ORIGINAL

In the

Supreme Court of the United States

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al., Petitioners,	)	
v.	)	No. 79-48
GLOVER CONSTRUCTION COMPANY, Respondents.	)	

Washington, D.C.
March 24, 1980

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CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., Petitioners, v. GLOVER CONSTRUCTION COMPANY, Respondent.	No. 79-48

Washington, D. C.,

Monday, March 24, 1980.

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:

ANDREW J. LEVANDER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the Petitioners

D. D. HAYES, ESQ., 444 Court Street, Muskogee, Oklahoma 74401; on behalf of the Respondent

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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. 79-48, Andrus, Secretary of the Interior v. Glover Construction Company.

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

ORAL ARGUMENT OF ANDREW J. LEVANDER, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case is here on the government's petition to review a decision of the United States Court of Appeals for the Tenth Circuit. The focal point of this case is the so-called Buy Indian Act. The act itself is quite brief. It authorizes the Secretary of the Interior insofar as may be practicable to employ Indian labor and to make purchases of Indian industry in the open market.

The Secretary has delegated his authority under the act to the Bureau of Indian Affairs and the Bureau in turn has promulgated a detailed policy statement concerning Buy Indian contracting.

The Buy Indian program is fairly narrow in scope. It pertains only to BIA procurement and that by definition pertains to the welfare of Indians, Indian tribes and Indian lands.

The policy statement directs the local BIA contracting officer where practicable to first ascertain that there is a qualified 100 percent Indian owned contractor capable of filling the contracting need. If there is more than one such firm in the normal competitive area, whatever the contracting need is, then the BIA officer is directed to arrange competitive bidding among the various Indian firms. If there is only one such qualified firm, then the BIA officer is authorized to negotiate a contract with that firm at a fair and reasonable price. And if there is no such qualified firm or if no firm is willing to fulfill the contracting need at a fair and reasonable price, then BIA turns the contract over to open competitive bidding.

QUESTION: Mr. Levander, are you going to cover the chronology of the statutes and the regulations some time in your argument?

MR. LEVANDER: Yes, I will attempt to.

Now, the controversy in this case centers on a five-mile stretch of Indian logging road that cuts through Indian trust lands in Pushmataha County, Oklahoma. In 1977, in accordance with the BIA program I just described, the BIA contacted three qualified Indian firms in the normal competitive area and asked each to submit a bid. The respondent, which is a non-Indian corporation, was

not asked to bid and subsequently the contract was awarded to Indian Nations Construction Company, a company wholly owned by three Indians. The price that it was awarded at was considered to be fair and reasonable both by BIA and the National Highway Administration.

QUESTION: When did the Secretary first start construing the Buy Indian Act to cover construction of roads?

MR. LEVANDER: I think that as we detailed in our brief that the earlier reports -- the Buy Indian Act itself was enacted in 1910. However, suitable language appeared in a series of appropriations acts between 1884 and 1908, almost identical language. And the temporary administrative reports, that is reports that were required by Congress to be filed by the Secretary of the Interior and the Commissioner of Indian Affairs reflected all during this period, including 1910 and thereafter, that the Commissioner of Indian Affairs and the Secretary considered the Buy Indian Act and the preference contained in the act to apply not only to goods, as respondent argues, but also construction of all kinds.

For example, the 1908 appropriations act specifically expressly applied the preference to irrigation construction and a road on the Hooper Valley Indian Reservation and it --

QUESTION: That was before the Buy Indian Act was even enacted.

MR. LEVANDER: There was a predecessor act which has the same language and therefore should be construed similarly, and in 1910 when the act was enacted the legislative history and again the contemporary adminstrative reports show that Congress intended the act to apply to construction as well as to goods. The 1910, 1911, 1912 reports all show that the Commissioner of Indian Affairs and the Secretary of the Interior considered it their duty to employ Indians and to hire Indian teams, which are the sort of forerunners of today's modern corporation. Certainly at that time Indians didn't have corporations, but they did have entrepreneurs who had teams. And Rep. Sherman's statement, which is quoted at page 23 of our brief, I believe, and a subsequent comment in 1910 by Rep. Burke all show that they expected the act to be applied to irrigation construction, and I don't think that for the purposes of this case that you can distinguish meaningfully between irrigation construction and road construction. It is still construction.

QUESTION: Did the Bureau or the Secretary ever construe it as not to apply to construction?

MR. LEVANDER: No, they did not. It has been

a consistent interpretation. The language of the act is certainly broad enough to encompass construction. The word "product" as defined by the dictionary encompasses anything that human effort produces or creates, and that certainly includes road construction. An example of a very common usage of the word "product" to include construction is the gross national product. That includes goods, services, and construction work in the nation in a particular year, and that is a very common usage going back for quite some time. So the word "product" doesn't take any strain of the imagination, as the Court of Appeals suggested, to construe the word "product" to encompass construction work. And we think that Congress' intent and the consistent administrative interpretation should have been deferred to by the Court of Appeals as reflected in the legislative history and those --

QUESTION: Mr. Levander, the word "product" is not used by itself, it is used as products of Indian industry.

MR. LEVANDER: Right.

QUESTION: Do you normally think of road construction as a typical product of Indian industry?

