self-sufficient so the tribes operated the logging enterprise themselves, then they would be tax exempt.

MRS. STILLMAN: Yes, except that the tribe has found, and I believe this is in the record in one of the affidavits, that it is not economical for them to try it. They did try it at one place in the reservation and found that it cost them

more than --

QUESTION: If we sustain the State here,they have a competitive advantage in doing it themselves. It would be an addiditional incentive, wouldn't it?

MRS. STILLMAN: Speculative. I am not sure what --

QUESTION: Well, they save the taxes.

MRS. STILLMAN: I don't know --

QUESTION: To the extent that that is either a burden or a benefit.

MRS. STILLMAN: Yes; right. I am not sure as to what extent that would be the case.

The Arizona taxes at issue here would fall upon all of the logging contractors, not just Pinetop; and can reasonably be assumed as a practical matter to be passed on to the tribe. I don't think that is really contested. The State argues instead that legal incidence is what makes a difference.

The record does not show what all of those taxes have amounted to in any given year. But the important point is this: The tax rate is determined by the State quite independently of what the tribe's balance sheet might show in any given year. It is just an uncontrollable financial burden that could be quite substantial and is inconsistent with what we think is the thrust of the Federal scheme.

Second, the taxes infringe on tribal sovereignty and they do so in two ways. As we have argued, they interfere with

scheme that Congress has devised to foster and assure a viable tribal self-government. And they also represent an intrustion into the geographical territory of the tribe without the warrant of any strong State interest other than the desire to augment its general revenues.

Now, the argument here is almost somewhat metaphysical. I think that is something of what makes Indian law a little difficult and complicated. It is a notion of what it means for a sovereign or a quasi-sovereign to have authority over its territory. And although the tribes clearly do not have absolute authority of their territory, cannot block the State at the boundaries of the reservation, nevertheless it says something in derogation, in serious derogation of its powers over its territory for the State to come onto the reservation and tax some activity with no interest, no legitimate interest, no regulatory interest other than just a desire for more money. It is just a treatment of the boundaries as if they can be casually passed over without any seriousness to do so.

QUESTION: Isn't that wholly consistent with Moe?

MRS. STILLMAN: Well, in Moe, yes, I think it is, because in Moe what you had on the sale of the Indian trader to the non-Indians was a serious State interest in having --

QUESTION: Here they come onto the reservation, collect money, make the Indians collect it, and return it to the State.

MRS. STILLMAN: Yes, but what was happening there I

believe the State there was losing revenue that had otherwise people would be coming onto the reservation to buy things that they otherwise would have bought --

QUESTION: But the geographical matter is not --

MRS. STILLMAN: No.

QUESTION: -- of talismatic significance.

MRS. STILLMAN: No, it is not talismatic but I am saying that the weight of the State's interest has some significance here.

QUESTION: Well, you haven't made a commerce argument yet; I guess you aren't.

MRS. STILLMAN: Your Honor, we would rest upon -- I would assume that the argument made in our brief in Central Arizona Machinery would apply here as well. We thought that in this case that regulatory scheme required somewhat longer examination and we didn't make that argument here.

The taxes here, third, we do not think have been authorized by Congress either in the Buck Act or in the Hayden-Cartwright Act. For reasons that this Court found convincing in the Warren Trading Post case it found that the Buck Act does not apply to a tax on someone on an Indian reservation who is selling to Indians. And that is what the gross recepits tax, the motor carrier license tax here is absolutely in many ways identical to the tax here.

I see my time is up. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Macpherson.

ORAL ARGUMENT OF IAN A. MACPHERSON, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. MACPHERSON: Mr. Chief Justice, and may it please the Court:

At the outset I think what I would like to do is address a couple of questions that were raised by the Court during Mr. Wake's opening remarks, Mr. Brown's opening remarks and the United States' remarks.

Specifically, it is my recollection that Justice Stevens was inquiring as to the question of whether or not we were talking about the same principles, were we talking about a general gross receipts tax. What about Weyerhauesur or some other company operating on the reservation, would they be subject to a gross receipts tax if in fact we weren't talking about either the use fuel tax or the motor carrier tax.

The answer to that question is "Yes." In Footnote 13 of the petitioner's opening brief we find a discussion of Arizona Revised Statutes Section 42-1309 and 1312. Now, those were the statutes that were under consideration by this Court in Warren Trading Post.

An examination of the transaction privilege tax code will reveal in ARS Section 42-1321 an exemption for the transportation of tangible personal property from Point A to Point B within the State of Arizona if the outfit being purportedly other-

wise subject to the transaction privilege tax pays a tax under 40-641. The point is under 40-641 they are subjected to the motor carrier tax which has a relationship to State roads at a rate of 2-1/2 percent.

Under section 42-1310, which is under the transaction privilege tax code, they would otherwise be subject to the transaction privilege tax with respect to hauling within the State of Arizona. They are exempted by virtue of State law under section 42-1321.

