ORIGINAL

In the

Supreme Court of the United States

STATE OF WASHINGTON, ET AL.,

APPELIANTS,

V.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, ET AL.,

APPELLEES.

No. 78-630

Washington, D. C.
October 9, 1979

Pages 1 thru 58

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON, ET AL., Appellants,	:	
v.	:	No. 78-630
CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, ET AL., Appellees.	:	

Washington, D. C.,

Tuesday, October 9, 1979

The above-entitled matter came on for oral argument at 10:05 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:

SLADE GORTON, ESQ., Attorney General of Washington, Olympia, Washington; on behalf of the Appellants

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JAMES B. HOVIS, ESQ., Hovis, Cockrill & Roy, 316 North Third Street, Yakima, Washington 98907; on behalf of the Appellees

LOUIS F. CLAIBORNE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Appellees

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C O N T E N T S

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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 No. 78-630, State of Washington v. Confederated Tribes of the Colville Indian Reservation.

Mr. Attorney General, you may proceed whenever you are ready.

ORAL ARGUMENT OF SLADE GORTON, ESQ.,

ON BEHALF OF THE APPELLANTS

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

The State of Washington has for a number of years imposed a tax of 16 cents per pack on the sale or possession of cigarettes. Income from that tax supports a broad range of state programs, services and institutions. The state's general sales tax of 5 percent is also levied against cigarettes. Neither tax is applied to sales by Indians to other Indians on the reservation to which both belong.

The respondent tribes recently have gone into the cigarette business. In connection with that business, the tribes levy what they call a tax or an administrative fee on cigarette sales on their reservations. That fee is far smaller than the state's tax. Their claim in this litigation is that their entry into the cigarette business together with their tax or fee exempts Washington citizens from the state's cigarette and general sales taxes for on-reservation

purchases.

A divided District Court found that the state's pre-existing tax was preempted by the tribal taxes and fees and alternatively that the state tax interfered with tribal self-government. We appealed.

The scheme adopted by the tribes as upheld by the District Court has several interrelated consequences. The tribes emphasize only one of those consequences. Because their taxes or fees are 13 to 16 cents per pack lower than the state taxes, the tribes sell large quantities of cigarettes to non-Indians who are willing to drive considerable distances to save that differential. As a result, the tribes' revenues are substantial.

Not mentioned by the tribes, however, is the fact that the state loses about $4 from its tax revenues for every $1 which is secured by the tribes. Incidentally, the total loss in state revenues as a result of all Indian smoke shops now is about $13 million per year. Inevitably, that consequence adversely affects the ability of the state to supply governmental and social services to its citizens, Indian and non-Indian alike.

The fact that the bulk of that $3 difference between state losses and tribal receipts remains in the pockets of non-Indian purchasers cannot be overemphasized. It illustrates the fact that this case concerns the asserted

right of an Indian tribe to market their major tax exemption to non-Indians. Those non-Indians avoid taxes which their fellow citizens, who are either more principled or live farther from reservation smoke shops, must pay. The state tax is thus rendered inequitable and view it as a revenue sharing method. The entire method is absurd.

In this presentation, I propose first to deal with the preemption issue. I will show that no valid source may be identified to support the claim that the tribes can preempt or that the United States has preempted these state taxes, then I will demonstrate that the concept of tribal self-government does not and cannot by the imposition of these same taxes.

As an introduction to our argument against preemption, it may help to point out that the word "preemption" is used in your decisions as well as in this argument to describe two closely related but distinct concepts. First, the United States may preempt the state tax by adopting its own comprehensive taxing or regulatory statutes, thus occupying the field as it did in the situation in Warren Trading Post. Second, it may also preempt the state without occupying the field simply by prohibiting the state's entry, as you found it did in the McClanahan situation.

Now, except during the heyday of the federal instrumentality doctrine, this Court simply has not found a

state tax on non-Indians with respect to their on-reservation activities to be preempted unless that preemption is found in a statute or a treaty. And in Mescalero quite recently this Court declined to revive the federal instrumentality doctrine as a bar even to a state's direct taxation of a tribal enterprise.

Eighty years ago, in Thomas v. Gay, this Court unequivocally held that the Indian Commerce Clause of the Constitution standing alone did not preempt state or local taxation of non-Indian property on an Indian reservation. You have consistently required a showing of a preemptive statute or treaty before striking down a state tax on the on-reservation activities of non-Indians. And the only statute you have ever found to have that effect was the Indian Traders Act and the circumstances of the Warren Trading Post case. That statute you found to be so detailed and comprehensive as to preempt Arizona's levy of a gross receipts tax on a non-Indian holding a federal license to trade with the Navajos in respect to his income from Indians on their reservations.

Less all-encompassing statutes and treaty provisions, on the other hand, simply do not preempt state taxes on non-Indians doing business on reservations. Almost a century ago, in Utah and Northern Railway Company, when this Court could find neither a treaty nor a statutory bar

to a territory's taxation of an on-reservation railroad, it upheld the tax.

Again, in Thomas v. Gay, you found no treaty or statutory bar to a local tax on non-Indian cattle grazing on reservation land leased from the tribes with the approval of the Secretary of the Interior, even though the tribal leases were granted under express statutory authority from Congress.

And finally, three years ago, in Moe, you upheld a state cigarette tax on non-Indian purchasers from an Indian smoke shop. That smoke shop was located on land leased from the tribe, a tribe also controlled the shop's purchases of cigarettes and charged the operator an administrative fee. Nevertheless, you found no treaty or statutory provision to preempt the state tax.

To return for a third time to the decision in Thomas v. Gay, the taxpayer asserted there that the tax might destroy the value of the Indian lands for leasing purposes. This Court found it sufficient to answer -- and this is its complete answer -- "but it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the land for privileges of the Indians."

This is precisely the distinction this Court has reaffirmed since the decline of the federal instrumentality

doctrine in far broader circumstances. When the legal incidence of a tax is on the United States itself, the tax is invalid; when, however, the legal incidence of a state tax falls on someone else, even though its economic impact is felt by the United States, and even though it may be alone in that feeling, the tax is valid unless it is expressly preempted by a federal statute and there are a number of such statutes.

QUESTION: Mr. Gorton, just so I understand it, if the legal incidence of this tax had fallen on the retailer, the Indian retailer, it would clearly be invalid.

MR. GORTON: It would be.

QUESTION: Okay.

MR. GORTON: The tribes here claim a more expansive preemption to apply when a state tax on a private party impacts the income of those tribes than obtains when such a tax impacts the United States government itself. But Mescalero and Moe teach us that no such expansive claim can be supported.

