ORIGINAL

In the

Supreme Court of the United States

CENTRAL MACHINERY COMPANY,)
)
APPELLANT,)
)
V.)
) No. 78-1604
ARIZONA STATE TAX COMMISSION,)
)
APPELLEE.)
)

Washington, D. C.
January 14, 1980

Pages 1 thru 44

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

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CENTRAL MACHINERY COMPANY, :
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Appellant, :
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v. : No. 78-1604
:
ARIZONA STATE TAX COMMISSION, :
:
Appellee. :
:
- - - - - - - - - - - - - - - - - -:

Washington, D. C.,

Monday, January 14, 1980.

The above-entitled matter came on for oral argument at 10:04 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:

RODNEY B. LEWIS, ESQ., Box 416, Sacaton, Arizona 85247; on behalf of the Appellant

LOUIS F. CLAIBORNE, Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; as amicus curiae for the United States

IAN A. MACPHERSON, ESQ., Assistant Attorney General, 1700 West Washington, Phoenix, Arizona 85007; on behalf of the Appellee

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on behalf of the United States
as amicus curiae 17

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on behalf of the Appellee 25

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 78-1604, Central Machinery Company v. Arizona State Tax Commission.

Mr. Lewis, you may proceed whenever you are ready.

ORAL ARGUMENT OF RODNEY B. LEWIS, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case is here on appeal from the Supreme Court of the State of Arizona. It involves the question of whether the State of Arizona can impose a transaction privilege tax on the sale of 11 tractors to the Gila River Indian Community.

In 1973, representatives of Central Machinery went upon the Gila River Indian Reservation for the purpose of selling farm machinery to Gila River Farms. Gila River Farms is a subsidiary and business enterprise of the Gila River Indian Community, a recognized Indian tribe organized pursuant to section 16 of the Indian Reorganization Act.

After negotiations which occurred on the reservation, Gila River Farms agreed to purchase 11 John Deere tractors. Subsequently delivery and payment for the

tractors was made on the reservation. Central Machinery added to the purchase price the amount of $2,916.62 which was paid by Gila River Farms to Central Machinery. Central Machinery remitted these funds to the State of Arizona as payment for the transaction privilege tax. Central Machinery paid this tax under protect.

The sale was approved by the Superintendent of Pima Agency, the Secretary's representative on the Gila River Indian Reservation. The Pima Agency Superintendent allowed Central Machinery to come onto the reservation and to transact this business without securing a trader's license. The Superintendent prior to the sale had also approved the farm's budget which had set aside monies for the purchase of the tractors.

The administrative appeals and the court action and the Arizona courts followed, culminating in this appeal before this Court.

The traders statute, U.S.C. 261 through 264 and federal regulations, preempt Arizona's jurisdiction to levy this tax on this sale. It is our position that Warren Trading Post governs this case thereby preventing application or imposition of the transaction privilege tax, a tax which is measured by sales to this sales transaction.

QUESTION: Mr. Lewis, would you agree that if instead of the transaction taking place on the Gila River

Reservation, it had taken place in New Mexico and Arizona had sought to levy its privilege tax, it would be taxable?

MR. LEWIS: I'm not sure whether or not there would be a sufficient connection to the State of Arizona allowing Arizona to impose that tax. That, of course, is not the situation here before us.

QUESTION: But if there had been, do you think the same standard would govern or do you think that its licensing by the Secretary of the Interior and the other peculiarly Indian aspects of this case that --

MR. LEWIS: I don't think the licensing by the Interior is dispositive of this case, nor do I think it would be handled the same way regarding a transaction in New Mexico.

Our position is that Warren Trading Post which held that federal statutes and accompanying regulations preempted the field did not allow the imposition of this tax to this transaction.

Warren Trading Post held that Congress has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the states to legislate the subject. Any assessment and collection of a tax involved was, it was held in Warren, to frustrate the evidence congressional purpose of insuring that no burden be imposed upon Indian traders, trading with Indians or

reservations except as authorized by acts of Congress or by valid regulations promulgated under those acts.

Congress enacted the trader's statute to deter fraud and prevent exploitation of Indians engaged in commercial transactions with an Indian country.

QUESTION: Mr. Lewis, could I ask you a question. Was this transaction approved by the federal government?

MR. LEWIS: The transaction was approved by the federal government, was approved by the Secretary's representatives --

QUESTION: When it was approved, did the person who granted the approval know the terms of the transaction?

MR. LEWIS: He knew the terms of the transaction, he had approved the monies which had been set aside by Gila River Farms specifically for the purchase of the tractors.

QUESTION: Can it be inferred that the approval carried with it approval of the transaction tax?

MR. LEWIS: No, it cannot. First of all, I think our position is that the agency superintendent simply recognized that there was a problem involved here. He only approved the transaction, realizing the Gila River Farms and Central Machinery had paid this tax under protest. Secondly --

QUESTION: Was there any objection made on behalf

of the federal government to the payment of the tax?

MR. LEWIS: There was no objection at that time made by the federal government to the imposition of the tax. He was aware, of course, that the tax had been paid on the tractors under protest.

The power of Congress to legislate in this area stems from the Indian commerce clause, Article 3, section 8, clause 3 of the United States Constitution. On their face, these statutes indicate that exclusive power to regulate trading rests with the federal government. For instance, 25 U.S.C. 261 says that the Commissioner of Indian Affairs has sole power and authority to appoint Indian traders. 25 U.S.C. 262 specifies that any person must first satisfy the Commissioner that he is a proper person to deal with --- to trade with Indians.

QUESTION: Do you mean to argue that if the Indian purchasers had left the reservation and gone to the city or gone into a town or some neighboring community and negotiated the purchase of the tractors and paid for them there and delivery taken there, that the seller would have to qualify as an Indian trader?