MR. LEVANDER: Well, I would think -- yes, I would. Industry, if you are talking about an industry in a technical sense, certainly the construction industry

is considered to be an industry and "industry" in the sense of work or energy, certainly you have Indians working on --

QUESTION: Is that the normal interpretation you get in just wording the words "products of Indian industry"? Doesn't that convey a message that products of industries in which Indians typically engage?

MR. LEVANDER: I don't think so.

QUESTION: You don't think it does?

MR. LEVANDER: And the respondent concedes that the Buy Indian Act would apply to an Indian corporation today that produced electronic computers, and you would not think of that as a typical product. In fact, both the legislative history and the administrative reports show quite clearly that there was an anticipation that Indians would engage in all kinds of modern industry, and there was a whole -- by use of preference legislation like the Buy Indian Act, that in fact Indians could finally rid themselves of dependence and that they would eventually become self-sufficient.

For example, in the 1911 report, the annual report of the Secretary, he states, "Indians all over the country are entering gradually into ordinary industrial activities," indicating that there was a hope and an anticipation and recognition that the Buy Indian Act

would apply to these kinds of activities and that --

QUESTION: Is that report in connection with this legislation?

MR. LEVANDER: These were annual reports that were submitted each year by both the Commissioner of Indian Affairs and the Department of the Interior to Congress --

QUESTION: But did that particular comment have any specific relationship to the enactment of --

MR. LEVANDER: Yes, it did. In the various reports they talk about insofar as practicable we have been using Indians in accordance with legislation to do this and do that, to hire teams and to employ. Now, they didn't say "Buy Indian Act," but the words "so far as practicable" appears in the reports and the words "so far as practicable" appears in the statute, and the only inference -- and this is the only legislation of that time which directed the Indian Affairs Bureau to employ Indian labor and to purchase products, and so it is reasonable to assume that is what they were referring to, I think, and that was the anticipation.

QUESTION: But I take it the Indian industry from which products may be purchased must precede the contract, the existence of the industry?

MR. LEVANDER: I'm not quite sure I follow your question, Mr. Justice White.

QUESTION: Well, could the government finance the Indian industry at the same time that it gives a contract to it?

MR. LEVANDER: Well, they could but not under the Buy Indian Act. I mean there is various legislation --

QUESTION: I know they could, but would they be required, would they be permitted to buy from that industry without advertising?

MR. LEVANDER: Yes, I think they would. It would apply to that. The 1974 --

QUESTION: Even though the industry was not pre-existing?

MR. LEVANDER: Well, in 1974, Congress --

QUESTION: Even though this was the first time the Indians had ever been in this industry?

MR. LEVANDER: Yes, I think it would, but that is because in 1974 Congress passed the Indian Financing Act of 1974 which specifically directs the BIA to start new industries, to fund the money and to develop. There is an Indian Development Bureau which was created in 1974 under the Financing Act, and the whole point of that act is --

QUESTION: I understand that, but I am wondering about the Buy Indian Act --

MR. LEVANDER: Once the business got started,

the BIA would be entitled to --

QUESTION: But it must have gotten started?

MR. LEVANDER: That's right, but as soon as it got started -- I mean I'm not sure what that -- in any event, we think that the construction of the words "products of Indian Industry" should be given a liberal construction. It is not only supported by the legislative history and what we consider to be a consistent and long-standing administrative practice, but also by two very important policy considerations.

First of all, this Court has reiterated over and over again in cases such as in the last term Wilson v. Omaha Indian Tribe and Alaska Pacific Fisheries v. United States and other cases, that when you are construing a statute that has been passed on behalf of Indians, that you must give every reasonable and possible inference to the benefit of the Indians, and certainly the word "product" is easily stretched or easily encompasses the word "construction" and it doesn't take much imagination to get it to road construction.

Furthermore, the second policy consideration is that the Buy Indian Act is very important, it is not a theoretical benefit to the Indians. As we detailed in our brief and as also detailed in the brief of the amicus curiae in this case, the impact of the decisions below

has been severe on Indian industry, especially in the field of construction. It takes a fair amount of know-how, money and expertise to get into complicated industries like electronic computers. That is not true of the construction industry, although there obviously is some expertise needed. But there is a lot of labor needed and that kind of an industry can be started up much more easily. In many reservations, the construction industry or logging industry are the most important employers and source of revenue.

The effect of the decisions below has been to cut off in large part Buy Indian contracting, as a result of which several Indian firms have actually gone bankrupt and there is loss of employment and economic dislocation among the group who has been recognized by this Court and Congress over and over again as terribly disadvantaged.

The second issue in the case, assuming that the Court agrees with us that products of Indian industry includes road construction, is whether the Federal Property Act, what I referred to FPASA in our brief, impliedly relealed the Buy Indian preference in 1965.

Now, respondent concedes that the Buy Indian Act was initially passed not only as a preference for Indians but also as an exception to the general federal advertising requirements. He also acknowledges that it continues to

be an exception even in 1980 for the purchase of electronic computers. His sole claim is that section 302(e)(B), which appears I think at page 41 of our brief -- on 42 actually -- impliedly repeals the Buy Indian preference as regards major construction.