Finally, rather than following respondents' invitation to focus on federal statutes which have nothing to do with taxes, like the Indian Financing Act or the Indian Self-Determination Act, we should look briefly at acts which do explicitly address questions of state taxing power over Indians and Indian reservations. Those acts

include the Buck Act, Public Law 280, and various termination acts. The first two expressly disclaim any intention to delegate to the states any power to tax Indians on their reservations. The latter determination acts, of course, do authorize just such taxes after termination. None of those acts so much as mention any non-Indian immunity from state taxation on their reservation activities. The reason for that is obvious. It never occurred to Congress that there was any such immunity, and Congress was correct.

Now, incidentally, the same analysis which applies to the determination of the existence of non-Indian tax immunity on reservations, is there a statute or a treaty creating them, seems also to be the key at least to your modern determinations of the validity of state attempts to tax on reservation Indians themselves. While such cases are decided against the backdrop of the Indian's sovereignty doctrine, a statutory or treaty provision always seems to provide the basis for preempting a state tax levied on reservation Indians.

In McClanahan it was the Navajo Treaty and a statutory pattern. In connection with the compensating use tax invalidated in Mescalero, it was a single section of the Indian Reorganization Act. In Moe, state taxes on reservation Indians were preempted only by the statutes cited in McClanahan and Mescalero and not by any doctrine

of constitutional law. Inevitably, therefore, the question here must be what if any treaty or statutory source can be found to prevent the state from taxing non-Indians engaged in purchases of cigarettes which purchases were identical to those in Moe.

The statutory pattern here is unchanged from the statutory pattern in that case and the applicable treaty provisions here, among those who are treaty tribes, are identical in effect to those of the Helgate Treaty present in the Moe case.

Although the tribal participation in the cigarette basis in the Yakima case here as to the tribal lease arrangements, purchasing controls and administrative fees present in Moe, only the tribes' wholesaling functions in that cigarette business, the tribes claim that a congressional policy of encouraging Indian self-government preempts the state taxes in these cases.

The Indian Reorganization Act and subsequent federal enactments cited by respondents in their preemption argument seem to be designed to accomplish twin goals: First, to improve the economic status of individual Indians; and, second, to foster tribal self-government. As this Court characterized the Indian Reorganization Act in the Mescalero opinion, "these provisions were designed to encourage tribal enterprises to enter the white world on a

footing of equal competition."

Now, Moe tells us that no federal statute or treaty gives an individual Indian a huge competitive advantage in the cigarette business by preempting a state tax levied on non-Indians. Thomas v. Gay, Mescalero, and Moe teaches that the mere fact that a non-Indian tax may adversely impact tribal income does not trigger an automatic preemption of that state tax.

How then can a tribal entry into the cigarette business, with or without a tribal tax, trigger a preemption which gives the tribe a prohibitive competitive advantage in the teeth of the federal goal to encourage tribal enterprises to enter the non-Indian business world on a footing of equal competition?

QUESTION: General Gorton, is the extent of the competitive advantage significant in your argument? Now, apparently there is both an excise tax and a sales tax, and is the same argument applicable to both?

MR. GORTON: The same argument is applicable to both.

QUESTION: So the extent of the competitive advantage really isn't critical here.

MR. GORTON: No. No. The policy of these acts are that Indians should enter the non-Indian business world on an equal footing basis.

QUESTION: Does your argument apply to retail sales by Indians of, say, things they might make on the reservation, artifacts or souvenirs or things like that?

MR. GORTON: To non-Indians.

QUESTION: To non-Indians.

MR. GORTON: Yes.

QUESTION: The same --

MR. GORTON: And as a matter of fact, that kind of tax was even upheld by the District Court in this case.

QUESTION: All right.

MR. GORTON: The answer is that the tribe cannot trigger such a preemption since no federal statute has been cited for the proposition that tribal enterprises are entitled to unequal advantages over their non-Indian competitors. The state's non-discriminatory taxes on non-Indian purchasers of cigarettes from Indian dealers are not preempted.

QUESTION: Mr. Attorney General, you answered Brother Stevens that if the incidence of the tax was on the Indian seller, there would be -- it would be illegal or unconstitutional or what? What is the basis for that? Is it preemption or is it --

MR. GORTON: The basis for that would be McClanahan. I believe --

QUESTION: And what do you understand the legal --

MR. GORTON: It would be preemption.

QUESTION: From what?

MR. GORTON: Preemption from the statutory and treaty pattern which was utilized in McClanahan and then later in Moe to preempt exactly the --

QUESTION: Would this be a wrong statement, that absent some federal statute expressly permitting such a tax, it is forbidden? Is that a brand of preemption? It might be.

MR. GORTON: I think that the correct statement would be, based on Moe and expressly on Footnote 17 of Moe, that absent a federal statute or treaty provision preventing or prohibiting such a tax, the state would be permitted to impose it even on sales to Indians.

QUESTION: And you suggest that it is preempted by some -- by a pattern of federal statutes and treaties?

MR. GORTON: It is precisely the pattern which was utilized in McClanahan and --

QUESTION: Preemption in the sense of conflict or just occupying the field?

MR. GORTON: In McClanahan, it would be a prohibition because there was no occupation of the field, nor was there in Moe. There were no Indian taxes which interfered in the state's attempt to impose a tax in either McClanahan or Moe on Indians.

QUESTION: So you think it is an expression of congressional consent that in light of the existing statutes there shouldn't be any state tax?

MR. GORTON: That's correct.

The tribes and the United States assert that even if there is no preemption of the state's power to tax on-reservation cigarette purchases by non-Indians, nevertheless the state tax may not be imposed because it infringes upon the right of reservation Indians to make their own lives and be governed by them, and it states that as a separate theory.

That right of Indian self-government standing alone without preemption can never bar the imposition of a tax by the state on its own non-Indian citizens. In illustration, the broadest powers of self-government which can be possessed by any sovereign are those exercized by a fully sovereign nation, obviously. But the United States itself, obviously a self-governing sovereign, has no power to prevent Great Britain from imposing taxes on British citizens, on purchases made by those citizens on visits here to the United States, even if the goods purchased here never leave the United States.

Another illustration is --

QUESTION: General Gorton, I suppose the parallel would be could Great Britain require the United States

retailer to keep a lot of records to do the regulating necessary to --

MR. GORTON: No, it could not because the United States retailer is not within Great Britain.

QUESTION: That is really the problem because there is no doubt about your power to impose the tax. You impose the tax if they buy it over in Oregon, too, can't you?

MR. GORTON: We could impose a different tax. We can impose a tax when they return with those goods to the State of Washington. We could not impose a tax if they never did so. But the point is here that --

QUESTION: Couldn't you impose the tax? Maybe you couldn't collect it, but you could impose it. Your British analogy is a good one anyway.

MR. GORTON: My British analogy would not cover this situation because the United States Constitution would prevent the state of Washington from making that imposition. That is why I used the British example. The United States Constitution does not bar the British tax collector in dealing with its own citizens.