So theanswer to Mr. Justice Stevens' question is yes, a transaction privilege tax would apply to that transportation. Again, that is not the case that we have here this morning but if that case were to come up, then the question becomes would it be permissible as a matter of Indian law. Again, it would remain the State of Arizona's position, yes, we are dealing with a non-Indian entity on an Indian reservation. Any economic burden of either the Arizona transaction privilege tax, the motor carrier tax or the use fuel tax which may be visited upon the Indian reservation arises solely by virtue of contractual negotiation, nothing else. There is absolutely no requirement of the State law under any of those three taxes that these costs be passed on or that the legal incidents be shifted over.

QUESTION: You then would just draw the empirical line I take it that if -- between a tribal transportation

operation and a non-tribal transportation ooperation. I suppose if you win this case and then the tribe liquidates Pinetop and operates itself,the transportation owns the trucks and operates, that you wouldn't tax them.

MR. MACHPERSON: We would not tax them? That is correct, Your Honor.

QUESTION: Mr. Macpherson --

MR. MACPHERSON: Yes, Justice Marshall.

QUESTION: Take a big farm. Could you tax the transportation of the farm material from one end of the farm to the other?

MR. MACPHERSON: On the theory -- well, does your hypo --

QUESTION: Any theory.

MR. MACPHERSON: Does your hypothetical perceive those roads to be private roads?

QUESTION: Yes, sir.

MR. MACPHERSON: No, sir, we would not.

QUESTION: Well, what is the difference?

MR. MACPHERSON: Well, at this point, Your Honor, I think it would be appropriate, and I have discussed this with the Court's leave, with Mr. Wake, by way of explanation as to the record in this case --

QUESTION: Yes.

MR. MACPHERSON: There apparently was some misunder-

standing with respect to exactly what issues were before the Arizona courts with respect to what roads and what taxes we were being -- we were taxing the use with respect thereto.

QUESTION: Well, I am thoroughly confused, because you said that some State roads are used, some local roads are used, and I guess some are hybrid. I didn't get it from either one the two, so why don't you tell me what roads are involved.

MACPHERSON: Well, very good, Your Honor. It is my understanding that the Pinetop operation occurs totally within the confines of the Fort Apache Indian Reservation. There are several types of roads on that reservation, including State highways. And this gets to the question that one of Your other Honors asked: What about this fact that they use State highways? With respect to the travel on those State highways, they have paid the taxes without protest. It is my recollection Mr. Wake indicated that they choose not to challenge that.

Certain other travel occurring on BIA-designated roads, tribal roads and other types of roads on the reservation are the subject of the lawsuit here.

With respect to travel on the BIA roads, it is the State of Arizona's position that the assessment in question relates to those -- the use of those highways and pursuant to Federal law, even without regard to the Hayden-Cartwright Act, travel on those roads is specifically authorized by virtue of the Code of Federal Regulations.

QUESTION: Well, what is the difference between BIA roads and farmer Brown's roads, in my hypothetical?

MR. MACPHERSON: In your hypothetical, Your Honor, farmer Brown's roads are private roads. By virtue of Federal regulations BIA roads are "open to free public use," by mandate of the regulation. And that is the distinction.

QUESTION: Well, then, if farmer Brown says anybody wants to use those roads, if he used it he would be in trouble.

MR. MACPHERSON: Mr. Justice Marshall, trouble -- he would perhaps travel on those roads would be subjected to the tax. But so long as the road remained a private thoroughfare they would not be so traveled and use of those road would not be subject to the State tax.

With respect to the argument that this entire area has been preempted, it is the State of Arizona's position that quite the contrary,the Federal regulatory scheme speaks in terms of sound management of the forest resource. The Federal objective is to protect the forest resource, to protect it from disease, fire, various other plagues and famines that might occur that would destroy or harm the forest resource.

The State of Arizona respectfully submits that that preempts Area A, and we are talking about Area B. There is nothing in either the Federal statutes or the Code of Federal Regulations upon which Pinetop and the tribe rely to indicate a congressional intent or, indeed, an intent on behalf of the

Commissioner of Indian Affairs to preempt costs. Indeed, the Code of Federal regulations specifically provides with respect to the Bureau of Indian Affairs that administrative costs up to the extent of some 10 percent of the gross receipts of the tribal enterprise might be subjected to a charge to cover these administrative expenses.

So the congressional objective, while it may be to protect the forest resource, there is nothing in the regulations as was present in Warren Trading Post with respect to the prices that a trader could charge. There is nothing in these regulations to suggest that the cost that Pinetop incurs in pursuing its activities on the reservation are similarly pre-empted. We are talking about two different things.

Mr. Brown mentioned that Public Law 280 was passed for purposes of permitting States to assume criminal jurisdiction and civil jurisdiction over civil positive action. Well, in fact this Court's decision in Bryan v. Itasca County establishes that that grant of authority by Congress does not extend to States if they desire to impose the direct legal obligation of State taxes upon reservation Indians. Quite the contrary, Public Law 280 was construed by this Court to extend to civil causes of action, tort cases, contract cases, access to the State courts.

