

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ATKINSON TRADING COMPANY, INC., :

4 Petitioner :

5 v. : No. 00-454

6 :

7 JOE SHIRLEY, JR., ET AL. :

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9

10 Washington, D.C.

11 Tuesday, March 27, 2001

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States as
14 10:03 a.m.

15 APPEARANCES:

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17 Petitioner.

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20 Arizona; on behalf of the Respondents.

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23 amicus curiae, supporting the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 00-454, the Atkinson Trading Company v. Joe Shirley.

Mr. Cole.

ORAL ARGUMENT OF CHARLES G. COLE

ON BEHALF OF THE PETITIONER

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

This case presents the question of whether an Indian tribe may tax a transaction between nonmembers on fee land within the reservation. This Court has already held that nonmembers who are involved in an auto accident on the equivalent of fee land are not subject to the jurisdiction of tribal courts absent consent. A transaction between nonmembers on fee land is similarly outside the tribe's jurisdiction because it does not involve a consensual relationship with the tribe and does not threaten tribal self-government.

QUESTION: What precisely is the incidence of the tax, Mr. Cole? Who was the tax on?

MR. COLE: The incidence of the tax is on the guests of the hotel.

QUESTION: And they -- what? The hotel owner

1 simply acts as a collector?

2 MR. COLE: Yes. The hotel owner acts as a
3 collector. If it fails to collect, however, the hotel
4 owner would be held liable for the tax.

5 QUESTION: What if -- what if the tax were
6 imposed, or a tax were imposed on the hotel itself instead
7 of the guests?

8 MR. COLE: We believe there would still be no
9 basis for the taxation on these facts. It's still a
10 transaction between nonmembers on fee land.

11 QUESTION: Is there -- does the hotel have to
12 get any license or permission from the tribe to operate
13 under the federal statutes governing Indian traders?

14 MR. COLE: The hotel must have a license from
15 the Federal Government in order to trade with the members
16 of the tribe.

17 QUESTION: Even though in conducting the hotel
18 it isn't dealing with members of the tribe?

19 MR. COLE: It needs that license to deal with
20 members of the tribe, but in dealing with nonmembers of
21 the tribe, the Federal regulatory scheme is not
22 applicable. This Court's tax cases illustrate that point,
23 because there is no preemptive effect in dealing with
24 nonmembers.

25 QUESTION: Suppose it didn't deal with members

1 of the tribe. It could still run the hotel without --
2 without getting any Federal license?

3 MR. COLE: Yes, I think that's right.

4 QUESTION: You think it -- you're not sure
5 that's right?

6 MR. COLE: Well, I -- that's the way I read the
7 regulations, yes.

8 QUESTION: Does it have to do with being within
9 the borders of the reservation, because even though it's
10 fee land, it is inside the reservation boundaries.

11 MR. COLE: That's correct, Your Honor.

12 QUESTION: But you don't know for sure whether
13 an Indian trader's license would be necessary for the
14 hotel, even if it were serving guests from outside the
15 tribe. You're not certain about that?

16 MR. COLE: No. If all the hotel were doing, the
17 act of serving nonmembers of the tribe on fee land, it
18 would not need a license by virtue of the fact that it was
19 within the reservation.

20 QUESTION: Is there on this hotel -- is it
21 subject to an Arizona room tax?

22 MR. COLE: Yes, it is.

23 QUESTION: Do you know what -- what would that
24 amount to?

25 MR. COLE: Five point five percent from the

1 state, as I understand the state law. And I understand
2 there is also -- this isn't in the record -- a local
3 county tax that would be in the neighborhood of point
4 eight eight percent.

5 QUESTION: So this would be three -- three room
6 taxes essentially, then. Are there other hotels on this
7 reservation?

8 MR. COLE: Yes, there are, Your Honor.

9 QUESTION: Are they also on fee land, or are
10 they on tribal land?

11 MR. COLE: The record doesn't reflect the kind
12 of land that they're on, and I don't know all those facts.

13 QUESTION: It seems to be a -- no, please --

14 QUESTION: On that particular thing, it seemed
15 to me quite important, and I seem to be missing a fact.
16 If there is no other hotel on fee land, then your position
17 is stronger. If there are several, then I guess it's the
18 fact that you who don't have a connection is not the
19 answer because maybe everybody in your category has a lot
20 of connections with the tribe's services that they
21 provide.

22 MR. COLE: Well, I don't think this is decided,
23 Your Honor, on a generic basis across all the hotels. The
24 question is whether this landowner and these guests have
25 in some way submitted themselves to the jurisdiction of

1 the tribe.

2 QUESTION: Well, that's my question, I guess,
3 because suppose that there are a hundred hotels, ninety-
4 nine of which use the sewerage systems, the water systems,
5 the police, the hospitals, all kinds of other services
6 provided by the tribe. Well, that might be a basis for
7 imposing a tax on hotels. And then I don't know that one
8 could get out of it by the happenstance that that
9 particular hotel doesn't use all those services, only uses
10 a couple.

11 MR. COLE: Well, we don't have those facts in
12 the record at all, and I think that the law is still that
13 the individual nonmembers' rights not to be governed by
14 the tribe would be respected. It's not an equal
15 protection question.

16 QUESTION: Whose burden is it to provide the
17 facts?

18 MR. COLE: Well, it's the tribe that's asserting
19 jurisdiction in this instance, and we have provided the
20 facts to show that there are no -- there's no consensual
21 relationship that we have with the tribe, and we are not
22 on tribal lands.

23 QUESTION: Well, didn't this also go through the
24 tribal court?

25 MR. COLE: Yes, it did.

1 This establishment that we're talking about
2 originally sat outside the reservation. In 1934, an Act
3 of Congress redefined the borders of the reservation with
4 the result that this land was included within it. The Act
5 specifically preserved the valid rights of the landowner.
6 Well, this --

7 QUESTION: You had an option, didn't you, to get
8 compensated for it, or to trade for land outside the
9 reservation?

10 MR. COLE: Yes, that's true. But at that point,
11 something had already been built on the land, and this
12 land was located right there on a Federal highway.

13 QUESTION: They wouldn't compensate you for what
14 was already built? You don't know.

15 MR. COLE: Well, the history here is unusual.
16 The case is representative insofar as the presence of
17 Indians -- non-Indians on fee land within the reservation
18 was the result of a Federal statute. As a result of other
19 Federal statutes, there are non-Indians on fee land in
20 other reservations around the United States. While they
21 may live and work there, they typically have no right to
22 participate in tribal government. They can't vote in
23 tribal elections or serve in elected roles in tribal
24 government --

25 QUESTION: But that would be -- that would be

1 true, too, if this hotel were on tribal land itself. And
2 is that the distinction you're making -- that this happens
3 to be on fee land?