The point here is, however, Mr. Justice Stevens, that this injunction and the theory of the case by the United States and the tribes doesn't say that we simply can't collect this tax on the reservation but can collect

it from non-Indians who leave the reservation. It says that the tax is invalid, we cannot impose it at all, even after non-Indian citizens return. And of course, that is necessary to their argument because in order to protect their tribal income, they need to prevent us from imposing that tax anyway, not simply from collecting it on the reservation itself.

QUESTION: General Gorton, would the reaching of the majority allow an Indian automobile franchise on the reservation to sell new automobiles and prevent the state of Washington from collecting a use tax if those automobiles were used outside of the reservation in the state of Washington?

MR. GORTON: If the automobile dealership were a tribal enterprise producing income for the tribe, the theory of the District Court would prevent that tax, and I intend to get to that in a little bit greater detail in just a moment.

Another illustration similar to the British one, the Yakima Nation was fully sovereign early in the 19th Century; nevertheless, it could not then have exercised that unlimited power of self-government to prohibit the United States from taxing one of its citizen members of the Lewis and Clark Expedition on purchases which that citizen made from the Yakima Indians in the Yakima Nation.

The Constitution or laws of the United States might have prohibited such a tax, but the laws of the Yakima Nation could not have done so.

The power to levy a tax may be inherent in retained sovereignty, but the power to bar the imposition of a tax by another sovereignty on its own citizens in its own territory is not. Thus the limited right of self-government now possessed by the Indian tribes cannot bar Washington's imposition of these cigarette taxes upon non-Indians in Washington state. The United States may in the future preempt these taxes by some statute or even authorize the tribe to do so, but to assert the right of tribal self-government is not to prevent an alternative grounds for affirming the District Court, it is merely to restate the preemption argument.

Nothing in this submission, of course, is designed to deny the realities of the tribal self-government doctrine and the proposition of state actions may not infringe on the right of reservation Indians to make their own lives or to be ruled by them. That Williams v. Lee doctrine does two things: Affirmatively, it confirms in the tribes the right to control internal tribal relations, to prescribe laws applicable to tribal members, and to enforce those laws in its own court. Negatively, it prohibits the state from applying its laws to on-reservation Indians and

enforcing those laws in state courts except where authorized by Congress to do so. This protection necessarily requires non-Indians to sue reservation Indians in tribal court in order to enforce rights created on the reservation.

A state tax upon non-Indians cannot possibly affect that right of reservation Indians to make their own laws and to be governed by them. This Court has never extended that doctrine to bar a state tax on non-Indians, nor should it do so now. To do so would be to subvert the very foundations of state sovereignty and the ability of the state to adopt a just and equitable tax system.

If the state of Washington may not impose a cigarette tax on reservation sales to non-Indians because to do so would interfere with tribal self-government by destroying a source of tribal revenue, can the state then even repeal its tax on off-reservation sales in order to equalize tax burdens on its citizens? That action would have exactly the same effect on tribal cigarette sales and tribal income as would the imposition of the state's tax on reservations.

Of course, the state retains the right, the power to repeal its off-reservation tax. The question and answer simply illustrates the point that the effect on tribal revenues of a state tax on non-Indians is as irrelevant to the right of tribal self-government today as

it was at the time of Thomas v. Gay.

The state of Washington has chosen rationally to levy high excise taxes on tobacco and liquor, among other things, either to discourage their consumption or to concentrate its revenue sources on socially marginal activities rather than on important activities such as the purchase of food. That choice and similar future choices are threatened by the decision below.

Our state might well choose in the future to impose extremely high excise taxes on, say, the purchase of gold or of motor vehicles which make less than 20 miles per gallon of gas. Should the District Court be affirmed, however, the sale of those goods if the tax were high enough could immediately be monopolized by Indian tribes by the simple expedient of adopting tribal ordinances similar to those at issue here.

QUESTION: Well, could it make any difference to your argument if the state of Washington had adopted a tax of a dollar a load upon bread and the Indian tribes on their lands sold the bread tax-free?

MR. GORTON: It would not make any theoretical difference in the argument, Mr. Justice Rehnquist, remembering, of course, that the Indians could sell it tax-free to their own members, but that tax might very well be found to be unconstitutional or in some kind of violation of due

process, but that is --

QUESTION: What tax? I am talking about a tax on sales -- supposing instead of smoke shops on the reservations, the Indians had bread shops.

MR. GORTON: If the set of statutory patterns and the tribal arguments were identical to those here, the result would be the same.

QUESTION: And furniture shops or --

MR. GORTON: In the case of furniture shops, the District Court here found that the tax would apply because the Indians had not shown that it had any effect on their income.

In effect, the power to decide how Washington citizens will be taxed and what social goals are to be pursued will be transferred from the state legislature to the tribal councils. We submit that neither the Constitution nor any act of Congress nor any treaty provision nor the right of tribal self-government permits such a subversion of rational state policies of non-discriminatory taxes on non-Indians. The right of Indian self-government and the right of all citizens for self-government can flourish together only if these decisions are reversed.

There is, however, a shorter and similar and simpler answer to this controversy if this Court wishes to adopt it, is simply follow your own decision in Moe. The

transactions here do not differ significantly from those in Moe. In the Yakima case here, the tribe does not claim to be engaged in the retail cigarette business, nor does it claim to tax cigarette sales to non-Indians. It is solely a cigarette wholesaler whose profit is partly called by that name and partly denominated an administrative fee. The tribe in Moe imposed just such an administrative fee, leased the smoke shop site and controlled wholesale purchases.

In the Colville case here, the tribes claim to be in the retail cigarette business and to levy a retail tax on cigarettes. But the actual conduct of that business does not differ from that of the Yakimas. The tribe is really a wholesaler profiting from two different markups, one of which it calls a tax. The smoke shop operator is much like the operator in Moe. He pays a fixed price per carton to the tribe, sets whatever retail price he wishes and takes home his gross sales receipts less his costs and business expenses. The state taxes on non-Indian purchasers and its collection requirements on Indian retailers operate in precisely the same fashion and with precisely the same results as did the Montana tax in Moe. The result here should be the same as well.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Anderson.

ORAL ARGUMENT OF STEVEN S. ANDERSON, ESQ.,

ON BEHALF OF THE APPELLEES

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

The state of Washington in these proceedings contends for a radical principle, the principle that it has the power to effectively preempt and eliminate tribal taxation of Indian commerce on trust land within the external boundaries of an Indian reservation. Under the facts of this case, that commerce is already taxed by the tribe, the governing body of the situs where this Indian commerce between Indians and non-Indians takes place.