MR. LEWIS: If we went off the reservation to buy these tractors, we would be subject to the Arizona transaction privilege tax.

QUESTION: And the seller wouldn't have to be

recognized as an Indian trader?

MR. LEWIS: The seller would not have to be recognized as an Indian trader. When he comes onto the --

QUESTION: Well, what if went off the reservation and bought and paid for the tractor an the adjoining community and asks that it be delivered on the reservation?

MR. LEWIS: Well, that would not be our case.

QUESTION: I know it isn't your case.

MR. LEWIS: It is a little difficult to answer that but in that case I think the transaction could be taxed.

QUESTION: I see.

MR. LEWIS: The federal government has traditionally and historically regulated trading involving Indians. Beginning in 1790, they enacted the trader statutes, and throughout the 19th Century the trader statutes were amended from time to time. Because of this predominant federal interest, state regulation has often been precluded.

The sale by Central Machinery to Gila River Farms falls within the scope of the trader statute, and the holding of Warren Trading Post. 25 U.S.C., for instance, 264 penalizes any person conducting unauthorized trading with Indians or Indian tribes and the Commissioner has issued comprehensive regulations to carry out the

objectives of the statute.

The attempt to attack this sale of these tractors to Gila River Farms which occurred on the reservation must fall since the trader statutes preempt Arizona's jurisdiction to enact this tax, and because of the holding and the interpretation of the trader statutes by Warren Trading Post.

Our second argument deals with the fact that the tax interferes with the federal purposes of the Gila River Indian Reservation. The reservation was established in 1859 to provide Pimas and Maricopas a sound economic base. Gila River Farms is pursuing this objective. The Pimas and Maricopas have farmed along the Gila River for hundreds and even thousands of years, certainly before the establishment of the American Republic.

The imposition of the Arizona transaction privilege tax burdens the economic purpose of the reservation. Second of all, the tax interferes with tribal self-government. Warren invalidated the same tax in 1965, this tax which is measured by sales, because -- in part because it interfered with tribal self-government. And McClanahan invalidated Arizona's income tax because of its interference with tribal self-government.

The Gila River Indian community's ability to government itself will likewise be interfered with.

I would like to now address two arguments raised by the State of Arizona. First, the Arizona Supreme Court thought it important that because of the lack of trader's license, this transaction did not come within the trader statutes or the holding in Warren.

First of all, there is not a statutory requirement that Central Machinery have a trader's license to engage in trading on a reservation. The purpose of these statutes, as I mentioned before, is to supervise trading with Indians and Indian tribes, to prevent unfair prices and practices. The issuance of a trader's license is not the exclusive way in which or method in which the federal government uses to accomplish the purpose of the statutes.

For instance, the Code of Federal Regulations allows itinere‵t peddlers to go on the reservation to trade for limited purposes, therefore they need correspondingly less supervision. Here there wasextensive supervision which met the objectives of the statutes and that is to defer fraud and prevent exploitation of Indians. There was a specific approval of the sale, there was approval of the farm's budget which included money set aside for the tractors, and there was approval of the tribal budget of the Gila River Indian Community, the parent organization of Gila River Farms, as is required by Article 15 of the constitution and bylaws of the Gila River Indian

Community, which was approved by the Secretary of the Interior.

A determination was made by the agency superintendent in this single transaction that a license not be issued because there probably had been adequate supervision of this transaction and the purposes of the statute had been met and accomplished.

A second argument raised by the State of Arizona and which was discussed in the Supreme Court's opinion in Arizona was that it did not come in within the trader statutes, this transaction did not come within the trader statutes or Warren Trading Post because it lacked a permanent place of business on the reservation.

Again, the trader statutes don't require that persons engaged in commercial transactions with Indians within Indian country have a permanent place of business on that reservation.

QUESTION: Well, should Central have had a license?

MR. LEWIS: Central did not need a license in this case. The purposes of the statute had been met, there was direct supervision of the entire transaction by the Secretary of the Interior.

QUESTION: Are you saying that the trading statute did apply except for the licensing provision, is that it?

MR. LEWIS: The trader statutes applied. The licensing is not required by the statute. The force of the federal government in supervising the sale was in effect, the full force. The sale was comprehensively regulated by the agency superintendent.

QUESTION: You are suggesting that the licensing is merely a matter of form, formality?

MR. LEWIS: In this case it was a mere formality. The actual supervision had taken place.

QUESTION: Well, is the extent of the economic burden any factor in your argument, or is it just a straight preemption argument?

MR. LEWIS: Well, that is basically our argument, but certainly the economic burden on the tribe, on a group of Indians with limited resources certainly has a strong effect. This $2,916 adds up, when you count the tremendous amount of similar transactions which occur, these are funds which ordinarily would go to support the tribal government which has its purpose to maintain government on the reservation and to attempt to establish a sound economic base for Pimas and Maricopas who lived there since time immemorial.

In summary, the trader statutes preempt Arizona's authority to tax this sale. Warren Trading Post, interpreting the trader statutes, governs and controls this case, preventing imposition of this transaction privilege tax

which is measured by sales. The imposition of the tax will interfere with the federal purposes of the reservation to provide a sound economic base for Pima and Maricopa Indians and interferes with the right of the Gila River Indian Community Tribe to govern itself.

QUESTION: Let me just be sure I understand you correctly. Did you respond to Mr. Justice White by saying that if the contract had been signed off the reservation that then the tax could be imposed?

MR. LEWIS: I think the question was if the farms had gone off the reservation, bought the tractors, then that would be a different situation and probably the Arizona tax would apply in that situation. But in this case --

QUESTION: But the tax cannot be applied if they go off the reservation and negotiate the whole transaction and then go back on the reservation and sign the papers?