Now, before turning to the act itself, I think that this Court's unanimous decision in Morton v. Mancari is very instructive on this point. In that case, the question was whether Title VII of the Civil Rights Act had impliedly repealed a long-standing Indian preference, and this Court said in the absence of affirmative indications that Congress intended to repeal the long-standing preference, the Court would not construe the two acts -- the Court would give each act force and would not find implied repeal.

Now, even if the act was not as explicit as it is -- and I will get to that in a moment -- about preserving prior exceptions to the advertising statutes, Morton v. Mancari, it seems to me, indicates quite strongly that the Court should be wary of finding implied repeal. There is nothing in the legislative history or language of the 1965 act which refers to the Buy Indian Act, so if it repealed it, it repealed it implicitly.

Now, three separate sections of the Federal Property Act expressly state that there is an intent to

preserve prior existing exceptions to the general advertising statutes. The Buy Indian Act was not only express exception to what was then called Revised Statute 3709, that is, the original federal advertising statute, but it also talks about purchases in the open market which was a well understood phrase in contrast to advertised bidding. So there is no doubt, and respondent concedes that this was a well established exception.

Section 310 of the Federal Property Act, which is printed on page 41 of the brief, specifically states that any statute which was a prior exception to Revised Statute 3709 -- which was then codified at 41 U.S.C. 5 -- is also to be considered an exception to the Federal Property Act. The respondent concedes that the Buy Indian Act falls within Section 310, and it seems to me that now this is a case that is a fortiorari after Morton v. Mancari since the act specifically says it is to preserve the preexisting exceptions and that it should not be -- no change is made in those exceptions.

Section 310 further states that the act shall be considered to be an exception under section (c)(15), 302(c)(15) of the act. Now, section 302(c) says basically you must advertise except for the following 15 exceptions. The first 14 exceptions --

QUESTION: Mr. Levander, can I slow you down

for a second, because I am trying to follow it. It excepts it as I read it in subparagraph (15).

MR. LEVANDER: Right.

QUESTION: But does that meet the argument presented by subsection (e) that follows?

MR. LEVANDER: I am working my way there slowly, if I could.

QUESTION: All right.

MR. LEVANDER: Okay.

QUESTION: I thought you were going pretty fast for me.

MR. LEVANDER: All right, I will try to slow down. Section 310 of the act, as I said, preserves all exceptions and directs you to (c)(15). Now, the first 14 exceptions of subsection (c), 302(c) are exceptions to the advertising rules created by subsection (c), that is they don't depend on other acts. They are exceptions created by the act, that is for things like impractability and emergencies and exigencies and national emergencies and professional kinds of things, experimental research and a number of them, and they are all created by the act.

(c)(15) merely recognizes exceptions created by other law, as otherwise provided by law. Now, the respondent agrees again that we are in (c)(15) and as to non-construction work the binding act constitutes an

exemption. He turns to 302(e)(B), however, and says, ha, 302(B) says that of the exceptions created by the Federal Property Act, seven are listed and (15) is not one of them and therefore (15) obviously was not intended to apply to major construction. But (e)(B) states that this section shall not be construed to authorize, if there is nothing about what other sections or other statutes authorize, and it is simply a way of differentiating among the 14 exceptions created by the statute itself and does not have any effect or impact upon an authorization or an exemption created by other law. When the Buy Indian Act authorizes the negotiation of a contract, it is simply not a contract authorized by section (c)(15), it is authorized by the Buy Indian Act, and there was no need for Congress to refer to (c)(15) because (e)(B) does not apply to those kinds of other exceptions.

This reading of the statute I think is confirmed both by the language of the act and also by the legislative history.

QUESTION: Mr. Levander, does section 302 itself authorize construction contracts?

MR. LEVANDER: Does 302(e)(B)?

QUESTION: Is 302 an authorizing statute or merely a statute that spells out the procedure that shall be followed when construction is otherwise authorized?

MR. LEVANDER: 302(e)(B) --

QUESTION: Just the whole section 302.

MR. LEVANDER: Oh, section 302.

QUESTION: Is that an authorizing statute?

MR. LEVANDER: It is as to negotiated contracts which are authorized by sections (1) through (14) of subsection (c). It is not an authorizing statute with regard to advertising which is authorized by some other statute. It simply preserves the exception that is created by the other statute.

QUESTION: Well, what language in section 302 authorizes the government to do anything?

MR. LEVANDER: 302(c) says all purchase under contracts for property and services shall be made by advertising...except that such purchases and contracts may be negotiated by the agency head without adveritising if -- and it lists 15 exceptions.

QUESTION: But that wouldn't authorize an agency to go ahead and make a contract, would it?

MR. LEVANDER: No, that is correct. The agency otherwise has to have authority to do whatever it is that it is doing. In other words, there may be authorization for an agency like the Department of Education to build buildings, and the only thing that 302 is concerned with is whether once you have the authority -- I may have

misunderstood your question -- once you have the authority to build a building, do you have to advertise the contract or can you negotiate a contract.

QUESTION: I maketthe point because you rely heavily on the word "authorize" in (e) as I understand you.