So if the suggestion be that had Arizona adopted Public Law 280 this would be a different case, Arizona would

submit it is just not so. This Court would have to ignore Bryan v. Itasca County.

QUESTION: Maybe I am not interrupting at a good time. I am not sure I understood everything, your entire response to Justice Marshall.

You said there were different kinds of roads on the reservation. One was the State roads, and everybody agrees taxes are paid on the use of those. The other was the BIA roads.

Are there also roads that are not public highways at all that are involved, such as roads going into the depth of the forest or anything like that?

MR. MACPHERSON: Mr. Justice Stevens, yes, there are.

QUESTION: And you are asserting the right to tax on those two.

MR. MACPHERSON: Yes. That puts the issue right before us and I -- this relates again to the discussions that Mr. Wake and I have had since arriving in Washington.

The Arizona Court of Appeals opinion, which is before this Court, does not differentiate between BIA roads and tribal roads. The fact is however that the assessment that was made by the Arizona taxing authorities related only to the taxes attributable to Pinetop's operation upon BIA roads. Use on tribal roads was extracted,that was not subjected to taxation.

Now, it is true, I must confess, that that position was not specifically or clearly advocated in the appellate briefs, nor does the Court of Appeals opinion make that distinction.

However, the fact of the matter is that under current State law, under the legislative scheme that exists in Arizona right now, Arizona has no intention of going forward on some purported theory that because the Court of Appeals decision says we can, that we can go ahead and tax use on these tribal roads. I have been assured of that by my client by telephone last night. And other than that we would put that before the Court to apprise the court of what the true facts are.

The fact of the matter is however that that goes to the question of magnitude of what the burden is. By that I mean Mr. Wake's argument presumably will be -- and I don't mean to put words in his mouth -- but it is my understanding that if we were talking about use on tribal roads too there would be a lot more --

QUESTION: Let me just interrupt you again, if I may.

The fight is over the use of tribal roads. That is where you are really in dispute, is that right?

MR. MACPHERSON: Well --

QUESTION: The BIA roads -- I mean BIA roads. I am sorry.

MR. MACPHERSON: That is correct, Your Honor, BIA roads.

QUESTION: You say are public roads but under the Arizona Supreme Court's opinion it is broad enough to cover those roads even if they weren't public roads?

MR. MACPHERSON: Mr. Justice --

QUESTION: Pardon me?

MR. MACPHERSON: No, if I may correct --

QUESTION: I mean you don't defend that position. reading the opinion, I thought it would apply to that.

MR. MACPHERSON: Well, the Court of Appeals opinion states that with respect to all the roads, private roads, BIA roads, all of the roads, go ahead and impose these taxes.

QUESTION: And you don't defend that position.

MR. MACPHERSON: I don't defend that position.

I defend it to the extent that the term "tribal roads" includes BIA roads.

QUESTION: Right.

MR. MACPHERSON: Because there was no differentiation.

QUESTION: What I meant to say is your real fight is over the right to tax on BIA roads.

Does the record tell us much about those roads, for example does it tell us whether the State police are on those roads or whether they have speed limits or things like that?

MR. MACPHERSON: Your Honor, the record does not

specifically go into that much detail.

QUESTION: However, it presents us with a hypothetical case quite different from the one you asked us to decide.

MR. MACPHERSON: Well, Mr. Justice Stevens, the case is -- we felt it necessary as an ethical consideration to apprise the Court of what the actual situation is.

But, having said that, the issue, the legal issue, if it please the Court, may still be decided with respect to the BIA road use. The fact of the matter is that BIA roads pursuant to Federal -- the Code of Federal Regulations are reauired to be open to free public use, as a matter of Federal law.

QUESTION: Yes, but does that tell us whether the State spends any money in their maintenance and protection and policing, and so forth? You know, the case would be different depending on what the facts are.

MR. MACPHERSON: The record does not specifically present us with those facts. However, there are facts in the record to indicate that the posting of speed limits, for example, are done by other than -- at least with respect to the tribal roads are done by jurisdictions other than the State of Arizona.

QUESTION: Well, what about the BIA roads?

MR. MACPHERSON: My recollection, Your Honor, is that we do not take the position that we may establish speed limits

on BIA roads. Perhaps Mr. Wake can fill me in on that. The only roads that we exercise jurisdiction over -- and, again, only with respect to non-Indians -- the law in Arizona is that even if we have a State highway through a reservation we cannot assert direct jurisdiction over Indians on those roads.

QUESTION: Yes, but these people are not Indians.

MR. MACPHERSON: That is quite correct.

QUESTION: Well, I don't know what we are supposed to decide here, frankly.