4 MR. COLE: Yes.

5 QUESTION: Would it be different?

6 MR. COLE: Yes, it does make it different
7 because in building on tribal land they create a
8 relationship with the tribe. They are on the land that
9 the tribe controls, and it's a different situation.

10 QUESTION: Even though they still can't vote,
11 and most of their guests are not members of the tribe.

12 MR. COLE: Right. But the point that I wanted
13 to make, Your Honor, is that because of this relationship
14 with people who can't vote, it's a sensitive issue. And
15 this Court has developed some general rules that deal with
16 the relationship between the nonmembers and the tribe, and
17 those rules brought a distinction between fee land and
18 tribal lands as a way of setting to each group what its
19 rights would be.

20 QUESTION: You said that if the building were on
21 tribal land, that there would be a relationship with the
22 tribe by virtue of that. What would that relationship
23 consist of? What would its practical consequences be?

24 MR. COLE: There are really two relationships.
25 As a practical matter, you would ordinarily have some kind

1 of a lease or contractual document between the tribe and
2 the landowner, and the very fact of being on tribal land
3 means that the tribe would have power over the nonmember
4 in that situation.

5 This Court's decision in Montana, as I was
6 saying, supplied a general clear understandable rule for
7 nonmembers on the reservation. In Montana, this Court
8 reasoned that members of the tribe had inherent power to
9 govern themselves but could govern nonmembers only in
10 exceptional circumstances. Those exceptions were grounded
11 in the rationale of the main rule. If nonmembers enter
12 tribal lands, as I've mentioned, they subjected themselves
13 to the tribe's power to govern its own lands. If they
14 entered into a consensual relationship with the tribe or
15 its members, they subjected those relationships to the
16 tribe's power of self-government.

17 QUESTION: Well, would the Buster case out of
18 the -- I think the Eighth Circuit -- figures rather
19 largely in the briefs here. That was a tax on people who
20 wanted to do permit fee -- for people who wanted to do
21 business within the reservation. There was no distinction
22 in fee land and non-fee land there, was it?

23 MR. COLE: Your Honor, the origins of that case,
24 I think, have been a little obscure with time, but here is
25 the background there.

1 That case dealt with what were then called the
2 five civilized tribes. There were a number of Attorney
3 General opinions and judicial opinions that said that
4 those tribes had the power to exclude non-Indian intruders
5 from their lands and therefore had the power to impose a
6 licensing fee upon them if they decided to do business
7 within those lands. At the turn of the century, the last
8 century I'm talking about that ended in the late 1800s --
9 as Congress began to open up those lands, it gave the
10 settlers the right to remain on their lands and
11 essentially not be excluded. But at the same time there
12 was a specific statutory and presidential and treaty
13 framework that dealt with the problem of the licensing
14 fees. There was an Act called the Curtis Act which said
15 that any ordinance, including this ordinance that was
16 adopted by the tribe, would have to be approved by the
17 President, wasn't valid until it was.

18 And then there was a treaty that followed when
19 they opened up the land and said there wouldn't be removal
20 that eliminated certain licensing fees and did not
21 eliminate others. In *Morris v. Hitchcock*, this Court
22 looked at that situation, and what it said is that we can
23 see from the surrounding laws and treaties an intent to
24 preserve that original power to charge the license fee for
25 these tribes. And it said that quite clearly in *Morris v.*

1 Hitchcock, and that theme is then picked up in Buster,
2 which is, yes, originally there was some inherent power
3 here coming from the ownership dominion over the land to
4 charge a license fee as a condition. And we can see that
5 in this case, Congress by what it did, the President by
6 what he did, and the treaties by what they did, intended
7 to carry that forward and, therefore, the license fee is
8 still valid even as to settlers who can't be removed. So
9 that's, I think, the best explanation.

10 QUESTION: Buster wasn't one of our cases,
11 anyway. It was a Ninth Circuit case, wasn't it?

12 MR. COLE: No, it wasn't --

13 QUESTION: Eighth Circuit?

14 MR. COLE: Eighth Circuit case, Your Honor.

15 I spoke in general terms of the Montana rule.
16 Respondents seem to suggest that a different rule might
17 apply to taxation. There is no basis for that
18 distinction. The central question is still the same --
19 whether the tribe is governing itself or not -- and the
20 exceptions have to be the same. Thus in Strate, this
21 Court said that the Montana rule would apply broadly to
22 forms of civil jurisdiction. And in Montana itself, this
23 Court referred to taxation as one form of regulation that
24 might be permissible where a consensual relationship was
25 sought -- shown.

1 A consistent rule for all forms of tribal
2 jurisdiction, including taxation, is important from the
3 perspective of the nonmembers who invest in homes and
4 businesses on fee land within the reservation.

5 QUESTION: May I just interrupt this? How do
6 you work in the Jicarilla tax on the oil company into your
7 reasoning?

8 MR. COLE: I'm sorry, Your Honor?

9 QUESTION: The Jicarilla Merrion case -- how do
10 you fit that into this analysis?

11 MR. COLE: Well Merrion was a case about, as you
12 said, the lease with the tribe, I guess, for drilling on
13 tribal trust lands -- that entire reservation was tribal
14 trust lands, and the Court said --

15 QUESTION: Yes, and the outcome is they'd been
16 given a lease to take the oil out, so they did have a
17 property interest in the oil wells.

18 MR. COLE: But that -- but the lease was with
19 the tribe, so they directly entered into a consensual
20 relation --

21 QUESTION: It was made before the tax was
22 imposed.

23 MR. COLE: Well, that's true, Your Honor, and
24 there was a difference of views in that case.

25 QUESTION: I'm just wondering how you reconcile

1 the majority's holding with your position here.

2 MR. COLE: The majority's holding was simply
3 that in signing that lease, the tribe did not give up its
4 power over -- dominion over its own trust land. It said
5 at one point in the opinion that there was no tribal
6 authority until the nonmember entered tribal lands or
7 engaged in business with the tribe. So even that case, on
8 its own terms, essentially excluded a situation where
9 someone was not on tribal trust lands.

10 QUESTION: Mr. Cole -- no, I was being -- Mr.
11 Cole, you spoke a moment ago the fact that we had referred
12 to the possibility of a taxation exception as part of the
13 first Montana exception essentially arising from
14 consensual relationships. It strikes me that it's
15 certainly possible that a taxation exception might arise
16 under the second Montana category, and that brings me back
17 to something that has already come up, but I just want to
18 get clear on your position on it.