MR. LEVANDER: Well, we rely heavily on the word "authorize" but we also rely heavily on the legislative history of that section and the clear intent that we think emanates from sections 310 and 302(a)(2) of the act as well. 310 would be sort of rendered meaningless or at least would be cut in half without explanation if 302(e) were to overrule 310 as to all construction projects.

QUESTION: Well, it would still have viability for everything except those things that are covered by 302(e), namely road construction --

MR. LEVANDER: That's right.

QUESTION: -- and it seems rather clear that 302(e) was intended to have more restrictions apply to the kinds of contracts that are described, doesn't it?

MR. LEVANDER: Well, the legislative history is quite clear --

QUESTION: Otherwise you wouldn't need (E) at all.

MR. LEVANDER: The legislative history is quite clear as to what -- that's right, but 302(e), the

legislative history to 302(e) states that the provision simply restates what is past law and that is if you look at the seven exceptions which are stated in 302(e) and compare them to the seven exceptions, the other seven exceptions in (1) through (14) which are not present there, it is quite obvious that the first seven which are mentioned would or could possibly apply to major construction, and that the other seven could not, and the other seven are items --

QUESTION: Are you saying otherwise authorized by law could not apply to major construction?

MR. LEVANDER: No, no, no. Putting aside the (15) --

QUESTION: You can't have it both ways.

MR. LEVANDER: No, no. Putting aside section (15) which we think is very different, the first 13 exceptions are only created by the statute, but section (15) is merely recognized by the statute as preserving a prior exception in other law. Okay.

Now, as between the 14 exceptions that appear in section (e), seven of them are excepted also under section (e). Those seven could naturally apply to major construction work. The other seven could not. And Congress imply put this statute in, as the legislative history makes quite clear, to assure that exceptions (4)

through (9) and exception (13) do not apply to construction and there is no intent to appeal the prior other acts and are already contained in other acts to negotiate construction contracts.

The original act was passed in 1949 and did not apply to BIA. It was amended in 1965 to apply to BIA and every other agency, and the legislative history both times shows that there wasno intent to make any kind of major change. And if Congress was intending to appeal the Buy Indian Act and various other acts which previously authorized construction to be negotiated, you would have thought there would have been something in the legislative history and a more specific statement in the language showing that Congress wanted to do that. It didn't.

The legislative history says, "For clarity, this subsection (e) provides that section 302 does not authorize or change the existing requirements for authorization for the erection and repair of buildings, roads, sidewalks or similar items." It didn't change anything.

QUESTION: Well, it didn't really authorize anything either, did it?

MR. LEVANDER: That's right.

QUESTION: It simply set down procedures to be followed.

MR. LEVANDER: It simply made sure that agencies

would not attempt to negotiate major construction projects without bidding based on the exemptions from advertising contained in subsections (4) through (9) and (13). There was certainly not an intent to repeal --

QUESTION: That was my brother Stevens' point, that section 302(e), when it says this section shall not be construed to authorize the erection, repair or furnishing of any public building or public improvement, that such authorization shall be required in the same manner as heretofore, is in a way unnecessary since section 302, the entire section didn't authorize anything.

MR. LEVANDER: Well, it authorized agencies to make --

QUESTION: It set down certain procedures to be followed.

MR. LEVANDER: That's right, but that is an authorization --

QUESTION: To carry out previous authorizations.

MR. LEVANDER: No, I --

QUESTION: Existing authorizations.

MR. LEVANDER: I'm not sure that is correct, Mr. Justice Stewart, in the sense that it didn't create any power of an agency to contract.

QUESTION: No.

MR. LEVANDER: It did create power among the

agencies to negotiate contracts for which they already had authority and it is a very simple -- it just restates what is obvious from the face of section (e).

QUESTION: Mr. Levander, in your brief on page 5, you say that the Buy Indian Act -- in the footnote -- is the common name for section 23 of the act of June 25, 1910, and section 23 simply consists of the statement that hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section 3709 of the Revised Statutes provided that sofar as may be practicable Indian labor shall be employed and purchases of the products of Indian industry will be made in the open market in the discretion of the Secretary of the Interior.

Now, do you rely on the proviso or the first part or on both?

MR. LEVANDER: Well, the first part was simply -- and was later repealed -- simply stated that the Indian, hereinafter all Indian service procurement shall be subject to the general advertising statute, that is Revised Statute 3709, but we maintain and we enact into positive law the common preference for Indian goods and Indian products and Indian labor that heretofore existed in every appropriations act since 1884.

QUESTION: So you rely simply on the proviso in section 23?

MR. LEVANDER: Right, which was not repealed when the first sentence was repealed.

MR. LEVANDER: Do you think section 302 applies to this road contract at all?

MR. LEVANDER: Yes, I -- well, it may -- not 302, no, I don't think it applies at all. I think that the binding act --

QUESTION: In which event you never get to (15), you don't need to get to (15), do you?

MR. LEVANDER: Well, 310 tells you that the advertising exceptions that previously existed are preserved in their entirety --

QUESTION: I know, but 302(a)(2) says --

MR. LEVANDER: Right.

QUESTION: -- says that there are some things to which this subchapter doesn't apply at all.

MR. LEVANDER: We think the Buy Indian Act also qualifies under that section, although we don't think the Court --

QUESTION: I suppose you could have saved us a lot of ear trouble if you had just argued that.