MR. MACPHERSON: Well, if it please the Court, Arizona's position is this: The legal question as to whether or not these State taxes may be applied under notions of this exists in an area other than a preempted area or under notions of the application of the Hayden-Cartwright Act can be decided on the BIA road issue alone.

The fact of the matter is that if we talk about the tribal roads, as I was attempting to explain, Mr. Wake's argument probably will be -- and, again, I don't mean to put words in his mouth -- but if we are talking about the authority of the State to impose these taxes on tribal roads as well, then the amount, the economic burden of these taxes is going to be much greater. And therefore Mr. Macpherson's argument that the magnitude of these taxes is of some relevance goes out the window because the footnote that we have in our brief based upon the record attempts to establish a percentage of what the

true economic burden is with respect to a particular time period. That percentage would change by going up if the State were taxing tribal roads as well.

But that is a consideration apart from the question of BIA road use and whether or not the Hayden-Cartwright Act applies.

QUESTION: Mr. Macpherson, quite apart from the question in this case which involves Indian tribes, what about a private owner of land -- whether it is the Weyerhauseur Company or a rancher who owns many square miles of ranch land, does Arizona impose a tax upon his fuel if the vehicle that he owns is used exclusively on his own private property 365 days a year, or this year 366, and never on the public roads of Arizona?

MR. MACPHERSON: It does not, Your Honor.

QUESTION: It does not?

MR. MACPHERSON: That is correct.

QUESTION: Could it?

MR. MACPHERSON: Presumably it could, but it has not. And that is the basis upon which the tribal roads were taken out of the exemption. They were not -- or, excuse me, taken out of the assessment. But they were not taken out by virtue of the fact that they were Indian roads.

QUESTION: That is what I thought.

MR. MACPHERSON: They were taken out by virtue of the

fact that they were private roads.

QUESTION: Yes.

MR. MACPHERSON: And that is the current state of the law.

QUESTION: Does Arizona also allow a taxpayer to allocate on the basis of mileage driven in say New Mexico and subtract that in some way from the amount of the tax due to Arizona?

MR. MACPHERSON: Your Honor, yes, it does.

QUESTION: Is the same privilege accorded to a taxpayer with respect to mileage driven on Indian reservation roads?

MR. MACPHERSON: Your Honor, it is not; and that is the question that we have here. At least the argument is being advanced -- my understanding of the argument being advanced by Pinetop is that that is the vice in the Arizona statute. It does not allocate between use of State roads within the reservation and roads other than State roads on the reservation.

QUESTION: Well, I have not understood Pinetop's argument to be a question of discrimination. I have understood it to be an argument of preemption and it seems to me that perhaps a narrower ground might exist here where the Arizona tax is faulty in that if it allows such a deduction for travel in New Mexico but not on the White River Reservation roads is it entitled to make that sort of discrimination under the

Constitution.

MR. MACPHERSON: Mr. Justice Rehnquist, I would submit that it is not, for this reason. In the first instance, the tribal outside the State of Arizona occurs in a jurisdiction beyond the jurisdictional reach of Arizona. Now, having said that, the question becomes: Is the Fort Apache Indian Reservation beyond the jurisdiction of the tax reach, if you will, of Arizona?

Arizona would submit that, no, it is not. Number one, this is based on this Court's decision in Surplus Trading v. Cook. It would also presuppose the existence of a State within a State or a nation within a State.

QUESTION: My question was phrased I believe: Is Arizona allowed to make this distinction?

You answered: "It is not."

MR. MACPHERSON: Excuse me.

QUESTION: The follow up indicates to me that you meant it is allowed to make that assumption.

MR. MACPHERSON: I am sorry, Your Honor.

Yes, it is allowed to make that distinction. It has not made that distinction. That would present a different case and I am sure that -- you know, that there would be -- well, I am not sure but there would likely be litigation on that point as well.

QUESTION: Did I understand you to say that Arizona

has no responsibility for maintaining the BIA roads?

MR. MACPHERSON: That is correct, Your Honor.

QUESTION: And did it contribute to the construction of those roads?

MR. MACPHERSON: So far as the record shows, it did not, Your Honor.

QUESTION: And no police responsibility, either?

MR. MACPHERSON: That is correct, Your Honor, however we havn't really discussed this Court's decision in Oliphant with respect to jurisdiction over non-Indians. For example, a non-Indian robs a bank -- that is a bad example, that is Federal -- robs a convenience market in White River and goes running off to a tribal road. Question: Can the State DPS officers chase him? That is a separate question. But --

QUESTION: What about the tribal roads; can you respond as to that, maintenance of tribal roads?

MR. MACPHERSON: The State does not contribute to the maintenance of tribal roads. However, if it please the Court, we have attempted in Footnote 35 of our brief to explain that that is a State law question that has been specifically decided against the position advanced by Pinetop Logging. The fact of the matter is that under this Court's decisions in Thomas v. Gay and Kelly v. Pittsburgh, which is cited in Thomas v. Gay, there is no ironclad requirement of benefits burdens for purposes of determining whether the tax is applicable or

not. Surely it is one of the considerations and it is one of the considerations that Pinetop is making -- they are basing their argument upon.