19 Under the second exception in effect for the
20 integrity of tribal government, I think there's probably a
21 pretty fair argument that if the tribe is, in fact,
22 providing services, then the tribe ought to be able to tax
23 to pay for, in effect, a proportionate share of the costs
24 that those services cost the tribe. I realize that
25 there's a factual dispute in this case -- I realize from

1 the briefs -- about the extent of the services that the
2 tribe is providing. My question is, do you take the
3 position that your client gets no services whatsoever, or
4 no benefit of municipal services whatsoever from the
5 tribe?

6 MR. COLE: I would say that the benefits are
7 incidental, Your Honor, that the services are focused on
8 the Navajo population in this part of the reservation, and
9 there can be incidental benefits from that. But that --

10 QUESTION: The fact that there is generally law
11 and order and that sort of thing?

12 MR. COLE: Exactly. But that shouldn't be a
13 basis for taxation. In the first place, we can draw a
14 distinction between those situations in which the
15 nonmember on fee land requests the service from the tribe
16 -- for example, ambulance services. And the record
17 reflects here that when ambulance service for a nonmember
18 is requested, the tribe charges for that. And that would
19 be a consensual relationship and a voluntary request, and
20 that could be charged for.

21 QUESTION: Okay, now --

22 QUESTION: How about -- how about water and
23 electricity and that sort of thing? Utilities?

24 MR. COLE: Well, in the -- in this case, there's
25 no such request being made, Your Honor.

1 QUESTION: The hotel supplies its own --

2 MR. COLE: It takes the water on its own land
3 from the river and returns it to the river, so it does not
4 receive water from the tribe.

5 QUESTION: What about fire protection?

6 MR. COLE: Well, there is a dispute in the
7 record about that. There was only one fire, it was on an
8 employee housing unit, and ultimately fire engines came -
9 - both from the state and from a tribal source. I think
10 that the answer is that when you have people living side
11 by side, you have a community of tribal members and you
12 have nonmembers as well, the nonmembers are paying state
13 taxes, sales taxes -- they're paying property taxes,
14 they're paying income taxes -- for the benefits of a
15 civilized society.

16 QUESTION: But the same thing is true, it seems
17 to me, in many state relationships in which there is a
18 state police force, there's a county police force, there's
19 a local police force, and a given property tax owner is
20 paying taxes through various taxing mechanisms for all
21 three. So the fact that there may be another source --
22 and maybe even a principal source -- of police, fire, or
23 whatnot protection available I don't think necessarily
24 leads to the conclusion that you shouldn't have to pay, as
25 it were, the portion of some -- for the same services by

1 an overlapping jurisdiction.

2 MR. COLE: Well, each one of those would be a
3 full sovereign in its own right, and would be an entity in
4 which these citizens could participate --

5 QUESTION: Well, it's true, but the assumption
6 of the question is that the Indian sovereignty is
7 sufficient to give it authority to provide fire services,
8 police services, and so on. So I think -- I think this
9 argument assumes that we are within an area of
10 sovereignty.

11 MR. COLE: Well, certainly the tribe can provide
12 the services, but the nonmembers cannot participate in
13 tribal government.

14 QUESTION: Could the tribe not provide the
15 services? Could the tribe say, look, we're not going to
16 send our fire engines unless -- unless you agree to pay
17 for them just as you agreed to pay for the ambulance
18 service. I know that sometimes there are two counties,
19 one of which doesn't -- isn't large enough or populace
20 enough to have a fire department, and in my experience
21 very often the neighboring county will send their fire
22 engines but charge the homeowner whom they've serviced in
23 that fashion. Could the tribe do that here?

24 MR. COLE: Yes. I think the tribe probably
25 could do that here.

1 QUESTION: Well, since you say the tax is on the
2 guests at the hotel, and the hotel merely acts as a
3 conduit, then why was the -- why did the tribal court say
4 that the hotel owner was liable?

5 MR. COLE: There is a specific statutory
6 provision which says that if the taxes are assessed
7 against the guests, that the hotel must pay. I'm not sure
8 if that's your question.

9 QUESTION: So it's statutory in the sense of
10 tribal regulation, or --

11 MR. COLE: There -- it appears, I think, on page
12 105(a) of the petition appendix, if I recall correctly.
13 It said --

14 QUESTION: Is it tribal, or Federal, or state?

15 MR. COLE: It is tribal.

16 QUESTION: Thank you.

17 QUESTION: The state tax works the same way,
18 doesn't it? The tax -- the incidence is on the guests,
19 but the hotel pays it to the state. Isn't that so?

20 MR. COLE: Yes. Yes. Well, I think that's
21 right, yes.

22 QUESTION: So is the legal question here, do the
23 guests have a relationship with the tribe, or does the
24 hotel have a relationship with the tribe. Which is it?

25 MR. COLE: Well, I think that the central

1 question is, do the guests have the relationship, because
2 the incidence of the tax as Your Honor pointed out at the
3 outset falls on the guests.

4 QUESTION: Well, you're not going to win very
5 much if that's what we hold -- the tribe will just go back
6 and impose the tax on the hotel.

7 MR. COLE: And I -- and I --

8 QUESTION: You really want us to address that
9 question?

10 MR. COLE: I think that the arguments that have
11 been made by the other side may require this Court to
12 address it, because they have tried to reach the guests
13 through the activities of the hotel, and I think the
14 rationale for why the guests are not taxable is that a
15 transaction between nonmembers on fee land is not one over
16 which the tribe has jurisdiction. And that also will
17 reach the hotel at the same time. And I think that if we
18 permit taxation of the hotel based on incidental services,
19 we open the box to any kind of tax on all nonmembers,
20 because all of them, or anyone who's on the reservation,
21 benefits in the same indirect way from law enforcement,
22 and --

23 QUESTION: Mr. Cole, can I go back to kind of a
24 basic question. Sometimes tribes when they have a
25 reservation they have the power to exclude non-Indians

1 from the reservation. Would this tribe, in your view,
2 have the right -- have the power to decide we're not going
3 to let any non-Indian tourists in the Navajo reservation.
4 We want to keep it for tribal members?

5 MR. COLE: No. This tribe doesn't have that
6 power.

7 QUESTION: Why doesn't it have that power?

8 MR. COLE: Because these are roads that are --
9 this is a -- it's right on a state highway, at least as
10 for this hotel. It's on a Federal highway, and there's a
11 crossing state highway. There are many other Federal and
12 state highways that run through the reservation. There
13 are National Parks within this reservation. The
14 reservation is open, and I think under the principles of
15 Strate it couldn't be closed at this point.

16 QUESTION: Does the tribe impose taxes on
17 nontribal members residing on fee land within the
18 reservation? I mean, other kinds of taxes? Income taxes,
19 real estate taxes?

20 MR. COLE: No, it does not impose -- it doesn't
21 impose some of those taxes on anybody within the
22 reservation. It doesn't tax its own members with an
23 income tax, at least as of the time that this record was
24 created.