MR. LEWIS: Well, I think if delivery was going to be made on the reservation --

QUESTION: Well, it is always going to be made on the reservation. Delivery was made on the reservation here --

MR. LEWIS: Yes, it was.

QUESTION: -- and I think in Mr. Justice White's example, too.

MR. LEWIS: I think the mere fact that some negotiations took place off the reservation I still think would prevent imposition of this tax.

QUESTION: The key is where they sign the contract, is it?

MR. LEWIS: The key is that you have a trader dealing with Indian tribes and the statute --

QUESTION: If the only difference is where you sign the contract, is that the difference between taxation and no taxation?

MR. LEWIS: No, that is not the difference between taxation and no taxation. When --

QUESTION: Well, what is it then?

MR. LEWIS: Well, a taxable event in this case was the transaction of the sale of the tractors to the Gila River Indian Community. That was a taxable event. The elements of the sale involved negotiations, signing a contract, making payment and delivery, these took place in this case on the reservation.

Now, if in a situation negotiations took place off the reservation, that would not make any difference. The trader statutes still govern that transaction. If the contract was signed off the reservation, I still don't think that the -- I still think the trader statutes would govern the situation and preempt the state's authority to levey a

tax.

QUESTION: Then is it delivery, any time merchandise is delivered on the reservation? I think you changed your position now. You say even if it was signed off the reservation, there would be preemption.

MR. LEWIS: In this case, these events --

QUESTION: I understand but I am trying to understand what is your view of the line between a taxable transaction and a non-taxable transaction.

MR. LEWIS: The line is drawn when you are dealing with an Indian tribe within Indian country. That is one line. If you are dealing with a business, an important part, an important function of the tribal government, that is a second major factor. Finally, you are talking about, in this case we are talking about a series of events which constitute the sale which also took place on the reservation. When you are dealing with an Indian tribe, within Indian country for the sale, this comes within the trader statutes, comes within the meaning of Warren.

QUESTION: Then are you saying that it is the status of the Indian tribe that is the dispositive factor and that all these other factors are unimportant and irrelevant?

MR. LEWIS: Yes, the status of the Indian tribe, the fact that it occurred within Indian country, it was a

commercial transaction, yes, those are the factors which preempt the Arizona state sales tax.

QUESTION: Well, certainly in Mescalero the decision from our Court several years ago, rejected the idea that the mere fact that it was an Indian tribe automatically meant federal preemption, did it not?

MR. LEWIS: It did. The ski lodge at issue there was off the reservation.

QUESTION: But if the status of the Indian tribe wasn't in doubt, so the status by itself wouldn't be given exemption here, would it, under Mescalero?

MR. LEWIS: Under Mescalero, that of course involved a different situation. It involved Indian property located off the reservation. That is not the situation here. The fact that it is an Indian tribe is not dispositive of this situation. It is a fact that there was business performed within Indian country, the fact that there was an Indian tribe, the fact in this case that the events of the sale took place on the reservation.

QUESTION: If the tribe had sent a representative in to Phoenix to buy a truck and had bought the truck off of an automobile dealer lot and taken the truck back to the reservation, would that be covered by your submission here today?

MR. LEWIS: By the submission here today it would

not be covered.

QUESTION: You wouldn't be making the claim that you are making here today?

MR. LEWIS: We would not be making the claim.

QUESTION: Suppose the agreement to purchase the truck having been made in Phoenix also provided that the truck would be delivered to the reservation.

MR. LEWIS: I think simply delivery of the truck on the reservation probably would not bring this --

QUESTION: Would not be quite enough?

MR. LEWIS: It would not be quite enough.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Claiborne.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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

Let me begin by saying that we humbly endorse and have in our brief primarily relied on the statutory pre-emption argument; and with respect to that, in answer to some of the questions from the bench, I would put the matter this way:

The purpose of the Indian trader statutes was to protect Indian tribes against the abuses of those who came

onto that Indian territory, who came within Indian country and tried to sell them goods or services. It therefore does matter whether it is the tribe that goes outside to purchase equipment or whether it is the dealer who comes onto the reservation to sell to the tribe.

Whether some part of the negotiation is subsequently conducted on or off the reservation may be less critical than whether the approach comes from the outside or whether rather it is the Indian tribe --

QUESTION: Well, is it an approach from the outside if the farm machinery dealer simply advertises on local television, on the radio and advertises John Deere tractors at a very low price?

MR. CLAIBORNE: Perhaps not.

QUESTION: And off the Indian goes to buy a tractor.

MR. CLAIBORNE: Perhaps not. Perhaps that is the --

QUESTION: Well, is it perhaps so or perhaps not or --

MR. CLAIBORNE: I would have thought not. I would have thought that when the dealer either by mail, by telephone or by personal entry onto the reservation approaches the tribe with a view to selling machinery or any other --

QUESTION: How about a flier in the mail to all residents of the reservation?

MR. CLAIBORNE: That I think would be an invitation fromoutside and that would and should be subject to the --

QUESTION: And even if the Indian then leaves the reservation and signs the contract and takes delivery off the reservation?

MR. CLAIBORNE: Well, Mr. Justice White, of course, there are gradations and I am not clear as to each of the --

QUESTION: But you are clear about this one?

MR. CLAIBORNE: This one, of course, we got an approach from the outside, we've got the transaction conducted wholly within the reservation, we've got the contract signed there and we've got delivery effected there.

QUESTION: Do I understand correctly, Mr. Claiborne, that your reliance is primarily if not exclusively on the doctrine of Warren Trading Post?

MR. CLAIBORNE: Insofar as we rely on statutory preemption.