Our contention is that the state's attempt to apply its tax laws is an attempt to appropriate to itself tax revenues which more properly belong to the Indian tribes which is the governing body of the situs of this commerce.

Although Mr. Gorton tires to tell this Court that this is a tax immunity case, that is not true. This is not so. This is not Moe. This is a case in which the tribe is levying its own tax and using those tax revenues for essential governmental purposes.

QUESTION: Are you addressing yourself now exclusively to the cigarette tax or more broadly than that?

MR. ANDERSON: I am addressing right now the

cigarette tax, Mr. Chief Justice. There was no contention by the tribes in our case regarding the sales tax and that is not an issue in the Colville case. The real issue here is --

QUESTION: You represent the three tribes other than the Yakima nation?

MR. ANDERSON: That's correct, Your Honor.

The real issue in this case is which of two inconsistent and incompatible tax laws can be applied to these reservation transactions when it is not possible for the two systems to peacefully coexist.

The stipulated facts in this case make it absolutely clear that there can be no survival of the tribal taxing systems if the state tax is superimposed on the tribal tax that is already levied on these goods. If the state succeeds --

QUESTION: Do you mean that that is because it is economically not feasible?

MR. ANDERSON: Yes, I am talking about the practicalities of the situation and I think Williams v. Lee was a practical test and I think the imposition of state law in this case ought to be judged by its practical effects.

It is clear that this protected commerce between Indians and non-Indians, constitutionally

protected commerce if the state imposes this tax will be subjected to multiple burdens.

QUESTION: You are not claiming that the basis for your exemption here is constitutional, are you?

MR. ANDERSON: We make that argument as well, Your Honor, yes.

QUESTION: In spite of Footnote 17 in Moe?

MR. ANDERSON: Footnote 17 in Moe, Mr. Justice Rehnquist, stated that -- it was talking about the issue in McClanahan, whether or not state tax laws could be applied to Indians on the reservation, and the Court said that the McClanahan decision made it clear that there was no automatic exemption and that is, of course, clear because in McClanahan the Court looked to the specific federal statutes rather than the United States Constitution to find the preemption.

But the issue of a tax that directly and substantially inteferes with tribal self-government was not presented in McClanahan and I do not read that footnote in Moe to have disposed of the constitutional issues that were not before it.

We do contend that one of the purposes of the Indian commerce clause was to provide protection for tribal self-government and a tax -- Williams v. Lee, after all, is in part a constitutional test. You will remember that

the Court in Williams said that the question was whether absent governing laws of Congress, state law could impermissibly interfere with tribal self-government and this Court in Williams also recognized that the holding of the United States Supreme Court in Worcester was also a constitutional holding.

QUESTION: But didn't McClanahan make the statement that we had moved from an era of automatic lines between constitutional and unconstitutional to a less sovereign and more preemptive type of test?

MR. ANDERSON: McClanahan did say, Your Honor, that the Indian sovereignty doctrine was the backdrop and not the dispositive principle. But I think what the Court was saying was that the Worcester principle originally announced by Mr. Justice Marshall had been somewhat modified. Originally, as the opinion in Worcester makes clear, the Court treated Indian reservations at that time as a virtual island, a boundary of which state law could not cross under any circumstances. And in McClanahan the Court noted that in situations where tribal governments were not affected and the rights of Indians were not affected, state law could be applied to non-Indians.

On the other hand, the Court in Williams made clear, and as well in McClanahan, that the basic holding of Worcester, the basic constitutional holding still

remained intact in situations where essential governmental relations, essential tribal relations were involved. And I don't think that the Moe footnote can or should be read to eliminate a line of constitutional argument that was not even at issue and before the Court in Moe.

Now, it is clear that the practical impact of the imposition of this state tax will be to totally destroy the tribes' ability to tax in the situation. The District Court specifically found that one of the results of imposition of the state taxes will be the elimination of the essential tax revenues needed by these tribal programs, needed for the financing of these tribal programs.

In addition, the court found that a result of the imposition of these taxes would be forced relinquishment of these critically needed tribal programs. Now, ultimately the principle that the state contends for here is that the Indian tribe would have no ability whatsoever to tax transactions on the reservation that are already being taxed by the state. By the same token, an Indian tribe, if the state's principle is granted, would be committing economic suicide if it also attempts to tax transactions in which there is no state tax. In either case, the result of imposing the state tax would be that Indian commerce and transactions on the reservation would be more expensive than those transactions off the

reservation.

Now, Indian tribes are already suffering from depressed economies. Our tribes are geographically isolated. It is difficult enough for them to rehabilitate themselves and provide essential services with these physical and geographical disabilities. Now, that the state of Washington would impose additional disabilities upon the state by effectively preempting its ability to tax.

QUESTION: What about the furniture store, the automobile dealership?

MR. ANDERSON: I think the District Court answered that argument very well. The state of Washington in the proceedings below tried to argue that there was no limit to the principle, that if the tribes could tax cigarettes they would extend their activities to all sorts of other situations.

The District Court found -- and this is essential to its holding -- that the tribes had acted in a restrained manner and that the situation of a tribe attempting to extend its laws to all sorts of other situations is simply not before the Court.

QUESTION: Well, what theoretical principle separates a furniture store or an automobile dealership on the one hand from a smoke shop on the other?

MR. ANDERSON: Well, there perhaps is no absolute

theoretical difference. I would say --

QUESTION: Well, is there any theoretical difference?

MR. ANDERSON: Well, it seems to me that the core of the District Court's holding was that the tribes were acting in a limited capacity, in a limited way they were acting with restraint. Each of the tribes has imposed a three-carton limitation in this case. It is designed -- each of our three client tribes. That is designed to prevent an extreme loss of tax revenues by the tribe. The tribes have acted with restraint and there is simply no occasion for this Court to consider now a tribe trying to extend its activities into all sorts of other areas. But there are other --

QUESTION: Mr. Anderson, there are extensions in some other reservations, aren't there, around the country, or not?

MR. ANDERSON: There are other tribes that are taxing alcohol sales. I am not aware of any other --

QUESTION: What about ski areas?

MR. ANDERSON: I believe that the Mescalero Apache --

QUESTION: I thought that was off reservation.

MR. ANDERSON: That was off.

QUESTION: How about some other areas, though?

MR. ANDERSON: I am not aware of other tax systems. I think some of the tribes may have taxed minerals on the reservations.

QUESTION: How about hotels, inns?

MR. ANDERSON: I'm not aware of -- well, there are several tribes that have established resorts on the reservations. I am not aware of whether any taxes are imposed on --

QUESTION: But you would make the same argument if the tribe taxed those, you would make the same argument, I suppose?