25 QUESTION: What about real estate tax? Do they

1 have a real estate tax?

2 MR. COLE: No. It does not have a real estate
3 tax. It does have a -- it has a possessory interest
4 tax --

5 QUESTION: This sounds pretty good -- where is
6 this reservation?

7 MR. COLE: Well, it's -- Your Honor, that's a
8 point that -- there is a sphere of Federal protection from
9 state taxes that surrounds the reservation so that the
10 members are not being -- are not being charged state
11 income taxes -- that's the McClanahan decision. And they
12 don't have state property taxes to pay because a lot of
13 this is tribal lands, and in transactions among
14 themselves, then, they don't have state taxes. They also
15 don't have, according to this record, very much in the way
16 of individual taxes imposed on individual tribal members.
17 The Navajo tax director referred to that and said that
18 they are not paying much in the way of taxes.

19 QUESTION: Is your client paying property taxes
20 and income taxes?

21 MR. COLE: To the state? Yes. Yes, it is. And
22 those taxes go to fund the school in Cameron, which is in
23 the record -- the public school elementary school is being
24 paid for by county taxes.

25 Coming back to that, the central problem that,

1 Justice Souter, that you raised -- you have people living
2 here, members and nonmembers. Each one benefits to some
3 degree, in some incidental way, from the services provided
4 by the state or the tribe. But the problem is that the
5 nonmembers are not participating at all in tribal
6 government, and the tribal members are not being taxed at
7 all by the state. So in this circumstance, the rule of
8 Montana makes good sense that unless there's a consensual
9 relationship, a voluntary transaction as we've discussed,
10 or an entry onto tribal lands, that they wouldn't be
11 taxed. That we're not going to permit the tribe,
12 essentially, to exercise what this Court called its right
13 of self-government under the second exception as a means
14 -- and do that by taxing other people who are not able to
15 participate in tribal government.

16 QUESTION: Assuming that the hotel rather than
17 the guests are the object of the tax -- why isn't the
18 acceptance of fire service -- I think it's conceded that
19 on at least one occasion the tribal fire brigade did come
20 to assist the hotel. Why isn't the acceptance of that
21 assistance a consensual relationship?

22 MR. COLE: There is some ambiguity about how
23 that was requested. In other words, I'm not sure it's a
24 specific request to the tribe. It's rather a fire alarm
25 goes off, and it goes down to a number -- a 911 number

1 that's off the reservation, and the tribal company then
2 got sent. But if it were an acceptance -- if it were an
3 acceptance of a service, a voluntary transaction, it would
4 be limited to that one transaction. It would not provide
5 the basis for a generalized tax on the hotel.

6 I'll reserve the remainder of my time for
7 rebuttal.

8 QUESTION: Very well, Mr. Cole.

9 Mr. Gomez, we'll hear from you.

10 ORAL ARGUMENT OF MARCELINO R. GOMEZ

11 ON BEHALF OF THE RESPONDENTS

12 MR. GOMEZ: Mr. Chief Justice, and may it please
13 the Court:

14 The question here today is whether the Navajo
15 government can impose its hotel occupancy tax on travelers
16 who elect to travel onto the Navajo reservation, elect to
17 spend the night at a hotel, and receive the benefits of a
18 civilized society that's assured by the Navajo Nation's
19 govern --

20 QUESTION: Now, you say they elect to travel
21 onto the Navajo reservation. Your opponent says that they
22 can travel by a Federal or state highway to the hotel,
23 that they will be technically on the reservation. But do
24 you think that that is sufficient? If they never leave
25 the state highway except to go on fee lands?

1 MR. GOMEZ: We think -- in the area of taxation,
2 we think it is sufficient. The reason we feel that way is
3 the Navajo police patrol these highways. They patrol the
4 Cameron trading post on a regular basis. In joint lodging
5 material, page 178, 179, the Navajo police patrol the
6 Cameron trading post a couple of times a day.

7 QUESTION: Is it any different from what went on
8 in Strate where it was a Federal highway? And there were
9 tribal police as well as state police, I think, involved.

10 MR. GOMEZ: We believe that there is a
11 distinction here between the cases cited by the
12 petitioner, Montana, and in Strate. In Strate you were
13 talking about adjudicatory power of the courts. Here,
14 you're talking about taxation, and the guests who come on
15 -- looking at the reason for taxation, taxation is
16 utilized to share the burdens of the costs of government.
17 And it's not too much to ask these travelers to contribute
18 a small share --

19 QUESTION: I don't follow that distinction, as I
20 would think that the more basic power is the power to tax.
21 And if you have the power to tax, then you have
22 jurisdiction to enforce that tax. Is it -- Mr. Cole told
23 us that he doesn't -- he thinks that jurisdiction to tax
24 and jurisdiction to adjudicate go together. You seem to
25 think that jurisdiction to tax requires less than

1 jurisdiction to adjudicate.

2 MR. GOMEZ: I think in certain areas. For
3 example, in the Strate case, that involved two nonmembers.
4 Here you have the government of the reservation -- the
5 Navajo government -- on a reservation boundary that has
6 been drawn by Congress, engaging in services, providing
7 essential governmental services to whomever --

8 QUESTION: But if I remember correctly, Cameron
9 and Cameron trading post are right on the main highway
10 from Flagstaff up to the Grand Canyon. And it goes
11 through the reservation, but this is the main highway that
12 everybody takes going up there. And a visitor wanting to
13 stay overnight who is not a tribal member can drive on the
14 highway right into the Cameron trading post without ever
15 entering reservation land at all, spend the night, get up
16 the next day, and go on up to the Grand Canyon or to
17 Flagstaff. Isn't that right?

18 MR. GOMEZ: Yes.

19 QUESTION: Without ever being on reservation
20 land. Isn't that right?

21 MR. GOMEZ: That is correct, or they could
22 travel on the state highways which were right-of-ways
23 granted --

24 QUESTION: So it may make it a lot closer to
25 Strate -- I mean, the hotel itself is owned by a nontribal

1 member and is located on nontribal land. And so it's
2 maybe closer to Strate. Do you think this follows -- this
3 follows within one of the two Montana case exceptions?

