

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHEROKEE NATION OF OKLAHOMA :

4 AND SHOSHONE-PAIUTE TRIBES OF :

5 THE DUCK VALLEY RESERVATION, :

6 Petitioners :

7 v. : No. 02-1472

8 TOMMY G. THOMPSON, SECRETARY :

9 OF HEALTH AND HUMAN SERVICES, :

10 ET AL.; :

11 and :

12 TOMMY G. THOMPSON, SECRETARY :

13 OF HEALTH AND HUMAN SERVICES, :

14 Petitioner :

15 v. : No. 03-853

16 CHEROKEE NATION OF OKLAHOMA. :

17 -----X

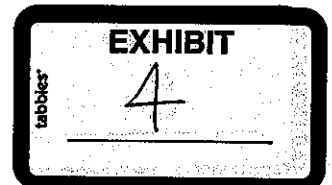
18 Washington, D.C.

19 Tuesday, November 9, 2004

20 The above-entitled matter came on for oral
21 argument before the Supreme Court of the United States at
22 10:12 a.m.

23 APPEARANCES:

24 LLOYD B. MILLER, ESQ., Washington, D.C.; on behalf of the
25 Cherokee Nation and Shoshone-Paiute Tribes.



1 JUSTICE SOUTER: And -- and their -- their
2 argument is that you can pay the contract amount without
3 robbing other tribes of the amounts that the -- that the
4 nonreduction clause refers to. They are saying -- I think
5 they're saying, look, you, the governmental bureaucracy,
6 get squeezed. Yes. And if so, the contract comes first
7 and you have to live with the squeeze and go back to
8 Congress and say, we're doing what you told us and we're
9 getting squeezed out of existence. I think that's what
10 they're saying.

11 MR. SRINIVASAN: That is what they're saying,
12 Justice Souter, but with respect to, I think it's
13 incorrect. The Government bureaucracy consists of two
14 separate types of bureaucracy. There's that core
15 bureaucracy that is the inherent Federal functions. And
16 one of their arguments is that the Secretary was required
17 to divest himself of the funds that were necessary to
18 perform those functions.

19 JUSTICE BREYER: No, he's not. But if -- if --
20 where I'm really coming from, to be honest -- and I'd like
21 -- you might as well reply to what I'm actually -- is why
22 I'm asking these slightly hostile questions.

23 (Laughter.)

24 JUSTICE BREYER: I -- I read here -- look, the
25 question really is was this money like the bureaucracy

1 money. Is it legally speaking an appropriation available,
2 not practically speaking but legally? And here it seems
3 to me, in looking through this somewhat quickly, that you
4 say no, but the Board of Contract Appeals say yes. And so
5 I think in my mind, you know, one group of people who
6 really know about this is the Board of Contract Appeals.
7 So if they're saying that money from a contract point -- a
8 point of normal contract law is legally available, I
9 promise you I'm predisposed to think they're right. So I
10 might as well expose that to you so you can tell me now
11 why I'm wrong or they're wrong or whatever.

12 MR. SRINIVASAN: Because, Justice Breyer, I
13 think the core of it is that even if you think that
14 they're right, that these funds are legally available,
15 that's not enough under the ISDA because the ISDA
16 specifically reserves to the Secretary the discretion that
17 he not be required to reduce funding for programs,
18 projects, or activities serving a tribe in order to make
19 funds available to another tribe under this subchapter.

20 JUSTICE BREYER: Well, there is -- is -- the
21 kind -- the money that's available to one tribe can't be
22 taken for the other. But I thought the Board of Contract
23 Appeals was saying taking that into account, there's still
24 enough money left over. Am I wrong about that? I thought
25 you should take money from one tribe to give it to