MR. ANDERSON: The same arguments could be made but I would like to remind the Court that because of the isolation, the physical isolation of these tribes, there are very practical limitations on the tribes' ability to raise revenues in this manner. I would also --

QUESTION: Aren't those limitations, wouldn't they be affected by the number of cartons you permitted them to purchase? If you win this case, why couldn't the tribe say, well, instead of a three-carton limit, we will have a ten-carton limit?

MR. ANDERSON: Well, the District Court advised us I think in its opinion that one of the reasons that this tax was sustained was that it was limited and the tribes were acting responsibly and the tribes were not attempting

to take an unfair or excessive share of state tax revenues. The fact that the tribes are limited I think is essential to --

QUESTION: I have the same problem that Mr. Justice Rehnquist expressed about why is that legally significant.

MR. ANDERSON: Let me respond to that in this way: Justice Frankfurter's opinion in New York v. United States said this: To press juristic principle designed for the practical affairs of government to abstract extremes is neither sound logic nor good theory, and this Court is under no duty to make law less than sound logic and good sense.

QUESTION: He was joined by one other Justice in that opinion, wasn't he?

MR. ANDERSON: Well, there were a number of separate opinions written by the Court, but I think that is -- the point I want to make is Justice Frankfurter's observation is a sound one. The imposition of state taxes in this case ought to be judged by what the tribes are doing, what limitations are imposed by the tribes and not --

QUESTION: As a practical matter, if you can get so many people to come to buy three cigarettes, couldn't you get an awful lot more to come to buy a new Chevrolet

if it is tax free?

MR. ANDERSON: Well, one of the problems with that kind of program is that in order for this tribal enterprise to work, we have to be dealing with an area in which the state taxation is substantial. Now, it is not practical perhaps for tribes to enter the sales tax area where the differential wouldn't be great enough to cause people to travel long distances to the reservation.

QUESTION: Well, doesn't the state of Washington levy a sales tax on new cars?

MR. ANDERSON: It does, yes.

QUESTION: Well, what if the tribes levied exactly the same tax?

MR. ANDERSON: If the tribes levied the same tax --

QUESTION: What if there was a dealership on the reservation and the tribe levied an equal tax on the sales of new cars to non-Indians?

MR. ANDERSON: On sales of new cars to non-Indians.

QUESTION: Yes.

MR. ANDERSON: Well, the principle that a tribe when it exercises its taxing power can preempt inconsistent state law would apply. There --

QUESTION: Well, that is all Justice Rehnquist

has been asking, isn't it, whether the same principle would apply if you had a tribal tax on sales of new cars.

MR. ANDERSON: Yes, except that it is not necessary for this Court in deciding this case to consider extensions of this doctrine to their ultimate and perhaps illogical conclusion. It is well within the power of this Court to set any limits that may be necessary or appropriate. I would also --

QUESTION: Like we could say this may not apply to new cars?

MR. ANDERSON: If this Court said that it cannot be applied beyond the facts of this case to another situation. The District Court basically did that by cautioning the tribes that its holding was based on the fact that the tribes were acting in an extremely limited manner in this case, and I think the District Court gave us a warning in that instance.

QUESTION: I don't understand why you characterize the economic situation in saving $200 or $300 on the sales tax on an automobile as an illogical conclusion. It seems to me that it is a perfectly logical conclusion and your argument should apply equally there.

MR. ANDERSON: I don't believe I said it was an illogical conclusion. I said it is not necessary for this Court to decide cases which are not before it. Let

me emphasize one other point. The state of Washington is --

QUESTION: Well, couldn't we say the case before us is the taxing of commodities?

MR. ANDERSON: The issue before us is taxing commodities that are involvedin commerce between Indians and non-Indians.

QUESTION: Right.

MR. ANDERSON: Yes.

QUESTION: So that would include tires, batteries, and --

MR. ANDERSON: Those are --

QUESTION: Yes or no?

MR. ANDERSON: Yes, I would think so.

QUESTION: All of that is before us.

MR. ANDERSON: Yes.

QUESTION: But yet you say the only thing we can decide is the tobacco. Couldn't we decide that the Indians could tax all commodities?

MR. ANDERSON: I don't think it is necessary for this Court to say --

QUESTION: Well, I am trying to find out what you are saying.

MR. ANDERSON: I am trying to say that the principle before this Court is a limited one, and I think

that it must be considered in context, because --

QUESTION: All commodities you say would be limited?

MR. ANDERSON: Well, the --

QUESTION: All, a-l-l.

MR. ANDERSON: The tribe is --

QUESTION: There is noting in "all" that is limited, is there?

MR. ANDERSON: Perhaps I don't understand your question.

QUESTION: You say limited and a minute ago you said that the Indians could tax all commodities.

MR. ANDERSON: I said that the tribe has extended its taxing ordinance in a limited way in this case and if the tribe exercised its power to seriously interfere with state government or some such thing, facts which are not now before this Court, this Court might well be in a position to draft a holding that would prevent that kind of abuse if it was regarded so of tribal power. That issue is not before this Court now.

MR. CHIEF JUSTICE BURGER: Your time is expired now, Mr. Anderson.

Mr. Hovis.

ORAL ARGUMENT OF JAMES B. HOVIS, ESQ.,

ON BEHALF OF THE APPELLEES

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

I represent the Yakima Indian Nation, appellee, in the United States v. Washington case. We do not take the position that this principle that we are asking for here should be limited just to cigarettes. I see no logical difference between any goods, whether it is cigarettes, cars, furniture, et cetera.

It would appear to me in the principle position that we take that if the state requires relief with regards to sales of other items that do not fit in with the Indian economy and do exceed their sovereign bounds, that the remedy that the state of Washington would have would be a legislative one before Congress.

My colleague, Mr. Anderson, has really put the focus of his discussion with regards to this matter on the Williams preemption infringement test. It has been pointed out that -- and it is stipulated in brief by everyone in this case -- that if the state tax goes on that it will destroy the federally approved tribal and tribal licensed enterprises.

I think it must be pointed out that in each tribe, that the federal government, through the responsible

federal authority has had these enterprises approved by the federal government. And I would join my colleagues in submitting that the Washington scheme is in violation of the Williams infringement preemption test and that the District Court's holdings are correct.

But I would, if the Court please, like to take my portion of the time to talk about Washington jurisdiction and power to reach these transactions on Indian reservations, on trust lands where the state has no jurisdiction or power, regardless of whether or not this would impair the tribal government or impair the tribal enterprise or regardless of whether or not it would destroy it.

QUESTION: I take it then regardless of whether there is an Indian tax?

MR. HOVIS: Regardless of whether there is an Indian tax. I think General Gorton --

QUESTION: This isn't a request to reargue Montana, is it?