MR. LEVANDER: Well, we argue both in the brief, but we think that --

QUESTION: But this is your stronger argument, the one you made today?

MR. LEVANDER: We think it quite clear that the Buy Indian Act does qualify under 310 and 302(c)(15).

QUESTION: What authority does the Secretary claim for issuing his present regulations under the Buy Indian Act?

MR. LEVANDER: Section 2 of Title XXV authorizes the Secretary of the Interior to issue regulations regarding all Indian programs.

QUESTION: So you don't think that -- he has never claimed any authority under section 302(a) to issue any regulations?

MR. LEVANDER: 302(a)?

QUESTION: Yes.

MR. LEVANDER: Well, the --

QUESTION: The executive agencies shall make purchases and contracts in accordance with the provisions of this chapter in implementing regulations of the administrator, so his regulations, outstanding regulations now under the Buy Indian Act, are they -- does he refer to this section at all?

MR. LEVANDER: No, the statute is critical, the subchapter does not apply to -- the subchapter is made inapplicable pursuant to any other law.

QUESTION: I understand that. I just --

MR. LEVANDER: But he has not relied on (a)(2)

in issuing regulations.

QUESTION: And he first issued this regulation in 1961, didn't he?

MR. LEVANDER: There have been regulations or policy statements and the policy has been followed before 1961. There is a reported case of the Comptroller General in 1957 and there are these early reports that we have described before that --

QUESTION: Well, those aren't regulations.

MR. LEVANDER: No. And prior to 1957, I would say that there is no articulated formal policy, although the policy was followed. They didn't set down in regulation form --

QUESTION: Do you have a cite to his regulations under the Buy Indian Act in your brief?

MR. LEVANDER: Yes, one of the regulations is 41 C.F.R. 14H-3.2.5.70.

QUESTION: It is 41 --

MR. LEVANDER: 41 C.F.R. --

QUESTION: Give me the first number, 41 C.F.R. what?

MR. LEVANDER: 14H.

QUESTION: That's enough.

MR. LEVANDER: Okay. I would like to reserve the rest of my time for rebuttal, if I might.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Hayes.

ORAL ARGUMENT OF D. D. HAYES, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Glover Construction Company's position is that five miles of roadway costing $1.2 million and located in Pushmataha County, Oklahoma is not a product for sale on the open market and it is not Indian supplies. We believe that such a project is a roadway construction within the meaning of the Federal Property Act and as such is subject to the competitive bidding requirements of that law.

The government's main thrust has been that the word "products" as used in the Buy Indian Act should be broadly and liberally defined to include roadway construction because of the policy of resolving doubtful expressions in favor of the Indian people.

We are aware that this Court has on several occasions announced that policy; however, we believe that policy has no application to this case. Based on the facts that were developed in the District Court, those facts show that the Indian community in general does not benefit from the BIA's interpretation of this statute.

The facts that were developed in the District

Court show that the beneficiaries of this interpretation were the owners of Indian Nations Construction Company. The president of that company is a one-fourth degree Indian who is an administrative law judge for the Department of Health, Education, and Welfare by occupation. The vice president of that company was a one-quarter blood Choctaw who is a self-employed rancher and who states his net worth at just under a half million dollars. The treasurer and general manager of that corporation is a non-Indian and he states his net worth at $1.3 million.

Now, based on the reports that we have seen from the American Indian Policy Review Commission, the Indians are desperately in need of roads. The report indicates that the roadway systems are about 40 percent inadequate, that they don't have enough money budgeted to build enough roads. Basically, the crux of the report is that they need more roads than there is money to buy.

Now, what is important about that is that in 1976 Glover Construction Company built the first five miles of this road for $538,000, and for less than what the engineer estimated the cost would be. The second five miles of this same road in 1977 cost $1.2 million without competitive bidding and was 22 percent above the

estimate that the engineers said it would cost to build it.

QUESTION: The topography was quite different, was it not?

MR. HAYES: I agree, Your Honor, it was quite different, but I think the significant point is that we built it for less than the BIA's engineer estimated it would cost, and also its specifications were changed, they built it for -- they let a contract to build it for 22 percent more than what it was estimated it would cost.

Based on these reasons, and another reason that we think it doesn't benefit the Indians is there is absolutely not one shred of evidence in the record, not one shred of credible evidence that any Indian workmen are employed on this $1.2 million project.

Now, we don't think it benefits the Indians. We don't think it gets them enough road built, we think it is more expensive and we don't think it is creating any jobs under this interpretation.

Now, we think that the usual methods of interpreting and construing statutes ought to be applied to this case. We think it should be remembered that the Buy Indian Act was simply a proviso to section 23 of the Act of June 25, 1910 and that section 23 was a remedial statute, and the obvious purpose of passing this remedial statute was to correct intolerable abuses in purchasing

and contracting within the Indian Service which was the predecessor to the BIA, and this is made clear from Rep. Burke's remarks where he says that at that time the Indian Service was interpreting the 1908 act to permit them to engage in virtually unregulated purchases and that this was resulting in indefensible abuses. So they passed this statute to remedy that problem.