QUESTION: Don't you do primarily rely on statutory preemption?

MR. CLAIBORNE: We do primarily rely, but we have, as Your Honor may know from our brief, also suggested that there is a constitutional dimension to the case. I

appreciate that that matter was not urged below. We felt that, at the Court's invitation as amicus curiae, it was our duty to put forward what we think is a constitutional preemption argument which is --

QUESTION: That is the Indian commerc clause?

MR. CLAIBORNE: The Indian commerce clause argument. As to that, we begin with the proposition which has been endorsed by this Court starting in the Worcester case and most recently reaffirmed in Bryan v. Itasca County, that the power to deal with Indian tribes is exclusively a federal power.

QUESTION: Do you agree with Judge O'Connor's statement in her opinion that it is the existence of the federal laws, that the accompanying regulations are not their enforcement which preempts the state's ability to tax the transaction?

MR. CLAIBORNE: Mr. Chief Justice, we endorse that statement entirely. It seems to us irrelevant if -- and we don't suggest that it is the case, buf if it were the case, that if the Department of the Interior had defauled by failing to apply the Indian trader statutes here to this transaction, that ought not give leave to the State of Arizona to impose its tax. Preemption in this area, an area committed by the Constitution exclusively to the federal government, is one in which the doctrine of

preemption depends on the existence rather than the exercise of federal statutory power.

QUESTION: Well, how do you distinguish your answer to the Chief Justice's question from the statement in Mescalero on page 147 of the U.S. Reports, at the outset we reject, as did the state court, the broad assertion that the federal government has exclusive jurisdiction over the tribe for all purposes and that the state is therefore prohibited from enforcing its revenue laws against any tribal enterprises?

MR. CLAIBORNE: Mr. Justice Rehnquist, I take that statement to address the broad proposition there put forward that the relation with Indians and with Indian tribes even off reservation was exclusively a matter of federal consideration.

QUESTION: But certainly Indian commerce can take place off the reservation as well as on the reservation.

MR. CLAIBORNE: Mr. Justice Rehnquist, we assume and I think with some justification in history that the Indian commerce clause was written against a background of two kinds of Indians. For the most part then on their own territory within Indian country, that was the Indian commerce spoken of. When Indians has assimilated, had joined the general population, were not longer on their reservation, that was not Indian commerce. The Indians had lost

their character as a tribe and we are talking about tribal commerce, not an individual Indian who goes off to buy a car or any other product. We are talking about, as the Constitution does, commerce with the Indian tribes within their territory as now defined by reservations.

QUESTION: Well, originally they were not reservations, they were just tribes that were considered in the era of the Worcester case a little short of sovereign nations like England or France or Germany, and those weren't reservation Indians, they were tribal nations.

MR. CLAIBORNE: Mr. Justice Stewart, of course they were more independent then than now, but the Cherokees in the Worcester case were on their reserved lands, those which they had not ceded, and --

QUESTION: Unlike today, where Indian reservations are federal lands, in those days they were Indian lands.

MR. CLAIBORNE: In some cases, of course, they are simply Indian lands set aside --

QUESTION: Indian sovereign nations or quasi-sovereign nations.

MR. CLAIBORNE: But there are and most reservations today are simply the residual of aboriginal Indian lands which are now more restricted in area and more subject to both federal and to some degree state regulation.

QUESTION: But those boundaries were fixed not

by the Indians but by treaties and by acts of Congress, as Justice Stewart suggested. Before that, the Indians merely claimed sovereignty over rather indefinite and vaguely defined lands, wasn't that so?

MR. CLAIBORNE: To some degree, Mr. Chief Justice. Of course, there were a number of treaties long before the decision in Worcester which had defined the area which could remain which was not ceded and which is recognized as pertaining to the Indian tribes. Indeed, the Worcester case involved the Cherokee area which had been defined at least twice by treaty by then and was very much less than the aboriginal area roamed by the Cherokee Tribes.

QUESTION: One of those reservations had been created when the constitutional language was drafted.

QUESTION: That is the point.

MR. CLAIBORNE: Well, that is not quite true, Mr. Justice Stevens. There had been a number of treaties before the Constitution which had fixed boundaries between the white man's land and the Indian land. Now, it is true that -- and, of course, they were Indians within the states even then, witness --

QUESTION: Were there states before the Constitution?

MR. CLAIBORNE: They were the --

QUESTION: I mean, do you --

MR. CLAIBORNE: -- before the Constitution --

QUESTION: -- and Lord Jeffrey Amherst and King George III or --

MR. CLAIBORNE: Well, Mr. Justice Rehnquist, the period between the Declaration of Independence and the Constitution, the period of the Continental Congress, was a period of the United States although not governed by the confederation rather than the Constitution, and those states, the State of New York and the State of Massachusetts had Indian enclaves within them. Witness Article I of the Constitution which excludes the Indians within the states from being counted in any enumeration of representatives. Those are only the Indians within states that are spoken of.

The question in this case it seems to us is whether the exclusive constitutional power of Congress to deal with Indian tribes includes, as the constitutional language itself suggests, commercial relations between the white world and the Indian world. It seems to us that that was a matter that was confined by the Constitution to the Congress, duly exercised in the non-intercourse acts but not entirely dependent upon that exercise.

Just as a state cannot authorize the cessation of Indian land today, regardless of the intercourse acts, so today the states cannot tax or regulate commerce in chattles between the Indian tribes and the white world.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Macpherson.

ORAL ARGUMENT OF IAN A. MACPHERSON, ESQ.,

ON BEHALF OF THE APPELLEE

MR. MACPHERSON: Mr. Chief Justice, and may it please the Court: My name is Ian Macpherson and I represent the appellees in this case.