MR. HOVIS: No, no, no. No, sir. No, sir. I would like to distinguish Montana. General Gorton, as I see it, in his attempt, in the state of Washington's attempt to destroy private self-government has two perimeters it must pierce. The first one is what I call the McClanahan principle, this Court has called the McClanahan principle, and the second one is the Williams

infringement test, is a second perimeter he must pierce before he can destroy tribal self-government.

I submit in this case that the state of Washington has no jurisdiction or power to tax the sale between the Indians and non-Indians on trust lands within the Yakima Indian Reservation. I think this Court has pointed this way to me in its 1973 pro curium decision in Tonasket v. Washington, when the Washington tax system was last before this Court, and at that time they said -- they reversed the Washington tax scheme, saying we reverse and send it back, the Supreme Court decision, and we ask you to look first at the state law and second at the McClanahan case. And when the Supreme Court of the state of Washington then dealt with it, they said that under state law the tax did not apply and therefore reversed their original decision, but not based on the McClanahan principle because they took care of it and the state law did not arise.

In McClanahan, this Court determined that Arizona had exceeded its power when it attempted to apply Arizona's individual income tax to a reservation Indian, regardless of whether or not this action infringed on the tribal government.

This Court has said in Bryan v. Itasca County that the McClanahan principle provides that state laws

are not applicable to tribal Indians on Indian reservations reservations except where Congress has expressly provided that state laws shall apply.

My learned friend, General Gorton, relies on this Court's holding in Moe v. Salish and Kootenai Tribes and submits that the McClanahan principle is not applicable to this instant case. I would like to discuss the reason that I believe and submit the reason that I believe that Moe is not applicable here.

In Moe, what this Court did, as I read the decision, was to uphold the District Court's denial of a restraint of criminal arrest of Indian retailers selling unstamped cigarettes to non-Indians contrary to the state criminal code on the site of the reservation where Congress had expressly authorized state criminal jurisdiction.

Moe did not involve the collection of taxes from Indian retailers, it did not involve a state licensing or the state regulation of Indian retailers; while here this case involves the collection of the taxes if the Indians do not collect them from the non-Indian purchasers or collect the taxes from the Indian purchasers, and also provide for the state regulation of the retailers to provide with the state regulations in regards to this.

My friend, General Gorton, suggests that it has the power to collect these taxes and we believe that is

not correct because where these transactions took place on the Yakima Reservation were within the exterior boundaries of the Yakima Reservation and on trust land where there is no jurisdiction, the state has no criminal or civil jurisdiction over the Indians involved on these lands.

This Court in Washington v. Yakima Nation last term upheld that this was part of the state's purpose, to provide for state government to keep the jurisdiction off of that and held that Congress had to have in mind, especially had that in mind when it passed Public Law 280, that such a partial quoting of jurisdiction could be provided.

Now, the transactions which Washington claimed taxing power all took place on these lands and there was no jurisdiction over the tribal members at all for an regulatory power, arrest power, civil or criminal, judicial or legislative power over the Indians involved.

And as this Court said in McClanahan, unless the states can show how they can constitutionally impose the collection of this tax and the regulation on the Indians where they have no jurisdiction, legislative or judicial, then that disposes of the case. And that is pages 178 and 179 of that decision.

Now, Washington -- my friend, General Gorton, submits that Washington, in his brief, may seize without

process, due or otherwise, goods being delivered to my clients in interstate commerce on trust lands. Now, these goods that are being delivered to my clients, the Yakima Nation, are not taxable in any event becauseit is clear that these goods are sold to Indians on the Indian reservation, on trust lands. The Yakima Nation does not sell to non-Indians. Non-Indian retailers later sell -- I mean the Indian retailers of course later sell to non-Indians, but when these goods are in transit they are not being sent to the Yakima Indian Reservation in interstate commerce by bonded carriers, the sale to the Yakima Nation is a legal one to its licensed retailers.

QUESTION: Is this issue before the Court, the issue of the sale trucks that go through Washington to the reservation?

MR. HOVIS: Yes, sir.

QUESTION: I thought the District Court didn't reach it because it struck down the tax on interstate --

MR. HOVIS: It struck down the tax situation on the preemption and the infringement test, on the Williams test, and they didn't reach that. But I am suggesting this for a full discussion of this problem before the Court because this Court has not this case but it has similar cases that it has accepted jurisdiction on that some discussion of the McClanahan principle would be

applicable here today in your determination. And I am into the enforcement area here to show you that there is no due process -- I submit to you that there is no due process way that the state of Washinton can collect the tax or have any power, legislative or judicial, over the Indian retailers which they suggest they are trying to do.

QUESTION: Well, what if the state of Washington simply stated or stationed tax collectors on the Washington side of the boundary between the reservation and the state of Washington and inspected cars coming off the reservation, and if they bought cartons of cigarettes on the reservation they would impose a use tax.

MR. HOVIS: I would think, Your Honor, that we are not in any different -- nor do I claim that we are any different from the state of Oregon. If you purchase something in Oregon and providing that you comply with the constitutional commerce clause, if the state of Washington does that and is not discriminatory, then they can collect from their non-Indians when they are within their jurisdiction.

QUESTION: Do you think your colleague from the three tribes agrees with you?

MR. HOVIS: No, they do not.

QUESTION: Nor the United States?

MR. HOVIS: Well, I have not asked the United

States. But they do not take the same position in this case that I do, Mr. Justice White.

QUESTION: Would you say that you would emphasize enforcement if the state could collect at the boundaries of the reservation, may they make the Indian seller collect?

MR. HOVIS: No, they may not. They have no jurisdiction whatsoever, legislative or judicial, over the Indian seller. That is my point.

I can go further, however. There may -- I do not disagree totally with my colleague, Mr. Anderson. I do not disagree totally but I don't think this is clear in this principle. I think there is a situation here where this sale may not be able to reach with a use tax outside the exterior boundary, and let me explain to you why I do not disagree with Mr. Anderson, although I do not think that it is as clear as this principle.

The reason I do not disagree with him is because this is not a case in which Congress has been silent. This is not a case in which Congress has been silent. Congress has in passing the Buck Act said that it permits the state to levy sales, use or income taxes in federal areas but it expressly provides that nothing therein shall be deemed to authorize the collection or any tax on or from any Indian not taxed and, as pointed out in our cases in

the brief, this is a continuance of an existing thing.

Now, I was particularly interested in a decision written by Justice Donaldson for the Mahoney majority in the Idaho Supreme Court, and I adopt his understanding and I adopt his rationale. As he pointed out, the Congress must have been aware at the time it passed the Buck Act in section 109 of the existing solicitor's opinion of the United States that opined that Indians arenot subject to state laws whether they deal with Indians or non-Indians, in the tax field.

Now, that Mahoney decision is a weight one. You see, that is the circumstance we have surrounding us, Idaho underneath their state law docs not tax -- does not try to impress the situation. I think it is worth nothing that with the regularity that this Court sees Mr. Gorton, that the state of Washington has somewhat different attitude about Indian rights in some of our neighboring states.