I don't think there is any question but that the rule that this Court has previously announced and previously followed is that remedial statutes ought to be interpreted to achieve the remedy that the Congress prescribed. Applying that rule to this case, that statute ought to be interpreted liberally to correct the defect and to promote competitive bidding.

Now, we also think it is significant that the Buy Indian Act was a proviso. It is almost uniformly held that a proviso should be strictly construed. It is almost uniformly held that the proviso should be construed in light of the enacting clause of the statute. It is almost uniformly held that the national limitation of the proviso is to those things previously mentioned in the enacting clause and that no case is taken out of the enacting clause unless it falls fairly or plainly within the terms of the proviso.

Now, to interpret the word "products" to include

roadway construction I think it would be necessary to violate or disregard every one of these usual rules of statutory construction. We have to forget that the purpose of the enacting clause in this statute was to require competitive bidding on Indian supplies. Likewise, we have to liberally construe the proviso, instead of strictly construe it, and the lower courts said that you couldnt' even get there with a liberal interpretation. You also have to forget the subject matter that Congress was regulating.

Congress was regulating Indian supplies. They were not regulating construction projects, and we think it is very clear that the kind of Indian supplies that was exempt from competitive bidding are products of Indian industry, that they weren't talking about --

QUESTION: What about services, the language of subsection (c), contracts for property and services? Is the contract for road building a contract for services?

MR. HAYES: Well, I think it is a construction contract and I believe you are talking about the Federal Property Act, is that correct?

QUESTION: Yes.

MR. HAYES: Yes, we believe that this is covered by the Federal Property Act and that it is a contract for services. But what I am speaking of just now is the

original act of 1910 where what they were talking about and the only thing they mention in the enacting clause was Indian supplies.

QUESTION: Well, they referred to Indian labor.

MR. HAYES: That was in the proviso. They mentioned Indian labor in the proviso, but in the enacting clause I believe the only thing they mentioned is Indian supplies. At any rate, you are absolutely correct, they do mention Indian labor in the proviso.

We think that it is also apparent that this act of 1910 was not designed to cover roadway construction by comparing this act with the act that it was designed to repeal, which is the Act of April 30, 1908. And the important thing to note in the Act of April 30, 1908 is that that act contains standard construction-type language.

The language in the pertinent part read that hereafter supplies may be purchased, contracts let and labor employed for the construction of artesian wells, ditches, and other workds of irrigation, and then they go on to say without advertising. Now, that is the act of 1908, and then Congress comes along two years later and passes this act for the express purpose of repealing that act and they deleted the language that I just read. And we think the rule is that when Congress passes a revising statute in the place of an original statute and they leave

out a provision from the original statute, they intended to repeal that provision and make it anulled. And in order to apply this statute, the Act of 1910 to raodway construction, I think you have to rewrite the statute to put that language back into it, and I don't think that is what Congress wanted done.

At any rate, we believe that the Court is confronted with a very clear-cut choice. You can define the word "products" by looking at a dictionary definition.

QUESTION: Do you differ with your colleague on the other side as to what the consistent administrative construction has been?

MR. HAYES: I certainly do. I will address that right now, if I might. This statute was enacted in 1910. According to the report of the American Indian Policy Review Commission, the BIA or the federal government first got involved in roadway construction under the BIA's road program in 1935. The Solicitor's opinion which first applies or first authorized supplying the BIA's present interpretation of roadway construction is dated 1971.

QUESTION: Well, what was the view before that time, do you know?

MR. HAYES: Well, there wasn't any evidence in the District Court, but if the competitive bidding laws have applied all along, and they have, and if the

Solicitor's opinion in 1971 says for the first time that it is legal to exempt it from competitive bidding, they had to be building those projects by competitive bidding. My client built one in 1976 by competitive bidding, and we believe -- and the evidence isn't clear on this point, but we believe that from 1935 to 1971, they had to be building these roads by competitive bidding. And we also believe that the Court should give great weight to the interpretation of the BIA when they first commenced the road building program in 1935, because that is the point closer in time.

The complained of bulletin which for the first time makes it mandatory to give the jobs without competitive bidding to an Indian-owned company is dated March 3, 1976.

QUESTION: Do you agree with the government's argument that section 5 of Title 41 does not apply to a construction contract?

MR. HAYES: No, I do not. I believe that section 5, as I understand the legislative history, section 5 applied from -- it was originally enacted in the middle 1800's and applied up to 1949 when the Federal Property Act was passed. And we believe that during that period of time it covered roadway construction and that is why we believe that when the BIA --

QUESTION: And required advertising.

MR. HAYES: Yes, sir. Yes, Your Honor. And we believe that when this act was passed in 1910 that it did exempt certain products of Indian industry, but it obviously did not exempt roadway construction and the Congress didn't intend for it to exempt roadway construction because Congress wasn't even in the business of roadway construction at that time. They didn't get into it until 25 years later.

QUESTION: Well, what about non-construction Indian products?

MR. HAYES: We believe that the Buy Indian Act can be applied to non-construction products.

QUESTION: Because why? Why is that exempt under -- let's say under Title 5, why was it exempt under Title 5?

MR. HAYES: Because of the Buy Indian Act.