I think at the outset what I would like to do is point out a couple of facts that were raised in the opening remarks by both counsel for the taxpayer and the United States as amicus curiae.

Mr. Lewis, on behalf of the taxpayer, has stated in his opening remarks that there was an extensive regulation and supervision of the purchase of these tractors. A further examination of the facts will reveal, and the record supports this -- as a matter of fact, it was stipulated in the agreed statement of facts upon which the matter was submitted to the Superior Court on cross-motion for summary judgment -- that in addition to the visible economic burden of the Arizona transaction privilege tax, Central Machinery Company included as well as an undifferentiated cost component the economic burdens of many of its other state taxes, that is, Central Machinery Company, it being a non-Indian Arizona corporation engaged in business within the State of Arizona, at Casa Grande,

Arizona, which this Court may take note of and is stipulated in the facts, is not located within any reservation whatsoever. It is subject itself to a number of our state taxes, state income taxes, state property taxes, and so on and so forth.

The conomic burden of those taxes, to be distinguished of course from the legal incidence of the taxes, were blended into the purchase price of all of the tractors. Those undifferentiated cost burdens were approved in the purchase order. And I think at this point it is important to note that the purchase order itself was approved on February 22 of 1974. The purchase order listed not only the individual tractors with an individual price for each tractor but also a grand total for the total of the eleven tractors, some $97,000, plus the visible economic burden of some $2,900 for the Arizona transaction privilege tax.

That purchase order was submitted to the Superintendent of the Pima agency, that agent who has authority over this particular reservation. If the argument be made that there was an extensive supervision of the purchase, the fact is the record is barren of any indication other than that the Commission of Indian Affairs or his delegate, the Superintendent of the Pima agency, approved it, simply rubber-stamped the purchase order that was put in front of him.

QUESTION: Is there no superintendent of the Gila River Reservation?

MR. MACPHERSON: Mr. Justice Rehnquist, that is my understanding. The Gila River Indian Reservation is within the jurisdicition of the Pima agent, I believe out of Tucson.

In any event, with respect to the argument that 25 U.S.C. section 81 governs the result in this case, notwithstanding the fact that Central Machinery had neither an Indian traders license nor an itinerant peddlers permit, that section 81 applies, that is the general power to approve contracts, the fact of the matter is that the Pima agent did not reject that cost that was included with the purchase order, he specifically approved it.

Now, with respect to the Warren Trading Post case, that fact situation fits precisely into the opinion rendered by Assistant Solicitor Harper in 58 I.D. 562, upon which this Court relied and cited with approval in the Warren Trading Post case. In that particular Interior Department opinion, it was specifically provided that where a purchase order is issued to a merchant doing business off the reservation, they are subject to state taxes, including, if the Court please, those purchases which relate to items, goods, whatever, for a specific program of Indian development. In doing so, Assistant Solicitor Harper overruled a

prior provision in 57 I.D. 124.

Previously, the opinion of the Interior Department had been that these purchases being for Indian development and in view of the "confused state of the law at the time," were felt at that time not by Solicitor Harper but rather Mr. Kirgis to be exempt from state taxation.

In 58 I.D. 562, on the other hand, Solicitor Harper specifically points out that based upon this Court's decision in cases, among others, James V. Dravo, the Penderes case -- these are all included within the Interior Department opinion, that in fact it now, that is in 1943, some three years after the rendition of the prior opinion, it appeared that, based on this Court's rulings in Interstate Commerce cases, federal immunity cases, that the mere fact that the economic burdens of some state taxes might be borne by the federal government was not in itself enough to infringe upon the immunity of the ultimate sovereign in this nation, the United States government itself.

QUESTION: Mr. Macpherson, isn't there a body of law to the effect that the representatives of the United States government cannot estop it, that is that just because the representative of the government makes a statement or a decision that a federal statute is to be applied in a particular way some time ago does not necessarily

conclude the government on that point?

MR. MACPHERSON: That is correct, Your Honor. I am not arguing estoppel. I am arguing that 58 I.D. 562 articulates a rule even under Warren Trading Post as it stands right now, that where the purchase order is issued to a merchant off the reservation it is subject to taxation. This in fact is consistent at least in Arizona's view with the subsequent decisions of this Court in cases including Gurley v. Rhoden and various other of this Court's decisions relating to the federal government's immunity from taxation.

QUESTION: Would there be tax exemption if it was a c.o.d. transaction?

MR. MACPHERSON: Mr. Justice Burger --

QUESTION: The tractor delivered on the reservation and cash on delivery at that time?

MR. MACPHERSON: Mr. Chief Justice, in that regard -- and I will apologize to the Court -- I do not have a transcript of the oral argument which was held in the Arizona Supreme Court with respect to this, but with due respect to Mr. Lewis' recollection of that argument, it is my recollection that the position was taken at that time that where a c.o.d. delivery was made on the reservation, that that indeed would also be exempt. Now, Mr. Lewis may wish to correct me on that, but that is my recollection.

It is the State of Arizona's position in this

case that if there were a c.o.d. delivery on the reservation with respect -- well, in point of fact that is essentially what we have here. The taxable activity in Arizona's estimation, contrary and distinct from the taxpayer's assertion as well as the United States, is not the sale. Arizona does not have a sales tax. Many other states have sales taxes. Maryland, Virginia, indeed the District of Columbia has a sales tax. It is an excise tax placed upon the actual transfer event, and in general, indeed all three of those named jurisdictions have a requirement that the legal obligation for that tax, although there may be a collection requirement from the vendor, ultimately rests by mandate of the organic law of those jurisdictions upon the vendee. Arizona does not have that kind of a law. It is a transaction privilege tax.

QUESTION: But Arizona doesn't prevent the vendor from passing along the tax to the vendors?