4 MR. GOMEZ: Your Honor, I think this would -- I
5 think this tax would be upheld under either one of the two
6 Montana exceptions. The first --

7 QUESTION: What's -- what's the consensual
8 relationship of the hotel guests with the tribe?

9 MR. GOMEZ: We feel that the consensual
10 relationship that the hotel guests have with the Navajo
11 tribe would be that they travel onto the Navajo
12 reservation and they're receiving the benefits of police
13 and fire protection. Whether they actually need it or
14 not, those services are available. And hopefully they
15 will never need it. I think when any of us travel --

16 QUESTION: Well, that's not as unfair as one
17 might think. The tribe receives a considerable amount of
18 assistance from the Federal Government, and some from the
19 state government, and these visitors pay Federal taxes and
20 they pay state taxes. Maybe one of the incidental
21 benefits of that is that when they happen to be on fee
22 land on a tribal reservation, they may get the incidental
23 benefit of some of the tribal services that these Federal
24 and state taxes enable to be provided. I don't see
25 anything terribly unfair about that. How much of its --

1 of its income is attributable to the Federal Government?
2 It was in one of the briefs. I don't remember which one.

3 MR. GOMEZ: It may vary, but I think it may be
4 about two-thirds. I think something --

5 QUESTION: So I don't consider that terribly
6 unfair. I mean, these people are paying their Federal
7 taxes, and they're paying state taxes. Many of them are
8 perhaps from states other than the state in which the
9 reservation is, but I don't see any terrible injustice
10 there to the tribe.

11 QUESTION: How is it different from Strate in
12 that respect? Presumably good police and fire protection
13 was there for automobiles as well in Strate. What's the
14 difference here?

15 MR. GOMEZ: I think the distinction here -- and
16 I guess I am taking a look at the reason for taxation.
17 It's to spur the cost of government so everybody shares -
18 -

19 QUESTION: But no. I mean, you were saying, in
20 other words, in your opinion if taxes are the same as
21 tribal court jurisdiction, if the rule of power is the
22 same, then you'd lose. Is that right?

23 MR. GOMEZ: I think applying the Strate rule,
24 and then I think we would be in a difficult situation.

25 QUESTION: Okay. Then my next question would

1 be, is there any hotel to which this applies other than
2 this one?

3 MR. GOMEZ: There are nineteen --

4 QUESTION: That's on fee land.

5 MR. GOMEZ: Okay. There are nineteen hotels on
6 the Navajo reservation, four of which are on fee land.

7 QUESTION: All right. Now, if four of them are
8 on fee land, do we have any information that although this
9 hotel doesn't use a lot of tribal resources, in fact none
10 except the theoretical possibility of police and fire,
11 maybe those other four hotels do. Do we know anything
12 about that?

13 MR. GOMEZ: I think with respect to the other
14 four that are located on fee land, their ownership may be
15 different than here, and that one, maybe two, are owned by
16 tribal members. One hotel is not owned by a tribal
17 member. The others may have agreements, for example, for
18 water, for use of land, for landing -- for air landing
19 strips, so that they may have a different factual
20 situation in the Cameron trading post as --

21 QUESTION: Do all those hotels pay the occupancy
22 tax?

23 MR. GOMEZ: All of the hotels on the Navajo
24 reservation carry this tax. And this tax is paid by those
25 hotels on behalf of their guests, regardless of whether

1 they are members or nonmembers.

2 QUESTION: But presumably for the hotels that
3 are not on fee land, at least, they are not -- the guests
4 are not paying a state tax or a county tax. Are they?

5 MR. GOMEZ: They -- the hotels that are located
6 on trust land?

7 QUESTION: On the reservation trust land.

8 MR. GOMEZ: It's my understanding those hotel -
9 - those guests would also be paying the state and county
10 taxes.

11 QUESTION: Do you have -- is there anything on
12 the record to tell us about that? That surprises me,
13 because generally transactions on trust land might be
14 dealt with differently in terms of state and county taxes.

15 MR. GOMEZ: It's my understanding that the
16 nonmember-owned hotels on trust land collect the Arizona
17 and county taxes that are imposed on the hotel guests
18 because of --

19 QUESTION: Nonmember-owned hotels on trust land.
20 How about member-owned hotels?

21 MR. GOMEZ: Member-owned hotels -- they may have
22 -- it's getting complicated here. This gets into a
23 situation where they -- it would depend upon where the
24 legal incidence of the tax falls.

25 QUESTION: Well, let's say it falls on the

1 guests.

2 MR. GOMEZ: If it falls on the guest and then
3 member-owned hotels would be subject to collecting that
4 tax and paying it over to the state.

5 QUESTION: Well, the incidence would be the
6 same. It's the same tax. Can you tell us for sure -- you
7 said there were nineteen hotels, four of them on fee land.
8 You say they're all equally subject to the tax.

9 MR. GOMEZ: All nineteen -- all nineteen pay the
10 tax. Everybody is subject to the tax.

11 QUESTION: Is this the only one that has
12 protested?

13 MR. GOMEZ: This is -- this is the only one who
14 has litigated -- there is one other hotel, I think, that
15 has filed a -- an appeal and they asked to wait until the
16 outcome of this case.

17 QUESTION: But as far as you know, the hotels
18 that are owned by tribal members on tribal land -- trust
19 land -- are paying the Arizona and the county tax as well.

20 MR. GOMEZ: Yes.

21 QUESTION: And the tribal tax, as well.

22 MR. GOMEZ: Yes. They're paying all -- all the
23 taxes. It's our understanding --

24 QUESTION: And the record somewhere discloses
25 this?

1 MR. GOMEZ: It would be -- it would be in the
2 record. Nobody testified on that legal -- on legal tax
3 theories. But we feel that this case is a lot different
4 than Montana. In Montana, it dealt with a -- a regulation
5 that applied only to nonmembers on hunting and fishing.
6 Here, you have a tax that applies to everybody,
7 irregardless of whether they are members or not. There's
8 no distinction here as to your liability to pay your tax
9 based on whether you're a member or not.

10 The -- there's no state interest involved here.
11 For example, in Montana you had the state interest
12 involved with the ownership of the riverbed, and also some
13 conflicting hunting and fishing regulations. Here, in
14 fact, the Arizona Department of Revenue and the office of
15 the Navajo Tax Commission both have entered into joint
16 enforcement agreements regarding this tax and other taxes.

17 QUESTION: Well, I think the state has an
18 interest in making sure that owners of fee land are
19 treated fairly and equitably.

20 MR. GOMEZ: Yes.

21 QUESTION: In the state of Arizona, and all of
22 the Arizona citizens who are using the hotel -- that's the
23 state's interest.

24 MR. GOMEZ: That's correct. And as I pointed
25 out, the tribal taxes apply to everybody, irregardless of

1 who you are, so that you don't get any benefit by being a
2 member -- you don't avoid paying the tax. You're still
3 responsible for paying this tax. And for example, some of
4 the other taxes that are paid include a fuel excise tax,
5 business activity tax, tobacco products tax, oil and gas
6 severance tax -- all these taxes are collected by the
7 Navajo Nation from whomever engages in that type of
8 activity, irregardless of whether they are members or not,
9 and nonmembers.