QUESTION: So you think that the Buy Indian Act was a provision that otherwise authorized the purchase of Indian goods without advertising?

MR. HAYES: Yes, sir. I believe it does. Yes, Your Honor, it does. I believe that it applies to non --

QUESTION: So your whole case turns on the definition of "products"?

MR. HAYES: That's correct, I believe it does.

I think Congress made that distinction, because I think in each one of these relevant statutes, Congress has seen fit to treat construction work separate from other products. They treated it separately in the Act of 1908, they treat it separately in the Federal Property Act or section 302. They deal with it separately.

QUESTION: How about under Title 5 before the passage of the Federal Property Act, do you think that you would distinguish between construction contracts and other contracts under section 5?

MR. HAYES: No, sir, I don't think section 5 does it, but I think the Buy Indian Act would permit the Secretary, when it was practicable, in purchasing Indian supplies to buy those products, but I don't think there is any distinction. I think that the BIA was regulated by section 5 of Title 41 until the Federal Property Act was applied to them.

QUESTION: Then the BIA was regulated by Title 5, but you just told me that Title 5 would not require or section 5 would not require advertising under the Buy Indian Act.

MR. HAYES: Your Honor, I think what I said is, with all due respect, is that Title 5 is a general --

QUESTION: Section 5.

MR. HAYES: -- section 5 was a general

advertising statute. Now, the Buy Indian Act is arguably an exception to that with regard to products of Indian industry.

QUESTION: You said it was a moment ago.

MR. HAYES: Okay.

QUESTION: But do you still think it is or not?

MR. HAYES: I think it is an exception to --

QUESTION: Section 5 is an old statute.

MR. HAYES: Yes, sir.

QUESTION: And you think when the Buy Indian Act came along it was an exception to Title 5?

MR. HAYES: It was a limited exception applying only to certain products of Indian industry available in the open market. It did not exempt them entirely from the application of Section 5, and we believe it didn't exempt them from roadway construction.

QUESTION: Your whole case really depends upon the proposition that roadway construction is not Indian products available in the open market, is that --

MR. HAYES: That's correct.

QUESTION: Isn't that your whole case?

MR. HAYES: Well, our whole case, Mr. Justice, is that --

QUESTION: Because if these are Indian products available in the open market, you have just said, as I

understood your answer to my brother White, they would not be subject to competitive bidding.

MR. HAYES: That's correct.

QUESTION: Mr. Hayes, does that mean that you have abandoned your argument based on subsection (e)?

MR. HAYES: No, it doesn't, not at all.

QUESTION: Then you had better explain why it doesn't.

MR. HAYES: Section (e) --

QUESTION: As I understood the court below to place alternative and separate reliance on (e), I understand you in effect to be abandoning that position.

MR. HAYES: Perhaps I haven't been clear. Our position is that the Buy Indian Act doesn't have anything to do with section 302(c) or (e) --

QUESTION: Well, I understand that if you are right about products under the Buy Indian Act, you don't need to reach (e); but assuming you are wrong about products, does it also take it out of (e)?

MR. HAYES: If this Court should construe products to be roadway construction and the Buy Indian Act exempts roadway construction, then the question arises is did (e) imply the repeal of the Buy Indian Act to that extent. Okay. Well, I don't think it did. I am sure this Court is well aware of Morton v. Mancari, but I

think that case is very, very different from this case. In that case, they were dealing with a very specific statute that came right out and said in 1935 unequivocally that there is going to be an employment preference for Indians within the BIA. All right.

When this statute was enacted in 1949, when they decided that under no circumstances could road construction not be subject to competitive bidding, nobody, including the BIA was interpreting products to mean roadway construction. The Solicitor's opinion, dated '71, said the practice may have been going on for ten years. So it places an intolerable burden on Congress when they pass a law in 1949 to assume that twelve years later the Indian Department is going to come up with a new interpretation of the word "products."

QUESTION: Can't Indian products change? Let's assume there was an electronics business started on a reservation and the United States wanted some electronic -- the BIA wanted to get some electronic products. It may have been fifty years ago that this wasn't an Indian product.

MR. HAYES: I agree with that statement, but I think that Congress has drawn a distinction between products of Indian industry and construction, and I think they --

QUESTION: Whenever a road was built, it just never was a product, that is just not within the reach of the word "product."

MR. HAYES: That is our position and we believe it is Congress' position because in 1908 if they had wanted it to apply, they had construction language and when they intended an act to apply to construction they said contracts let for construction of. If they intended for this act in 1910 to apply to that, we think they would have said contracts let for the construction of, instead of leaving that language out.

QUESTION: Well, there must have been an awful lot of roads built from 1910 on Indian reservations. Is it your suggestion that they have always been built on competitive bidding?

MR. HAYES: Based on the administrative reports that I have seen, in 1935 the federal government, through the BIA, got into the road-building program. Now, how they were built before, I must assume it was done by the states and the counties. That was not a matter that was put into evidence at the District Court level.

QUESTION: I see.

MR. HAYES: At any rate --

QUESTION: But you say from '35 to '71 you think they were built on competitive bidding?

MR. HAYES: That is our position. As I indicated, in 1935, section 5 of Title 41 applied to the BIA and they were required to go by competitive bidding. Then in --

QUESTION: But not on services, not on Indian products.