MR. MACPHERSON: That is correct, Your Honor. It neither prevents it nor does it require it. It is no moment to the state. How the vendor goes about collecting this cost from his customer is separate and apart from whether or not he has a liability for it.

QUESTION: But the general practice is to pass it along, isn't it?

MR. MACPHERSON: Mr. Justice --

QUESTION: You have already told us that was done in this case.

MR. MACPHERSON: That's correct. That arises, however, by virtue of contractual negotiation and no mandate of state law whatsoever.

QUESTION: I understand that. You have told us that, but the general practice and I suppose therefore the expectation is that it will be passed along to their retail customer.

MR. MACPHERSON: Your Honor, if the term "expectation" is used in the context of a requirement of state law, I would not --

QUESTION: You told us that it is not required by state law, but I asked you about the general practice.

MR. MACPHERSON: Yes.

QUESTION: It is to pass it along, isn't it?

MR. MACPHERSON: Your Honor, that is quite correct. As a business practice, the economic burden of the tax is passed along, along with the burden of all the other costs the vendor has, including his other economic burdens of taxes, his costs of acquisition, his labor expenses, his fuels, electricity expenses. Those are all matters of contract.

In this regard, I would submit to the Court that the fact that the economic burden of these taxes may be

borne by an Indian tribe or an Indian on the reservation indeed might constitute nothing more than a manifestation of the right, the exercise of the right of self-government. One of the attributes of the exercise of self-government surely must be the right to contract. They have the right to contract and negotiate as to the price, which indeed they did as to the price of the tractors, including, they have stipulated, the concealed economic burdens of these other taxes.

It appears that the argument boils down to nothing more than an objection not to the species of the costs, i.e., state tax, but rather the visibility of the tax. For example, if Central Machinery Company had attempted to conceal the economic burden of this $2,900 charge within the purchase price and submitted that without a separate statement, the State of Arizona would submit that if consistency is to brought to the taxpayers and United States position, that it would have been approved because they did the same thing with respect to the other burdens which were concealed.

Returning if I may to the point that Arizona does not have a sales tax, Arizona indeed has a business excise tax, it is denominated the Arizona transaction privilege tax. It has as its taxable event not the sale transaction, it has as its taxable event engaging in business within

Arizona.

QUESTION: Does state law require that the amount of the tax be disclosed at the time of the transaction?

MR. MACPHERSON: It does not.

QUESTION: And is it uniformally disclosed as a matter of practice?

MR. MACPHERSON: Your Honor, I can't speak for the some 100,000 vendors in the State of Arizona, but as a general practice, yes, it is separately stated.

QUESTION: If you bought an item in a department store, would the sales ticket reflect the tax?

MR. MACPHERSON: It does indeed.

QUESTION: What if the tribe had contracted for these tractors in Oklahoma and delivered themselves on over-the-road trucks to their reservation, is there any Arizona tax on them?

MR. MACPHERSON: Mr. Chief Justice, in the hypo are all of the negotiations done through the out-of-state vendor?

QUESTION: Suppose the Indians go over to Oklahoma or any other nearby state --

MR. MACPHERSON: Yes.

QUESTION: -- they want to buy these tractors, and deliver them any way you want, railroad, over-the-road, trucks or whatever --

MR. MACPHERSON: Delivery on the reservation?

QUESTION: Yes.

MR. MACPHERSON: Non-taxable.

QUESTION: Is there a different tax imposed on that transaction?

MR. MACPHERSON: Yes, normally there would be a use tax imposed upon that. However, as distinguished from the Arizona transaction privilege tax which has as its legal incidence the engaging of business, the liability being upon the vendor --

QUESTION: That would be on the vendee.

MR. MACPHERSON: That's correct.

QUESTION: In that case, would you say you could or could not collect the tax?

MR. MACPHERSON: From the vendee, the Gila River Tribe, Gila River Farms?

QUESTION: Yes.

MR. MACPHERSON: We could not collect it. We do not make any attempt to do that.

QUESTION: Why not? Why do you concede that?

MR. MACPHERSON: Because they are an Indian tribe located on an Indian reservation. This Court's decisions in Bryan v. Itasca County and McClanahan preclude that.

QUESTION: Apart from our Court's decision, just to get the theoretical basis more, what is the reasoning

that there cannot be a tax on that other than the Court has said so? Is there a legal reason for those cases?

MR. MACPHERSON: Apart from the Court's decision?

QUESTION: What is the underlying rationale of the Court's decisions as you understand them?

MR. MACPHERSON: As I understand the rationale of both Bryan and McClanahan, the state taxes in both of those cases which were being attempted to be imposed were sought to be imposed directly upon an Indian on an Indian reservation.

QUESTION: I am asking you what is wrong with that.

MR. MACPHERON: Beg pardon?

QUESTION: I am asking you why cannot that be done? Is it a constitutional reason or a statutory reason or just some general reason of judicial policy?

MR. MACPHERSON: Mr. Justice Stevens, it is my understanding that under the commerce clause as well as perhaps the supremacy clause the states are without power to impose the direct legal obligation for state taxes upon Indians on Indian reservations. This traces back to this Court's decision in Worcester.

QUESTION: It has some relationship to Indian tribal sovereignty, I take it.

MR. MACPHERSON: That is correct, Your Honor.

Again, some --

QUESTION: Why doesn't that rationale apply here? Why I am trying to identify the rationale, my next question would be why is not that rationale applied here. That is pretty obvious that is why I am asking these questions, I suppose.

MR. MACPHERSON: Well, if I may, Your Honor, there being no mandate of state law to transfer the obligation for the tax, that is the legal liability for the tax to the vendee in Arizona, the legal liability remaining by mandate of state law upon the non-indian Central Machinery Company off the reservation, and again the taxable event being not the sale but engaging in business in the state of Arizona.