But one of the things, Mr. Justice Rehnquist, in your question you were talking a little bit about some of the discussion of McClanahan. Yes, there has been some change in the Worcester doctrine, some modification in the line of more preemption. But one of the problems -- because, you see, in Worcester, it was a non-Indian. Worcester was a non-Indian, underneath the Worcester

doctrine.

MR. CHIEF JUSTICE BURGER: Your time is expired now, Mr. Hovis.

Mr. Claiborne.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE APPELLEES

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

Perhaps before attempting to join them back together, it might be useful if I sought to unravel the several strands of the argument as we see it on this side.

Without pretending that any single one of these arguments is sufficient to carry the day, it is in our submission useful to look at three arguments that when joined do in our submission justify the holding of the District Court.

I identify them first as the territorial principle; secondly, as the commercial principle; and thirdly is the governmental principle, somewhat arbitrary titles for the purpose.

But the territorial idea is one which, of course, dates from the very earliest cases in this Court dealing with Indian tribes. It is basically the notion that only in exceptional circumstances, as this Court repeated only last term, may state law or state taxes

invade that area which has been reserved to the continuing sovereignty of the tribe albeit in a most limited way.

And the question therefore is whether this case, this tax or these taxes fall within that exception, not the other way around. The burden is not on the tribe to show that this particular tax would normally apply but for reasons (a), (b), and (c) it does not. The burden is very much on the state to justify the intrusion of its laws, its taxes within an area still separate in some meaningful sense.

Now, that principle is not only an old one, it is one which has been reiterated as recently as Wheeler. It is a principle which has been the basis for distinguishing between activities on and off reservation, including cases in the tax area, noticeably the Mescalero opinion in 411 U.S. reports.

I suggest that the result in that case in respect of the sales tax or gross profits tax would have been different had that ski enterprise been on rather than off the reservation, and the thrust of the opinion as I read it is the emphasis on the fact that the immunity has its limits, its geographic limits and cannot be imported beyond the limits of the reservation or exported and, of course, there is no attempt to do so in this case.

There is, of course, a giving way of reservation boundaries over the years with the opening up policy which results in non-Indians living on the reservation, but that historic fact has nothing to do with this case. We are not dealing with a modern change of fact which requires a change of law because the Yakima Reservation is inhabited by a substantial non-Indian population. We are dealing with Indian trade which has been going on since the beginning in which the white man sells to the Indian and vice versa. Instead of dealing with furs or with other skins or with horses or with tobacco in its raw form, we now deal with cigarettes and the principle ought to be the same.

Of course, it matters what the effect of the state's intrusion is. If it is law, if it is tax, it impinges only on the non-Indian residents or the non-Indian while on the reservation, that is permissible. That is not the situation here. The effect is not indirect, it is not remote, it is not minimal. It destroys a tribal enterprise and it is a tribal enterprise and not a private one.

With those remarks, I turn to the second aspect which is the burden which this state tax places on the economy. Simply to illustrate that there is such a principle and indeed a constitutional principle which

derives directly from the Indian commerce clause, when we only posit a state law which prohibited implementation, if I may use that word, into the state of Washington of products grown or manufactured on the Yakima Reservation, such a law would be manifestly unconstitutional as violating the Indian commerce clause and so would the reverse, a prohibition on the exportation of products into an Indian reservation.

Now, of course, that is not this case but stimply illustrates that the Indian commerce clause has, like the other aspects of the commerce clause, a self-executing force which may be relevant to this case.

Here we deal with state taxes which not only burden the commerce between Indian and non-Indian but which in this respect destroy it, utterly.

The District Court found that the state sales taxes as applied to furniture and other manufacture did not have that effect, that the effect was not demonstrated and presumptively minimal and accordingly did not invalidate those taxes. Here the combined effect of the state excise and sales tax on cigarettes admittedly destroyed that commerce. That effect, it seems to us, implicates the Indian commerce clause.

Now, finally and perhaps most importantly, we look at the governmental aspects of the case and here the

great distinction between this case and Moe.

QUESTION: So you would say that because collection at the border of the reservation from the buyer would have the same impact, the tax collected that way would be too burdensome?

MR. CLAIBORNE: Mr. Justice White, if forced to an answer, I think I would probably would say that. I would stress that this is not a use tax imposed only on the use of the cigarettes once they have left the reservation.

QUESTION: No, the Washington law is that we impose on the buyer a tax when he buys cigarettes and they just collect it from him at the border.

MR. CLAIBORNE: Mr. Justice White, I appreciate the hypothetical, but it is a hypothetical. It isn't this case. In this case, the tax is --

QUESTION: I know, that is a fine answer.

MR. CLAIBORNE: I thought I said, Mr. Justice White, that if compelled to an answer, but emphasizing the difference between your hypothetical and the case before the Court, I would argue that they both fall because of the effect on not merely the commerce but --

QUESTION: I suppose the state could repeal it, its own sales tax.

MR. CLAIRBORNE: Yes, I have no quarrel with that and I --

QUESTION: Even just on cigarettes.

MR. CLAIBORNE: -- I recognize that that is so and that that too might have the same effect. Many things may have the same effect without being equally subject to challenge.

QUESTION: What if the Indians went into the business of manufacturing automobiles and made automobiles which they sold to the public, didn't tax them at all, but the state of Washington imposed an excise tax on them, would you say that the fact that the state of Washington's excise tax was enough to ruin the margin of profit that the Indians had been making before they imposed the tax fall, even though collected as a use tax outside the reservation?

MR. CLAIBORNE: In that instance -- and I am not clear, Mr. Justice Rehnquist, whether the enterprise of manufacturing the cars in your hypothetical is done by the tribe or by some entrepreneur --

QUESTION: By the tribe.

MR. CLAIRBORNE: There is perhaps an important difference there, but that case it seems to me would fall on the other side of the line, that is that we could not invalidate Washington's tax in those circumstances, there being no collision between the tax imposed by the tribe, there being none in your hypothetical, and that imposed

by the state.

There are gradations, but if you look at it from the other extreme it seems absurd perhaps that Washington would claim its right to tax even the most traditional Indian artifacts that are used on the reservation which would not otherwise come into commerce at all, and yet the Attorney General was quite clear that he would apply the same rule to that situation.

It may be that the tribes, though every incentive leads them to self-restraint -- after all, they must live at the end of the day with the state, with state officials in Washington state law, for the most part, applies on their reservations, there must be a modus vivendi. It is not in their interests to press their advantage if it is legally recognized to the extreme. But should they unwisely attempt to do so, the remedy in my submission lies with Congress and Congress would undoubtedly be pretty receptive to any indication that the tribes were abusing their privilege in such a way as seriously to detract from important state revenues. That is not the case here.