MR. HAYES: Not on Indian products. But we think Congress, as I have indicated before, we think Congress treated products and construction differently.

QUESTION: There is nothing to stop you from putting that in evidence, was there?

MR. HAYES: No.

QUESTION: Why didn't you put it into evidence?

MR. HAYES: Well, Your Honor, we just --

QUESTION: You didn't think of it? I'm not saying -- I am just trying to help -- but we can't take your "think," can we, that you think that is what they were doing? That is not enough, is it? Don't we have to know one way or the other in order to go along with your point?

MR. HAYES: I respect --

QUESTION: The point is that there was competitive bidding up until '71.

MR. HAYES: Your Honor --

QUESTION: Unless you can prove that, how can we assume it?

MR. HAYES: Okay. The Solicotor's opinion, which is dated 1971, says that as far back as 1961 we have been applying the Buy Indian Act to roadway construction. All right. If in 1935 the regular competitive bidding act applied and they first started applying the Buy Indian Act in 1961, then it just inescapably follows that they were doing it according to regular competitive bidding practices during the intervening period. Also we have some -- ther other side has not -- of course, we don't have access to that information after the District Court, and there has been no evidence from the other side that they commenced in 1935 when the program began of applying the Buy Indian Act.

QUESTION: I just would not like to participate in an opinion which says that prior to 1961 the government awarded its contracts on competitive bidding insofar as roads are concerned -- footnote, your thinking. I have to have something better than that, than your footnote.

MR. HAYES: Well, it is our position that the law was at that time and it still is that they were required to do it by competitive bidding. Now, we have to assume that they followed the law until they say they stopped following it, and they indicate through the Solicitor's opinion that they have quit following the law in 1961.

We know for a fact that we built the first five miles in 1976 under competitive bidding, and as far as we know it came as a shock to us because we thought they had always done it by competitive bidding until we were deprived of the right to bid for the first time in 1977.

In answer to one question, I didn't get it completely answered about the possibility of an implied repeal. We think that this Court itself has indicated that, in applying the Morton v. Mancari case, this Court itself indicated at Footnote 2 of that case that section 47 was a more narrowly drawn statute than section 12 which was at issue in that case.

This Court also indicated that for all practical purposes in Footnote 2 that section 47, along with some other sections, had been replaced by section 12. So we don't think that the Morton v. Mancari rule can be applied. We don't think because, number one, Congress could not have possibly envisioned that this would be applied to roadway construction in 1949 when that law was enacted; and, secondly, because it is not as broad a statute as section 12 was.

Thank you.

QUESTION: Mr. Hayes, may I ask a question.

MR. HAYES: Yes, sir.

QUESTION: You described the officers of this

Indian company and they didn't sound a lot like Indians to me. Who determines -- does the statute say that a one-fourth blooded Indian is an Indian for purposes of this statute?

MR. HAYES: I believe it does, Your Honor. In fact, I think it says -- and the government can correct me if I am wrong, but I think if they are even one percent Indian they are considered to be an Indian for purposes of this statute.

QUESTION: Another question, I think your brief or the government's brief described this road as being built in land occupied by Indians. Is it built on a reservation?

MR. HAYES: I don't think so, Your Honor. It is --

QUESTION: What determines where one of these roads may be built?

MR. HAYES: There is a statute -- and I am not familiar with the cite -- that sets out the BIA's jurisdiction over certain roads.

QUESTION: Does that relate to the percentage of population composed of Indians?

MR. HAYES: I can't answer that question. I don't know how they determine it. It is just that Congress gave them a particular jurisdiction by statute to maintain

certain roads.

QUESTION: And the United States government pays for the roads?

MR. HAYES: Yes, Your Honor, the United States government pays for it.

QUESTION: Without regard to whether Indian labor is used or not?

MR. HAYES: Obviously in this case regardless of whether Indian labor was used or not, because --

QUESTION: Because the contractor doesn't obligate the contractor to use Indian labor?

MR. HAYES: No, Your Honor, it does not. The memorandum does not address Indian labor either that we sued for.

QUESTION: My questions may be entirely irrelevant to this case. I was just curious.

QUESTION: Mr. Hayes, I had a similar question about the definition of the Indian enterprise. You just described it in terms of two of the executives being of partial Indian blood. Is there any requirement that the ownership of the company be in the hands of Indians?

MR. HAYES: The memorandum that we sued on, this 1976 bulletin says that it has to be 100 percent Indian owned, which I would interpret that to mean that all the stockholders have to be at least one percent Indian.

QUESTION: If that is true, then the third person that you named apparently had no Indian blood, was just merely an executive of the company, he didn't have any effect on the eligibility of the enterprise.

MR. HAYES: That is my understanding, he is not a stockholder. He was one of the original incorporators and is treasurer and general manager according to the exhibits that the government introduced at a deposition we took.

QUESTION: The other two people were stockholders, is that what it is?

MR. HAYES: I think there are three stockholders and I think they are all at least one-fourth Indian.

QUESTION: I see.

MR. HAYES: Thank you.

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

(Whereupon, at 11:02 o'clock a.m., the case in the above-entitled matter was submitted.)

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