Upon that basis, it is Arizona's position that the tax can apply. This is consistent we submit with numerous decisions, the most recent of which is the opinion authored by Mr. Justice Rehnquist in part four of the Moe decision. The mere fact that the economic burdens as opposed to the legal obligations for taxes may be visited by contract rather than state law upon Indians does not per se result in a violation of --

QUESTION: Do you think it makes any difference whether it is a tribe or an individual Indian that is involved?

MR. MACPHERSON: Your Honor, it may but it escapes me. why. In both Bryan v. Itasca County and McClanahan we had individual Indians involved. However, in McClanahan part of the rationale for the decision was that the imposition of the tax upon Rosalind McClanahan would interfere with the Navaho Tribe's right of self-government, so there is a relationship. I am not sure that is a satisfactory answer for Your Honor.

QUESTION: I just find this a very confusing area and I am asking questions because I am trying to understand it. I don't know if it is a satisfactory answer or not.

MR. MACPHERSON: If I may, by way of further explanation, the fact of the matter is that Arizona believes after an examination not only of the Warren Trading Post decision but the Warren Trading Post briefs and indeed the tape of the oral argument in the Warren Trading Post decision maintains that these taxes are not preempted. They are not preempted. Indeed, some 40 or 50 minutes into the tape, counsel for Warren Trading Post in oral argument conceded -- and this again gets into the question of the Buck Act -- that if the Buck Act applied to Indian reservations, he would have no case. I mean, that admission is made.

With that aside, the point is that Warren Trading

Post as it stands right now is distinguishable from the fact we have here. In Warren Trading Post, both the taxable event, i.e., engaging in business, as well as the measure of the taxable event, a distinct entity under Arizona law as confirmed by this Court's decisions in Gurley v. Rhoden and American Oil v. Neill, the measure of the event also ocurred on the Indian reservation. We had both things occurring on the Indian reservation.

QUESTION: Well, suppose we agreed with you in this case and then Central decided, well, we have read that opinion and so we are going to open a branch on the reservation, they had an office on the reservation. They either were licensed or they weren't, but I gather you don't think it makes any difference. Could you collect from them then if they made exactly the same kind of sale, the only thing is they had an office on the reservation and made the sale out of there.

MR. MACPHERSON: Out of the office on the reservation. Your Honor, I believe that that would fall within Warren Trading Post. As a condition --

QUESTION: It may, but I take it on your rationale I would think you would want to cut into Warren Trading Post.

MR. MACPHERSON: We've done something like that, Your Honor, at least we are suggesting that a reexamination

of the rationale of Warren --

QUESTION: Exactly. So I would think you would say that under your current rationale you would be able to collect even if they moved into an office on the reservation and made the sale out of there.

MR. MACPHERSON: Your Honor is correct. If indeed the Court is willing to at least reexamine the Warren Trading Post decision, that might be true, and --

QUESTION: Let me ask this, both in this case and the next one, as I understand it, to rexamine what is said in that footnote in Warren Trading Post about the Buck Act.

MR. MACPHERSON: That's correct, Your Honor. But in further response --

QUESTION: But you submit that in this case at least even if we don't do that you nonetheless must prevail?

MR. MACPHERSON: That's correct, Your Honor. The fact of the matter is that under Warren Trading Post as it stands right now, a condition precedent to Central Machinery Company's opening a branch office, as it were, on the reservation is the application for and acquisition of a federal Indian traders license. There is no exception in the statute that I can see that says that, well, you don't need a license because somehow we are otherwise regulated. There is no exception like that. As a matter of fact, the

dissenting opinion of Justice Lockwood in the Arizona Supreme Court's decision in the Warren Trading Post case, which this Court of course overruled, Justice Lockwood specifically said that the reason that this is preempted is because Warren Trading Post had acquired a federal Indian traders license, was in compliance with federal statutes, was extensively and pervasively regulated and therefore preemption must apply. Indeed, that same rationale as advanced by Warren Trading Post in the oral argument -- as a mtter of fact, of interest to the State of Arizona -- is that fact that Central Machinery Company in the reply brief makes reference to Complete Auto Transit v. Brady, this Court's decision in Complete Auto.

The fact of the matter is that one of the rulings, perhaps the major ruling in Complete Auto Transit, is the overruling of Spectre Motor Service v. O'Connor. Spectre Motor Service v. O'Connor was the cornerstone case in Warren Trading Post's position. Warren Trading Post did not initially advance as its primary argument preemption. What it argued was that under Spectre there is a prohibition upon state taxes upon the privilege of engaging in interstate commerce, and because of that prohibition in Spectre the State of Arizona did not have jurisdiction to impose the tax. That is the same rationale at least on that point that the New Mexico Supreme Court went through in Your Food

Stores v. Espanola.

Well, we have attempted in our brief to trace the history and underlying facts surrounding the Your Food Stores decision. We also point out that the question of whether or not a state may impose a privilege tax on the business of engaging in interstate commerce, this court has resolved. That is what Complete Auto transit does.

Now, if the argument is being made that somehow Complete Auto Transit is relevant for purposes of saying that we can't do this, that a state's determination as to the nature of its tax are not binding upon this Court, the fact remains that this Court has held that a state court's determination as to the nature of its tax as opposed to where the legal incidence falls, at least in federal context -- and we have footnoted this Court's prior decisions in First Agricultural Bank and most recently Diamond National -- that is a distinct consideration from the question of the highest state court's determination as to the nature of its tax.

Arizona's Supreme Court has consistently since 1935, when the transaction privilege tax was initially enacted, has construed it to be a transaction privilege tax. It was not a sales tax.