But the fact of the matter is as a matter of State law it is Arizona's position that that question has been resolved against them. The thrust of their position is based upon notions of preemption in Indian sovereignty.

And with respect to the discussion of both, or all three of the counsel this question of self-government which continues to be discussed, Arizona would submit should not be considered in a vacuum. The fact of the matter is that an attribute sovereignty is the negotiation of contracts. There is no requirement of State law that these taxes be borne by them. If they want them away, that is fine.

With respect to a final question asked by Justice Stevens in the opening remarks, the competitive advantage of the tribe that would be enjoyed if the decision of the Court of Appeals were reversed, merits a little closer examination. The fact of the matter is that there is nothing in the statutes or the Code of Federal Regulations that Arizona can see, at least, that suggests that as a matter of economic principle and in connection with the Federal objective of providing or permitting the generation by the forest resource of the -- whatever profit --

MR. CHIEF JUSTICE BURGER: We will resume there at

1:00 o'clock, Counsel.

MR. MACPHERSON: Thank you.

(Whereupon, at 12 o'clock noon, the hearing in the above-entitled matter was recessed, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION

(1:04 P.M.)

MR. CHIEF JUSTICE BURGER: Mr. Macpherson.

ORAL ARGUMENT OF IAN A. MACPHERSON, ESQ.,

ON BEHALF OF RESPONDENTS (RESUMED)

MR. MACPHERSON: Mr. Chief Justice, and may it please the Court:

I believe when we broke for lunch I was attempting to respond to one of the questions that Mr. Justice Stevens had asked of counsel for the amicus curiae United States with respect to the competitive advantage enjoyed by the tribe with respect to a situation if these taxes were voided.

The State of Arizona finds nothing in the Federal scheme, either the Code of Federal Regulations or the Federal statutes, which would suggest a prohibition upon the tribe as any other business and profit-motivated entity from itself seeking to recover these costs when it engages in the business of marketing the timber product. We concede that that is not sufficient grounds in and of itself to substantiate the imposition of the taxes upon the non-Indian in the first place.

QUESTION: Would there be anything constitutionally wrong about the Congress undertaking to give the Indian tribes some competitive advantage?

MR. MACPHERSON: Mr. Chief Justice, I think not. It is our position, however, that they simply haven't done that.

What Congress has done through the enactment of the Federal statutes and what has been authorized insofar as Federal regulations is concerned simply does not concern that area. It concerns the preservation and maintenance of the forest resource. And contrary, at least in Arizona's position, to the argument advanced by Pinetop, there is no articulable objective in the Federal scheme mandating that the entire economic benefit of the tribal resource come to the tribe. Rather, the language used is whatever economic benefit it may generate. It is one thing to state that the entire economic benefit should come to the tribe, thereby suggesting that any and all cost which somehow burden the accomplishment of that objective are prohibited. In fact the Federal regulatory scheme contemplates just the opposite with respect to the administrative charge provision when the Bureau of Indian Affairs is involved.

So the State of Arizona's position on Mr. Justice Stevens' question is that, yes, there may be a competitive advantage if these taxes are voided.

However, Congress -- neither Congress nor the Commissioner of Indian Affairs, in our estimation, has acted to insulate the Indians from those cost burdens; and, in fact, in pursuance of the Federal objective it would seem that they could recover these costs just as they recover the costs of the actual board feet charge that is contemplated under the contract with Pinetop. It is sound business practice. There

is nothing in the contract. Indeed, it is a good objective. And they may follow that.

With respect to the Hayden-Cartwright Act, although it is stated in the petitioner's reply brief that the State's principal defense of its use fuel tax of the Hayden-Cartwright Act, I feel it incumbent that the Court be aware that the Hayden-Cartwright Act at least in so many words, that it was first raised by the petitioners in an attempt to demonstrate that it did not apply by the petitioners in an attempt to demonstrate that it did not apply. But upon further examination, the Hayden-Cartwright Act in the State of Arizona's estimation does indeed, even if all these other arguments be rejected, does constitute the type of specific Federal regulation contemplated under Williams v. Lee. The rule in Williams v. Lee of course is that absent congressional enactments the question becomes whether or not the State law infringes upon the right of self-government.

If all of Arizona's previous arguments be rejected, the fact remains that the Hayden-Cartwright Act appears to be precisely that kind of legislation contemplated by Congress. We have cited and direct the Court's attention to another Solicitor's opinion, 57 ID-129. In that particular opinion Solicitor Margold as I recall discusses the application of the Hayden-Cartwright Act to the operations of the Menominee Mills, and in that opinion he specifically states that while sales of

motor vehicle fuels for use in the direct operations of the Menominee tribal saw mill would be exempt from the State motor vehicle fuel taxes in Wisconsin. The fact is that he decided that, or he opined that in the context of a Federal instrumentality.