10 QUESTION: Mr. Gomez, can I ask you a question
11 about how far your position would extend? We've had cases
12 that I remember from time to time, what we call
13 checkerboard reservations where about half the land might
14 be owned by non-Indians, and about half by tribal members.
15 And in those cases, one of the concerns was that taxation
16 without representation with the nonmembers being taxed
17 without having a voice in opposing the tax. Would your
18 rule apply, regardless of the percentage if the
19 reservation was owned by nonmembers?

20 MR. GOMEZ: You know, I think what we're asking
21 for is a rule that applies to the Navajo reservation, and
22 --

23 QUESTION: This is a specific -- Navajo
24 reservation-specific case, in other words, not a general
25 rule.

1 MR. GOMEZ: You know, we think that the facts
2 here were more than ninety-nine percent of the land is
3 held in trust on the Navajo reservation.

4 QUESTION: And if the next case involves one
5 where eighty-five percent is held in trust, what will we
6 do with that case?

7 MR. GOMEZ: I think you have to look at the
8 facts of the case --

9 QUESTION: Each case would be fact-specific.

10 MR. GOMEZ: -- on its merits.

11 QUESTION: In a way -- in a way that's a better
12 case for the tribe. I mean, gee, you're only talking
13 about one percent of the land that you can't tax -- one
14 percent of the land that you can't impose taxes on, at
15 least when the land is controlled by non-Indians. Why
16 wouldn't it be the case that we'd be more likely to uphold
17 the tribe's ability to tax under the second of the Montana
18 exceptions where much of the reservation is in fee? There
19 you would say that the tribe needs the money a lot more
20 from the fee land. I don't -- you know, I just don't see
21 which way it cuts. I'm not sure of the fact that a very
22 small portion of the land on this reservation is fee land,
23 that it helps your case rather than hurts it.

24 MR. GOMEZ: We believe that in taxation what the
25 Navajo government has tried to do is it's tried to be as

1 fair as possible so that when they pass a tax, everybody
2 that engages in that business has a responsibility of
3 paying that tax. And if you were to hold that just
4 because it was less than one percent of the land was held
5 in fee, this would give these people an economic advantage
6 over all the other people who did pay the tax -- all the
7 other hotel operators who operate on the Navajo
8 reservation.

9 QUESTION: But I don't think any of our cases
10 dealing with this issue of, you know, what percentage of
11 the land is held in trust, or what might be fee land? If
12 it ever made that sort of a distinction. Can you -- would
13 you know of one that has?

14 MR. GOMEZ: The only case that I'm aware of
15 where it seemed where a percentage of fee land was the
16 Brendale closed reservation judgment of this Court, where
17 I think ninety-seven percent of the land was held in trust
18 in the closed reservation in Brendale.

19 QUESTION: Mr. Gomez, may I -- may I ask about
20 the weight you put on the Indian trader status that this
21 hotel has had? You did say something about that in your
22 brief, and it seems to me that would be highly relevant if
23 we were talking about a buyer-seller relationship between
24 the trader and the tribal members. But in what way did
25 the Indian trader status affect the hotel-guest

1 relationship?

2 MR. GOMEZ: Well, it's my understanding that for
3 this operation to even engage in economic activity within
4 the exterior boundaries of the Navajo reservation, it is
5 required to obtain an Indian trader's license under the
6 Indian trader statutes and regulations -- a Navajo
7 business reservation license -- and that it cannot engage
8 in business in the absence of acquiring that license.

9 QUESTION: But this is like a statute till
10 business -- it just couldn't trade with the Indians.
11 Isn't that right? I mean, if it gave -- if it said, you
12 know, we will no longer buy from or sell to Indians, but
13 we'll continue to run our hotel, it wouldn't have to get
14 the Federal Indian trader license, would it?

15 MR. GOMEZ: It is my reading that previously
16 this hotel operation or the store -- in fact, it's a
17 trading company -- challenged the Indian trader -- the
18 applicability of the Indian trader regulations in the
19 Ninth Circuit in a previous case, Ashcroft, and in that
20 case it was determined that they were required to obtain
21 an Indian trader's license even though they had just a
22 small amount of sales to tribal members.

23 QUESTION: Oh, I understand that, but suppose
24 they had no tribal members. Isn't it clear -- and did
25 nothing but rent hotel rooms to -- to nontribal guests.

1 Would they have to have an Indian trader's license?

2 MR. GOMEZ: Well, I --

3 QUESTION: Certainly not.

4 MR. GOMEZ: It seems like the regulations may

5 require --

6 QUESTION: Well, then everybody is an Indian

7 trader. Everybody needs an Indian trader, I mean --

8 MR. GOMEZ: Within the exterior boundaries of

9 the Navajo reservation, I think that would be true.

10 QUESTION: Well, but of course in this case it's

11 as if the buyer had to have a license. You admit --

12 everybody agrees the incidence of the tax is on the guests

13 --

14 MR. GOMEZ: Yes.

15 QUESTION: I've never heard of an Indian trader

16 statute -- maybe I'm wrong -- where buyers have to have a

17 license?

18 MR. GOMEZ: No. No. And I think it's also

19 important to point out that some of these guests -- or

20 they made the comment that people pay Federal taxes, they

21 pay state taxes. The record shows that many of these

22 guests are -- are -- come from Japan and Europe, so they

23 would not pay either one of those income taxes. They are

24 travelers who travel to any location. For example, I

25 expect to be paying a hotel occupancy tax on my hotel room

1 this evening, and I will not be --

2 QUESTION: A tax, but do you expect to pay
3 three?

4 MR. GOMEZ: I'll look at my bill this evening,
5 but --

6 QUESTION: You never know.

7 MR. GOMEZ: I think that this case is different
8 than Montana in that the demographics are much different.
9 We're talking about a tax here that's utilized to fund
10 services that benefit these travelers who come onto the
11 Navajo reservation. And they may never need these
12 services, but these services are there. And in the
13 absence of funding to provide these services, it would be
14 a bad situation if you called the police and they didn't
15 answer. And what happens here is the 911 call may go down
16 to Flagstaff, but it's immediately routed to the Navajo
17 police force that has a substation in Cameron. Thank you.

18 QUESTION: Thank you, Mr. Gomez. Ms. Brinkmann,
19 we'll hear from you.

20 ORAL ARGUMENT OF BETH S. BRINKMANN

21 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

22 SUPPORTING THE RESPONDENTS

23 MS. BRINKMANN: Mr. Chief Justice, and may it
24 please the Court:

25 This case is not the Strate case because in the

1 Strate case there was no privilege to which the tribe
2 could attach a condition or a tax. Here, that was a just
3 a regulation of conduct between two individuals. Here,
4 there is a privilege of trade on the reservation. It is
5 the transaction that gives rise to the subject of Federal
6 regulations that gives rise --

7 QUESTION: I understand -- I thought they didn't
8 trade with the reservation. I thought that they had a
9 license that they never use.