Furthermore, the Warren Trading Post case is distinguishable because the area that has been preempted

under Warren Trading Post is not commerce with Indian tribes. Moe establishes that. The area that has been pre-empted is engaging in the business of Indian trading on an Indian reservation. Again, an examination of the oral argument in Warren Trading Post, it does not appear from the record, it does not appear in the Warren Trading Post briefs, but an examination of the tape will reveal that some 95 percent of the sales of Warren Trading Post Company were with Indians. This is the only transaction so far as we know that transpired between Central Machinery Company and the Gila River Farms.

Based upon those facts, if it please the Court, it strikes Arizona as being somewhat curious to characterize Central Machinery Company as being engaged in the business of Indian trading on an Indian reservation. They are not Indian traders. Furthermore, they are not itinerant peddlers. They don't fall within the class that is entitled to hold either an itinerant peddlers permit or an Indian traders license.

We furthermore maintain that with respect to these arguments of infringement with tribal self-government, the decisions of this -- well, state court decisions in which this Court has denied or dismissed the appeal for lack of substantial federal question, the Kahn case and the Makah case are both highly relevant, particularly Makah.

In Makah, the Washington cigarette tax was involved and the taxable activity, taxable event ook place off the reservation, there was an increase in the price to the Indians, nevertheless the tax was upheld. The Court cited the decision in the Minot case in support of that result, and this Court dismissed.

QUESTION: Is there any contention as you understand it, Mr. Macpherson, made by the government or by the tribe that the Central Machinery Company was in violation of federal law or regulation because it had not obtained a license and nonetheless done business with the Indians?

MR. MACPHERSON: Mr. Justice Rehnquist, quite the contrary. The position appears to be that under 25 U.S.C. section 81 they were in full compliance. They didn't need to get a traders license, they didn't need to get an itinerant peddlers permit because the contract itself had been approved and there had been this apparent pervasive regulation that authorized it. There is no suggestion so far as I can tell that the federal government was doing anything other than what it should be doing. And what did it do? It approved the purchase order. It approved the economic burdens of the concealed state taxes within the purchase price. It also approved the visible economic burden.

QUESTION: That is because an Indian tribe might

be subject to some indirect taxes, it doesn't mean that they are automatically subject to all other more visible taxes, does it?

MR. MACPHERSON: Mr. Chief Justice, that is correct. In the circumstances and facts of this case, however, the State of Arizona would respectfully submit that even under the taxpayers argument as supported by the amicus curiae, that they did everything they had to do. They approved the purchase price. That is consistent with 58 I.D. 562, even if the Court is unwilling to reexamine Footnote 18 in --

QUESTION: Weren't they also told that it was paid under protest? Isn't that what they approved?

MR. MACPHERSON: Mr. Justice Marshall, the purchase order, which is located in the record, as I recall, Item 15, pages 15a, and there has been a stipulation since the printing of the appendix, the purchase order has nothing on it suggesting that it is paid under protest.

QUESTION: Well, does the record show that the government agent was told by Central that this had been paid under protest?

MR. MACPHERSON: Your Honor, I find nothing in the record that specifically states that.

QUESTION: Then they are misleading us?

MR. MACPHERSON: I am not suggesting that they

are misleading us. Perhaps they are misleading the Court or counsel for Arizona. I simply don't remember that. Perhaps they can elaborate on that in their reply, but I simply don't remember anything like that. The first instance of a protest with respect to that separately stated charged shows up some three days later, three or four days later when the check from Gila River Farms was remitted to Central Machinery Company. There there is a protest noted at the bottom of the check, but there is nothing on the purchase order. It says "sales tax" and that is what was paid. The amount of the check, the full amount of the check $100,000-plus was remitted to Central Machinery Company.

QUESTION: Where did it say "sales tax"?

MR. MACPHERSON: Sales tax was located on the purchase order.

QUESTION: Well, was there a sales tax?

MR. MACPHERSON: If it please the Court, I think I see where the Court is going. There is no --

QUESTION: You went there.

(Laughter)

MR. MACPHERSON: The fact is that simply because the merchant may have mischaracterized the nature of that expense. It does not bind the state. I mean he can't by contract or statement transform, as it were, the --

QUESTION: Could I ask you, Mr. Macpherson, was

Warren Trading Post before we started transcribing oral arguments?

MR. MACPHERSON: Indeed it was, Your Honor.

QUESTION: And where did you listen to the tape?

MR. MACPHERSON: In my office in Phoenix.

QUESTION: Where did you get it?

MR. MACPHERSON: I obtained it from -- I have a cassette of the tape right here --

QUESTION: Where did you get it?

MR. MACPHERSON: The National Archives.

QUESTION: You can get a copy from them any time just by asking?

MR. MACPHERSON: Yes, you can.

QUESTION: You can't any more because our tapes are not delivered to them any longer.

MR. MACPHERSON: I stand corrected, Your Honor.

QUESTION: Thank you very much.

MR. MACPHERSON: In summary, if I may, it is the State of Arizona's position that there is no constitutional prohibition as advocated by the amicus curiae. In order to arrive at that conclusion, what you would have to do -- and we say that you should not do that -- is overrule the decision in Moe. There is nothing to suggest that that is required. There has been a misanalysis, a fundamental misanalysis of the Arizona transaction privilege tax which

should dispose of the question at the outset.

We again feel that Warren Trading Post is distinguishable. If this Court feel that it is not distinguishable, then Arizona would respectfully submit that a reexamination of the question, including an examination of the legislative history of the Buck Act, an examination of, for example, certain citations in the solicitor's opinions is required.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:05 o'clock a.m., the case in the above-entitled matter was submitted.)

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