In the present case we don't have a Federal instrumentality. We have a non-Indian independent contractor, and there is some dispute as to the terminology -- I think the record speaks for itself in the verified complaint -- establishes that Pinetop Logging is an independent contractor who is a non-Indian who bears the legal incidents of these taxes. As a matter of contract doctrine, he passes them on.

The opinion goes on, however, to specifically opine that the Hayden-Cartwright Act was intended by Congress to apply to Indian reservations. The Solicitor goes through several discussions and tracings of evidences in the legislative history of the Hayden-Cartwright Act which established in his mind an attempt on behalf of Congress to permit the application of these taxes on Indian reservations including, in Arizona's estimation as we read the opinion, the direct application of these State motor vehicle fuel taxes to Indians on the Indian reservation, provided only that they be not imposed upon the operations of the Menominee sawmill itself. Indeed, employees of the mill, Indian employees of the mill, at page 140 of the opinion, are specifically opined to be subject to the tax.

In point of fact, the Solicitor refers to his memorandum for the Commissioner of Indian Affairs of February 4, 1938. I would submit to the Court that in the tracing of the history of both the Hayden-Cartwright Act and the Buck Act, that particular memorandum of February 4, 1938, which is now available, in the opinions of the Solicitor, establishes some very interesting points, primary amongst them being the fact that where the tax under consideration is a true sales tax, that is a vendee responsibility tax, then, and for that reason, must the State tax be voided with respect to its application to Indians on Indian reservations.

An examination of the opinion, however, will also reveal that it discusses it in the context of the Utah sales tax. At that point in time Utah had a true sales tax. The taxable event was the transfer of tangible personal property, the liability for the tax by mandate of State law, was upon the vendee.

It is not surprising, therefore, that in that opinion he arrived at the conclusion that to impose these taxes upon an Indian tribe on the Uintah Reservation in Utah would be impermissible, whether the taxes be imposed on transactions by the Indians or purchases from the Indians.

In that regard, the opinion in the Moe case seems to have eroded somewhat even that determination. This Court should be aware -- and I am sure it is -- that in the Moe

case all we were talking about is putting the shoe on the other foot, as it were.

The economic burden of the State tax, at least for a certain period of time, was placed not by contract but by mandate of State law directly upon an Indian. Joe Wheeler was an Indian. The record is unclear as to whether or not he is a licensed Indian trader but clearly he appears to have been engaged in that kind of activity on the reservation that fits the definition of Indian trader. We don't know if he is an Indian of the whole blood and therefore exempt. Nevertheless, he was an Indian on the Indian reservation, he was subjected by mandate of State law to the pre-collection of the Montana taxes. This Court upheld it in a unanimous opinion.

The fact of the matter is that when Mr. Wheeler charged or added the price of the tax on to the non-Indians, in effect what he was doing was reimbursing himself. The tax had already been paid. It had been pre-collected for purposes of convenience only.

QUESTION: Wasn't he required to vest them?

MR. MACPHERSON: Well, he wasn't required to pass it on. The initial incidence of the tax was upon the non-Indian, on the vendee.

QUESTION: Well --

MR. MACPHERSON: He was required pre-collect it.

QUESTION: So, he was required to collect it from the

vendee.

MR. MACPHERSON: Excuse me, and you are quite correct, Your Honor, that is correct. That is correct.

But the rationale of the decision makes it clea that the reason that the tax was upheld, contrary to the prior three sections of the opinion; in other words, we are talking about section 4 of the opinion right now, in the prior three sections we are discussing situations where the direct legal incidents of the Montana taxes under consideration there were upon Indians. On the contrary, with respect to sales to non-Indians in Montana, the legal incidents of the tax was upon them. And this pre-collection requirement was not as a result of contract or anything like that, but by mandate of State law.

So we view the Moe case as being highly relevant in that regard.

With respect, again, to Mr. Margold's memorandum of February 4, 1938, if one goes even further to examine the surrounding circumstances of that memorandum, it will be discovered that almost without exception, at least to the extent I have had time to do the research on it, the impression that existed with respect to that opinion was that invariably a sales tax was a vendee responsibility tax. In the context of that opinion, he was talking about the Utah sales tax. The Utah sales tax at that time was a vendee responsibility tax. This is also true with respect to the Buck Act legislative

history with respect to, for example, Congressman Dempsey's view as to the application of the sales tax. He makes some references to this tax is required to be collected by the vendor and remitted to the State. That is true. He was from New Mexico. At that time New Mexico had a vendee responsibility to sales tax. So it is not surprising that in the discussion of the situation surrounding legislative history of the Buck Act one finds upon an examination of the facts that I have been able to discover in the legislative history that the over-riding concern of the people who are testifying with respect to the Buck Act was over legal incidents of State taxes required by mandate of State law to be imposed upon Indians. Those were impermissible. We have no problem with that. Under the present state of the law, Indians on the reservation are exempt from the direct legal aapplication of State loss.