10 MS. BRINKMANN: Your Honor, the record is clear
11 that, in fact, they do trade with Indians on the
12 reservation.

13 QUESTION: But what percent of their revenue
14 comes from trade on the reservation?

15 MS. BRINKMANN: I don't believe that's -- they
16 say that one or two percent of their -- the total sales.

17 QUESTION: You're saying less than one percent,
18 so it really has nothing to do with it. You're saying --

19

20 MS. BRINKMANN: I don't --

21 QUESTION: In other words, if a person opens up
22 a huge shopping mall and he happens to have -- he sells
23 one yo-yo to somebody on a reservation, that then the
24 reservation could impose any tax they want? Or tax the
25 whole operation?

1 MS. BRINKMANN: No, Your Honor, that's not quite
2 what I'm saying. I think I have three responses to make
3 to that.

4 First of all, the percentage is the record is
5 the sales. That doesn't account for the number of
6 customers. The Indian customers here are primarily at the
7 grocery store, the convenience store. They're not the
8 overnight guests. However there is also record evidence
9 that there have been Indians who have been overnight
10 guests -- there was some conference down there where
11 Indians did stay at the hotel.

12 In the Ashcroft case that my co-counsel
13 mentioned, petitioner litigated this issue to the Ninth
14 Circuit, and this Court denied review. And in that case
15 they challenged the applicability of the particular
16 reservation business regulations that apply to three
17 reservations that are applicable here -- the Navajo, the
18 Zuni, and the Hopi. Those are detailed regulations that
19 apply to all reservation businesses. A reservation
20 business is defined as anyone who is engaging in business
21 on these reservations with Indians, but those regulations
22 --

23 QUESTION: This is a Federal regulation?

24 MS. BRINKMANN: Yes, it is, Your Honor. It's 25
25 C.F.R. 141, and the following sections.

1 QUESTION: But as Justice Scalia said, it might
2 not -- it may be formalistic, but at least in this case
3 the incidence is on the guests. Everybody agrees with
4 that.

5 MS. BRINKMANN: Yes, Your Honor, and I would say
6 two things. We think that that --

7 QUESTION: And they haven't consented to do
8 business with the tribe.

9 MS. BRINKMANN: We think that that makes the
10 consent prong perhaps a more complicated analysis, Your
11 Honor, but we do believe because the guest is engaging in
12 a transaction that cannot exist but for the license that
13 has to be obtained under these regulations --

14 QUESTION: Why? Why? You say you need a
15 license to run a hotel?

16 MS. BRINKMANN: Yes.

17 QUESTION: I read the statute -- the statute
18 says power to appoint traders with Indians. The
19 Commissioner of Indian Affairs shall have the sole power
20 and authority to appoint traders to the Indian tribes and
21 to make such rules and regulations as he may deem just and
22 proper, specifying the kind and quantity of goods and the
23 prices at which such goods shall be sold to the Indians.
24 I don't see how in the world this has any application to a
25 hotel owner who has a hotel that serves visitors from off

1 the reservation.

2 MS. BRINKMANN: Two things, Your Honor. There
3 are other provisions of the statute I'll refer to in a
4 moment. There is also statutory direct authority for the
5 Secretary of the Interior to promulgate regulations which
6 control here. The other provisions are --

7 QUESTION: What sort of regulations? I mean,
8 could you tell us more about the Secretary's authority?

9 MS. BRINKMANN: Yes, Your Honor. On --
10 statutory authority comes from Sections 2 and 9 of Title
11 25 to promulgate regulations.

12 QUESTION: Well, where is that in the brief?

13 MS. BRINKMANN: Your Honor, I don't believe it's
14 in -- the regulations in the statute are, Your Honor --
15 this is simply the authority to promulgate the
16 regulations. In Title 25 it refers to the authority
17 specifically to -- for the Secretary to promulgate these
18 regulations, and it is to regulate trade with the Indians.
19 Those regulations, then, apply to all traders that deal
20 with Indians.

21 Section 2 provides the --

22 QUESTION: Well, where's the trade with the
23 Indians in this case?

24 MS. BRINKMANN: Your Honor, that was the
25 question that was litigated in the Ashcroft case.

1 QUESTION: Well, yes, but we're not bound by the
2 Ashcroft decision.

3 MS. BRINKMANN: No, I was just explaining,
4 however, that the claim there was that these regulations
5 should not apply because they do not deal primarily with
6 Indians.

7 QUESTION: But didn't that deal with the trading
8 post -- the little markets that sell things? That wasn't
9 the hotel operation in Ashcroft, was it?

10 MS. BRINKMANN: Well, it was the business which
11 includes all of these operations, we believe Your Honor.
12 But the point is this, when Congress enacted the statute
13 to control trade with the Indians and gave the
14 Commissioner expressed authority to promulgate regulations
15 thereunder. In the 1970s these tribes complained that
16 those -- that there were not sufficiently adequate
17 regulations promulgated thereunder, and that led to the
18 promulgation of 25 C.F.R. Section 141. Those regulations,
19 which are not challenged here, are key we believe to this
20 case because they do govern the business relations of all
21 reservation businesses.

22 QUESTION: And what is the statutory section
23 again that authorizes it?

24 MS. BRINKMANN: Section 2 and Section 9.

25 QUESTION: Twenty-five 2 -- and 2 through 9.

1 MS. BRINKMANN: Yes. And then the substantive
2 regulations governing the Indian trader statutes are
3 Sections 261 through 264, Your Honor.

4 QUESTION: And can you quote from them an
5 expressed statement to the effect that the Government is
6 purporting to require the license not merely to trade in
7 the terms that Justice Scalia quoted a moment ago, but to
8 provide non-Indian services.

9 MS. BRINKMANN: The regulations -- the statutory
10 authority is to regulate trade with the Indians.

11 QUESTION: Right. And then --

12 MS. BRINKMANN: And to -- and to introduce, for
13 example, goods into that area.

14 QUESTION: Okay. And how could -- but what
15 we're trying to get at is how do we make the leap from
16 that to the provision of hotel services by a non-Indian to
17 a non-Indian on fee land, and my question is, does the
18 regulations -- or does a regulation you have been alluding
19 to expressly say yes, trade with the Indians is broad
20 enough to include this.