Indeed, many other states have taken the opposite view of these reservation smoke shop operations. We are told amici in this case that Nevada and Florida expressly condone the claim of the tribes to be exempted from sales and excise taxes on their sales of cigarettes to

non-Indians. The Idaho Supreme Court has so held. I am further informed that Arizona takes the same view. Indeed, so does Wisconsin and New Mexico. That is the pattern. Washington is the exception. It apparently is a system with which most of the states have been content to live and some expressly recognize that this small effort by the tribes to become self-sustaining is lawful, ought not to be interfered with and --

QUESTION: Do you have solid statistical basis for saying one is a pattern and the other is the exception?

MR. CLAIBORNE: Mr. Justice Rehnquist, I can't say that there has been sufficiently accurate or adequate investigation of the various state laws. This information is for the most part contained in briefs filed in this case amicus curiae. I have supplemented it insofar as I have mentioned New Mexico, Wisconsin and Arizona.

QUESTION: But with respect to some of the states that don't attempt to collect its own tax, it doesn't make any difference whether there is a tribal tax or not, isn't that true?

MR. CLAIBORNE: Yes. I am not suggestint, Mr. Justice White, if I haven't said before that in each of these cases there is a tribal tax but that there is a tribal cigarette business and in each of these states the state though imposing an excise tax generally does not

impose that tax on sales to non-Indians occurring within the reservation.

QUESTION: You don't suggest that without the tax that Washington would be out of bounds here, without the tribal tax?

MR. CLAIBORNE: I suggest that it would be on a very close boundary except --

QUESTION: Well, would it be covered by Moe or not?

MR. CLAIBORNE: It would -- there is another distinction between that case, between this case and Moe which is that here we are dealing with a governmental operation not only in the sense that the tribe taxes but that the tribe regulates everything, including price.

QUESTION: How about the Yakima Nation?

MR. CLAIBORNE: That is so, the Yakima Nation.

QUESTION: Well, is that a tribal enterprise?

MR. CLAIBORNE: It is a tribal wholesale enterprise. The ordinance requires that a uniform price be fixed by the dealers and presumptively if they don't, if they fail to agree the state will impose it and it limits the number of outlets, it requires that each of them qualify and it requires that they be subject to continuing regulation and annual renewal of their licenses. It is a rather strict regulatory scheme of tax of the enterprise

even at the retail level.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Claiborne.

Do you have anything further, General Gorton?

ORAL ARGUMENT OF SLADE GORTON, ESQ.,

ON BEHALF OF THE APPELLANTS -- REBUTTAL

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

Mr. Anderson's presentation seemed primarily devoted to the responsibility of the Indians and the limitation of what was described as a modest business, emphasizing the fact that at the present time his tribal clients limit sales to three cartons of cigarettes apiece and that it was only on that basis that the District Court permitted the tax. That is demonstrably not the case, as there is no limitation in the Yakima ordinances which were upheld at exactly the same time and in the same set of cases by the District Court.

As a matter of fact, there is a showing in the record of the extremely long distances which people drive to purchase on the Yakima Reservation not only for their own use but for the use of their friends and neighbors.

He also seemed to say, I believe, Mr. Rehnquist, that somehow or another that, while Footnote 17 in the Moe

case stated that tax exemptions to Indians on reservation had only a statutory basis, that tax exemptions to non-Indians had a constitutional basis, which seems to me to be relatively inconsistent.

Finally, each of my opponents here has attempted at one stage or another to avoid the logical extension of their argument in dealing with how many economic enterprises the tribe could engage in, displacing -- to take state tax authority over its own residents. For example, Mr. Justice Rehnquist, when you asked Mr. Claiborne the hypothetical of the manufacturing enterprise controlled by the tribe on reservation, he said that the state could impose its use tax after its citizens had purchased those automobiles and removed them from the reservation because you didn't include a tribal tax in your hypothetical.

Clearly, his answer would have been that were there even the most modest tribal taxes, that that enterprise too would be tax free. As a matter of fact, he made that quite express when later on in his presentation he stated that in all probability that the state taxes would be invalid without a tax by the Indian tribes simply because of the tribal participation in the sale.

While each of these gentlemen has stated that they do not seek here to reargue or to reverse law, in effect every one of them, every one of their arguments for

all practical purposes requires reading Moe out of the United States reports.

The pure fact that the matter is that I do agree with Mr. Claiborne on one statement only, and that is, of course, that the state could have the same effect on tribal businesses simply by repealing its tax. What that shows more clearly than anything else is the fact that the state tax system is not an interference with tribal self-government, because the effect of a state action is identical in either event. If the state has the right to make one decision, it clearly has the right to make another.

Nothin in the state's program here prohibits any type of regulation of business on reservations by the Indian tribes, nothing in our submission here prohibits them from adding markups or taxes to their tribal enterprises. We simply say that they are subject to the same economic constraints that a state is in a taxing policy. A state can certainly impose a tax which will be self-defeating because it will be so high that people will not purchase either the commodity or the commodity in a particular place. State legislatures must deal with that question every day of the week, and we simply say that tribal councils must do so, too, and do not have a constitutional right in effect to be parasites on the state

system, gaining from the state system only because of rational state decisions in connection with its own tax authority. They do have a retained right in self-government, that right does not however include the right to distort a state tax system and to make it either ineffective or unjust.

QUESTION: General Gorton, before you sit down, do you view the issues on the motor vehicle excise tax scheme -- that is still before us, I guess.

MR. GORTON: They are.

QUESTION: We haven't talked about them very much this morning, but aren't they essentially the same as the others?

MR. GORTON: They are essentially the same. The question in the motor vehicle excise tax is simply the incidence of the tax. The Montana tax which you voided in Moe was clearly a property tax imposed on the reservation. The state tax in this case is a pure use tax which applies when the automobile is used off of the reservation in the state of Washington. Our tax could not be applied to on-reservation uses of an automobile exclusively if they --

QUESTION: Well, it is not the typical use tax that is paid, a one-time tax in connection with the transaction, isn't it an annual tax?

MR. GORTON: No, no, no. This is an annual tax.

QUESTION: And its economic incidence, I take it, is precisely the same as a personal property tax? It is based on the percentage of the fair market value of the vehicle, rather than so much on the horsepower or anything like that.

MR. GORTON: That is correct, but it is expressly -- and in our state it always has been, this wasn't a recent amendment, it is expressly a tax on the right to use an automobile on the roads of the state of Washington.

QUESTION: Is that the same way in which the tax which is collected from non-Indians on motor vehicles is characterized?

MR. GORTON: Yes, it is.

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

(Whereupon, at 11:26 o'clock a.m., the case in the above-entitled matter was submitted.)

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