But there is nothing, I would submit, in the histories of either the Hayden-Cartwright Act or the Buck Act and, indeed, the indications are just the contrary, of an intention on the part of the Congress to insulate Indians from non-discriminatory, contractually assumed costs, just like anybody else.

Arizona does not have at least, with respect to the Pinetop situation, no requirement of State law whatsoever, that these taxes be passed on and visited upon an Indian entity.

With respect to the argument that somehow the Hayden-

Cartwright Act does not apply because supposedly there is no sale occurring on the reservation, Arizona would submit that that simply does not comport with the legislative intent as supported by the legislative history of the Hayden-Cartwright Act.

Quite the contrary, the legislative history as demonstrated through Mr. Margold's opinion, supports the notion that it was the intent of Congress in the var ous amendments that it made after the initial enactment of the Hayden-Cartwright Act rather than restrict the rights of the States,to expand the rights of the States to impose these taxes even on Indian reservations.

We have cited, and do has the United States' amicus curiae decisions in the AGE Corporation case as well as Sanders v. Oklahoma Tax Commission, interestingly enough by way of brief -- correction -- it should be noted that on page 13 of the reply brief the citation is made to the decision State v. Yellowstone State Park Co., well, by wayof correction I am sure it is a typographical error, the decision was not made in 1972, thereby suggesting it is a more recent decision than is the decision in Sanders, it was made in 1942. This Court denied cert in that case in 1942. It also denied cert in the Sanders case which reaches an opposite conclusion with respect to the application of the Hayden-Cartwright Act, even in the absence of a sale, in 1946. So it remains the State of

the State of Arizona's position that the better recent view is as set forth in AGE court in Sanders v. Oklahoma Tax Commission.

By way of summary, if I may, the area that has been preempted here is not the area of contractual negotiation between tribe and non-Indian entities. The area that has been preempted is that of sound civil-cultural forestry management. If the State of Arizona were atempting to tell them and where they could get trees this would be a very different case. We are not. We are dealing only with a non-Indian entity who is hauling logs on the reservation. The State of Arizona's position is that those taxes are value imposed.

With that, are there any further questions?

Well, thank you.

MR. CHIEF JUSTICE BURGER: If not, Mr. Macpherson, Mr. Wake, do you have anything further?

REBUTTAL ARGUMENT BY NEIL VINCENT WAKE,

ON BEHALF OF THE PETITIONERS

MR. WAKE: Mr. Chief Justice, may it please the Court:

My good friend, Mr. Macpherson, has just said some remarkable things.

I think I hear him saying that the State is no longer interested in collecting taxes from tribal roads on the reservation which are not Bureau of Indian Affairs roads.

If that is what he has said, then I am delighted to accept his accept his concession. But I must also correct some of the suggestions he has made.

His predecessor, the Attorney for the State of Arizona, argued in the State appellate courts that the State was claiming the right to tax tribal roads. The judgment of the lower court gives the State the right to tax tribal roads. And that is the judgment we are burdened with and that is the judgment which we bring to this Court.

Our opening briefs state that is the issue. Their briefs acknowledge that is the issue, and that was the issue before the Court.

Now, --

QUESTION: That has some importance. I wonder if my understanding is coincided with Yours as to the concession made by the Attorney General.

MR. WAKE: No, Your Honor, what we have discovered recently in the last few days is that the amounts of taxes that were paid under protest by virtue of an administative agreement did not include all the taxes that might be allocable to all the use of all tribal and BIA roads. Trial counsel, Mr. Beus who is here, informs me over the lunch period that his understanding was that administrative agreement included the payment of certain taxes allocable to tribal roads.

QUESTION: Well, as I say, that is of some importance,

at least to me, whether there is an issue to taxes, either fuel or gross receipts taxes imposed on vehicles insofar as their use was confined to tribal roads.

Is there, or is there not a dispute?

MR. WAKE: I submit there was until Mr. Macpherson spoke.

QUESTION: Well, now you submit there isn't. And I --

MR. WAKE: I submit there isn't because has conceded the issue or withdrawing the issue. And perhaps he can clarify his remarks.

QUESTION: You say you accept it gladly.

MR. WAKE: I accept it gladly but --

QUESTION: You have won your case on the --

MR. WAKE: Your Honor, I would point out that that being the concession as I understand it, it would be appropriate in any event the judgment of the lower court to be correct in that regard since --

QUESTION: Mr. Wake, you can accept that, but I, for one, can't accept what that man there told you at lunch.

MR. WAKE: Your Honor, and by the same token I can't accept what Mr. Macpherson --

QUESTION: Well, what do we have before us that I can cite myself to?