21 MS. BRINKMANN: Yes, Your Honor, we believe they
22 do. In the regulations --

23 QUESTION: Can you -- can you quote?

24 MS. BRINKMANN: In the regulations governing the
25 Navajo business reservations -- in those provisions, it

1 expressly provides that for an Indian trader to apply for
2 a license, it has to include any approval that is required
3 by tribal or Federal regulations. It also includes that
4 for renewals of licenses, it then also expressly provides
5 that the --

6 QUESTION: If he's an Indian trader, but Justice
7 Souter's question is, do you become an Indian trader by
8 running a hotel on fee land by non-Indians for
9 non-Indians. That's the question. Does that make them an
10 Indian trader?

11 MS. BRINKMANN: Yes, Your Honor, to the extent
12 that they also trade with Indians.

13 QUESTION: No, no. In other words, everybody I
14 think -- at least my question -- imagine this hotel just
15 where it is, no Indian has ever come anywhere near it.
16 All right?

17 MS. BRINKMANN: The point --

18 QUESTION: It's only for tourists --

19 MS. BRINKMANN: The point --

20 QUESTION: Knowing now, do you -- it is,
21 however, on fee land on the reservation. Is there
22 anything in the regulations you have in front of you that
23 says to run a hotel like that you need a license?

24 MS. BRINKMANN: No, Your Honor, because the
25 hotel would not be permitted to deny customers based on

1 their Native American status. That's illegal.

2 QUESTION: You have to be an Indian trader.
3 Everybody has to be an Indian trader, so you --

4 MS. BRINKMANN: If you are operating a business
5 --

6 QUESTION: My, my. You can't go on fee land --
7 your own land -- and open any business there without
8 becoming an Indian trader.

9 MS. BRINKMANN: Your Honor, that's the history
10 of the Navajo -- of the Indian trader statutes.

11 QUESTION: Well, that's remarkable.

12 QUESTION: All right.

13 MS. BRINKMANN: This was directed --

14 QUESTION: Let's assume you just didn't have the
15 license. What would happen? He just doesn't have it. He
16 says, here I am, I'm opening a hotel, and I don't have a
17 license. Then what happens?

18 MS. BRINKMANN: I think --

19 QUESTION: By the way, the only people who ever
20 come are people who are not Indians.

21 MS. BRINKMANN: I think then, if you set all of
22 that aside, you also then come back to the analysis under
23 Montana, Your Honor, and I would like to address that.

24 QUESTION: No, but before you do, please, is
25 there -- I just want to know whether the Secretary has

1 gone so far as to say in so many words that the provision
2 of these kinds of hotel services that we keep describing
3 over and over again requires the Indian trader license.
4 Is there -- is there a phrase in a regulation to that
5 effect?

6 MS. BRINKMANN: I will read you the definition
7 of reservation business which explains that it governs
8 businesses on reservations that deal with Indians. I can
9 read that provision.

10 QUESTION: That's your best shot?

11 MS. BRINKMANN: Yes, Your Honor. That's --

12 QUESTION: Okay.

13 MS. BRINKMANN: And that's the overall scheme -
14 -

15 QUESTION: Okay, what's --

16 MS. BRINKMANN: This is to regulate --

17 QUESTION: No, but I don't want -- you talk
18 about overall schemes. The only thing that I've heard
19 quoted is, in fact, a series of statements that refer to
20 trading in goods with Indians. We're not dealing with
21 that here, and the overall scheme doesn't get me any
22 further from trading with goods with Indians. What I want
23 to know is, has the Secretary gone so far as to purport,
24 as to claim, that this overall scheme does in fact include
25 the provision of these non-Indian hotel services. So

1 what's the best shot at the Secretary's claim?

2 MS. BRINKMANN: We believe that the Navajo
3 business reservation regulations at 25 C.F.R. 141 include
4 several provisions that anticipate that. There are
5 requirements concerning pricing of goods, a bond that is
6 required --

7 QUESTION: Goods, goods. How about hotel
8 services?

9 MS. BRINKMANN: For example, there is a bond
10 requirement that every trader must post, and any --

11 QUESTION: That every trader must post.

12 MS. BRINKMANN: And any customer that would
13 recover is entitled to go against that bond for the
14 recovery of their judgment. It spans -- it applies beyond
15 simply Indian customers. Many of the regulations do.

16 QUESTION: Thank you, Ms. Brinkmann.

17 Mr. Cole, you have four minutes remaining.

18 REBUTTAL ARGUMENT OF CHARLES G. COLE

19 ON BEHALF OF THE PETITIONER

20 MR. COLE: I'd like to put this discussion of
21 the Indian trader statute in a somewhat broader context.
22 In every one of the cases that this Court's decided,
23 Montana, Bourland, dealing with nonmembers, Brendale, this
24 -- and Strate. This Court has repeated that if Congress
25 is going to -- if there's going to be an expansion of the

1 inherent powers of the tribes, it must be done by an
2 expressed congressional delegation. And if we apply that
3 standard to this whole problem with the Indian trader
4 statute, it becomes relatively easy. To the extent that
5 the traders are trading directly with Indians, then
6 perhaps there would be some form of consensual
7 relationship where the tribe would have some degree of
8 power, and these statutes and regulations may deal with
9 it. But if the United States --

10 QUESTION: Well, Williams against Lee has held
11 that it did, and it --

12 MR. COLE: Well, right, but the United States is
13 arguing that these statutes in this regulatory scheme
14 gives the tribes additional powers over nonmembers on fee
15 lands. And in order to have that, there has to be an
16 expressed congressional delegation. We don't have that
17 here -- mostly we've had a discussion of regulations, and
18 I won't go into the clarity of those regulations but, at
19 best, they are regulations -- they are not statutes.

20 And the statutes themselves don't purport to
21 give the tribes additional powers. They may give the
22 Secretary some powers, but they are not an express
23 delegation of additional powers for the tribe. So on that
24 basis alone, there is no basis for saying that the tribe
25 has some sort of privilege here it can grant or deny, a

1 power given to it by the Federal Government that it can
2 use to extract this tax on transactions between non-
3 Indians on fee land.

4 The other point I wanted to make was that when
5 we look at the second exception and whether there should
6 be some form of power that comes from the incidental
7 impacts of these tourists on the reservation, if we look
8 back at Strate, there this Court considered what was the
9 standard, and it was in effect on tribal self-government.
10 This Court looked at the possibility that accidents on the
11 reservation might create some health risks and certainly
12 would call on some tribal services, but that wasn't enough
13 to find that there would be tribal jurisdiction in those
14 circumstances.

15 Here we have these guests that travel on the
16 highway and end up in the hotel and, in effect, there is
17 less of a showing of an effect on the tribe, and there is
18 no showing of an effect on tribal self-government. This
19 is a difficult area when we look at the possibility of a
20 tax being imposed by one government in which a group of
21 citizens can't participate, and we have a well-established
22 set of rules that deals with that in Montana and the cases
23 that have followed it. This case should be decided under
24 that framework. Thank you.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cole.

1 The case is submitted.

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

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