MR. WAKE: Your Honor, what we have before us is a

complaint for declaratory relief and refund of taxes. The issues that were briefed below were taxation of all the roads. The State in its briefs below claimed the right to tax all the roads. They resisted the refund and they resisted --

QUESTION: Mr. Macpherson cannot concede away the judgment of the -- may for purposes of collecting taxes but you are interested in having the judgment of the Arizona Supreme Court modified or reversed.

MR. WAKE: To the extent that the judgment on its terms gives him the right to now disclaim wanting to have. I think it would be appropriate to have the judgment corrected.

QUESTION: Well, if there is a confession of error, then there is no adversary dispute here, is there?

MR. WAKE: Well, there is -- there still remains an adversary dispute with respect to the Bureau of Indian Affairs roads, --

QUESTION: Yes, clearly.

MR. WAKE: -- which I hear him maintaining his position with regard to that.

I hope --

QUESTION: He says they are public roads.

MR. WAKE: Pardon?

QUESTION: He says they are public roads.

MR. WAKE: Those roads, the Bureau of Indian Affairs roads, contrary to Mr. Macpherson's recollections, are described

in the record and, in fact, in the appendix at page 13 it is stated in the affidavit of the head forester in charge of this reservation whose business it is to know about the roads, that the State of Arizona contributes absolutely nothing to the maintenance or repair of tribal or BIA roads.

QUESTION: But he says it is public because BIA made it public.

QUESTION: It is public, or open to the public, in other words.

MR. WAKE: The roads are public in two senses. They are public in the sense that the Federal regulations require them to be open to the public. They are also public within the definition of the Arizona tax statutes at issue. Those tax statutes merely require that the roads be in fact used by the public.

QUESTION: That is right.

MR. WAKE: And that is the case with respect to the tribal roads, as well. I heard Mr. Macpherson make a remark about, well, perhaps the tribal roads don't come within the statutory definition of where we can tax. I will accept that concession, too. That wasn't the way we had ever read the statute. His own instand brief filed in this Court at pag 23, Footnote 35, says it is the State's position of course that the roads in question herein are public highways within the meaning of citing the statute.

Now, I gladly accept his concessions. I am a little disturbed at the implication that perhaps there is something here that we have proffered to the Court for decision without having fully made the record --

QUESTION: Well, why is --

MR. WAKE: -- on the issues.

QUESTION: Well, why is a public road in the State of Arizona not subject to public taxation?

MR. WAKE: There are a numbef of reasons, Your Honor.

The first reason is that you must go back to the regulations which speak to Bureau of Indian Affairs roads. The Secretary has the authority to construct roads on Indian reservations for the benefit of Indians. Now, the regulations require that they be open to the free use of the public. As a matter of fact the tribal roads are open in that regard also.

But the point of that provision of the Secretary's responsibilities to Indians is to benefit Indians. It is not to excuse State taxation that otherwise would be impermissible because of the requirements of preemptive Federel regulatory schemes.

Now, the fact is it is a public road in a factual matter. We can see that, Your Honor.

QUESTION: Could the Government terminate that public character; is it at sufferance?

MR. WAKE: I think that is entirely correct, Mr. Chief Justice

QUESTION: Well, I am asking a question here.

MR. WAKE: And the reason for that is the BIA roads are trust lands. They are not publicly owned, they are trust lands. So that they are part of the trust administration responsibility of the Secretary and, although I have not --

QUESTION: Where it is a State highway, that is land that has been ceded and it no longer belongs to them.

MR. WAKE: That --

QUESTION: And that is the difference.

MR. WAKE: That is precisely the distinction. The State of Arizona does nothing, the Secretary operates these roads for the benefit of the Indians.

Now, --

QUESTION: Do you think there is a difference for Federal preemption purposes between the private roads -- that is the tribal roads and the BIA roads? I don't understand your opponent to concede there is a difference for Federal pre-emption purposes but rather to say it is a matter of Arizona law the tax isn't imposed on the tribal road.

MR. WAKE: Your Honor, I do not concede there is any difference whatsoever.

Again we must come back to the principal task at hand which is understanding and applying the Federal regulatory

scheme in a way to promote the congressional objectives and with respect to those Federal purposes it does not matter whether these roads are tribal roads or BIA roads. They are not State roads. They are up there for the benefit of the Indians, the State doesn't have anything to do with them. It doesn't police them, it doesn't regulate them, it won't write an accident report on them if you have an accident there.

Now, again, --

QUESTION: Well, why doesn't your preemptive argument then cover State roads, too?

MR. WAKE: Your Honor this comes back to one of the first questions asked this morning.

QUESTION: You say it might, but you don't want us to consider it and you don't assert it?

MR. WAKE: It might, Your Honor. I can see equities in the other side. Our client chose not to finance that lawsuit, is the truth of it. And their intention is to continue to pay taxes allocable to the use of State roads. And I might add that was done before getting the benefit of counsel. They thought that was fair and that is the way they want to do things.

And, in any event, the funds allocable to the State road I don't think are significant enough for us to trouble at this point.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted. Thank you, Mrs. Stillman.

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