

The Burger Court Opinion Writing Database

Choctaw Nation v. Oklahoma

397 U.S. 620 (1970)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 12, 1969

Re: No. 41 - Choctaw Nation and the Chickasaw Nation
v. State of Oklahoma

No. 59 - Cherokee Nation or Tribe of Indians in
Oklahoma v. State of Oklahoma

MEMORANDUM FOR THE CONFERENCE

I adhere to my original vote to affirm in this case.

W.E.B.

W.E.B.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 22, 1970

MEMORANDUM TO THE CONFERENCE:

Re: Nos. 41 & 59 - Choctaw Nation and Chickasaw
Nation v. Oklahoma

In its present posture I believe the best solution is to
set the above cases for reargument when we have nine
Justices.

We can discuss this on Friday.

WESB
W. E. B.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

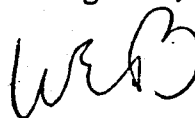
April 22, 1970

Re: Nos. 41 and 59 - Choctaw Nation and Chickasaw Nation
and Cherokee Nation or Tribe of Indians in Oklahoma
v. Oklahoma

Dear Byron:

Please join me in your dissent.

Regards,



W. E. B.

Mr. Justice White

cc: The Conference

December 15, 1917

Dear Thurgood:

In Re Nos. 41 and 42

Like the Chief Justice, I adhere to my original vote in this case and if you should get a majority for your opinion, I shall want to write a dissent unless something else done.

Merry Christmas to you.

Sincerely,

Mr. Justice Brandeis

co-members of the Court

5
TCC
6BW

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

March 25, 1970

Dear Thurgood:

Nos. 41 and 59.

Re: The Choctaw Nation and the Chickasaw
Nation v. State of Oklahoma; Cherokee
Nation, etc. v. State of Oklahoma, et al.

Please note at the foot of your opinion:

"MR. JUSTICE BLACK dissents."

Sincerely,

Hugo
Hugo

Mr. Justice Marshall

Ar Jm
GDW
JCS
JAP

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 11, 1969

Dear Thurgood:

I like your memo in Nos. 41 & 59 -
the Choctaw and Cherokee cases. Please
join me.

I'll probably file something of
my own. But certainly I am with you.

WUD
W. O. D.

Mr. Justice Marshall

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Chief Justice
Justice Black
Justice Harlan
Justice Brennan
Justice Stewart
Justice White
Justice Fortas
Justice Marshall

SUPREME COURT OF THE UNITED STATES

Nos. 41 AND 59.—OCTOBER TERM, 1969

The Choctaw Nation and the
Chickasaw Nation,
Petitioners,

41 v.
State of Oklahoma et al.

The Cherokee Nation or Tribe
of Indians in Oklahoma,
Petitioner,

59 v.
State of Oklahoma et al.

On Writs of Certiorari
to the United States
Court of Appeals for
the Tenth Circuit.

[January —, 1970]

MR. JUSTICE DOUGLAS, dissenting.

While I join MR. JUSTICE MARSHALL's opinion, I add a few words.

The Cherokees, pursuant to treaties with the United States, exchanged their aboriginal domain in the East for 14,000,000 plus lands west of the Mississippi, then in Indian Territory but now a part of Oklahoma. Pursuant to promises in the treaties, the United States on December 31, 1838, issued a patent to the Cherokees describing the lands by metes and bounds and conveying the lands in fee simple.

A portion of the Arkansas River is entirely within the grant to the Cherokees. It is therefore a mystery why all of the bed in that portion of the river was not conveyed to the Cherokees. The river bed was not reserved to the United States by the patent. The United States, however, made other reservations: (1) right to permit other Indians to get salt on the western part of the grant; (2) any rights to lands assigned the Quapaws which turn out to be within the bounds of these Cherokee

1
45
1

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall ✓

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SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Nos. 41 AND 59.—OCTOBER TERM, 1969

Circulated: 12/31/69

The Choctaw Nation and the
Chickasaw Nation,
Petitioners,

41 v.
State of Oklahoma et al.

The Cherokee Nation or Tribe
of Indians in Oklahoma,
Petitioner,

59 v.
State of Oklahoma et al.

On Writs of Certiorari
to the United States
Court of Appeals for
the Tenth Circuit.

[January —, 1970]

MR. JUSTICE DOUGLAS, dissenting.

While I join MR. JUSTICE MARSHALL's opinion, I add a few words.

The Cherokees, pursuant to treaties with the United States, exchanged their aboriginal domain in the East for 14,000,000 plus lands west of the Mississippi, then in Indian Territory but now a part of Oklahoma. Pursuant to promises in the treaties, the United States on December 31, 1838, issued a patent to the Cherokees describing the lands by metes and bounds and conveying the lands in fee simple.

A portion of the Arkansas River is entirely within the grant to the Cherokees. It is therefore a mystery why all of the bed in that portion of the river was not conveyed to the Cherokees. The river bed was not reserved to the United States by the patent. The United States, however, made other reservations: (1) right to permit

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Souter

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SUPREME COURT OF THE UNITED STATES

Nos. 41 AND 59.—OCTOBER TERM, 1969

The Choctaw Nation and the
Chickasaw Nation,
Petitioners,

41 v.
State of Oklahoma et al.

The Cherokee Nation or Tribe
of Indians in Oklahoma,
Petitioner,

59 v.
State of Oklahoma et al.

Circulated: _____

Recirculated: 1-5-70

On Writs of Certiorari
to the United States
Court of Appeals for
the Tenth Circuit.

[January —, 1970]

MR. JUSTICE DOUGLAS, dissenting.

While I join MR. JUSTICE MARSHALL's opinion, I add a few words.

The Cherokees, pursuant to treaties with the United States, exchanged their aboriginal domain in the East for 14,000,000 plus lands west of the Mississippi, then in Indian Territory but now a part of Oklahoma. Pursuant to promises in the treaties, the United States on December 31, 1838, issued a patent to the Cherokees describing the lands by metes and bounds and conveying the lands in fee simple.

A portion of the Arkansas River is entirely within the grant to the Cherokees. It is therefore a mystery why all of the bed in that portion of the river was not conveyed to the Cherokees. The river bed was not reserved to the United States by the patent. The United States, however, made other reservations: (1) right to permit other Indians to get salt on the western part of the grant; (2) any rights to lands assigned the Quapaws which turn out to be within the bounds of these Cherokee

10: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

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SUPREME COURT OF THE UNITED STATES

Nos. 41 AND 59.—OCTOBER TERM, 1969

The Choctaw Nation and the
Chickasaw Nation,
Petitioners,

41

v.

State of Oklahoma et al.

The Cherokee Nation or Tribe
of Indians in Oklahoma,
Petitioner,

59

v.

State of Oklahoma et al.

On Writs of Certiorari
to the United States
Court of Appeals for
the Tenth Circuit.

[January —, 1970]

MR. JUSTICE DOUGLAS, dissenting.

While I join MR. JUSTICE MARSHALL's opinion, I add
a few words.

The Cherokees, pursuant to treaties with the United
States, exchanged their aboriginal domain in the East
for 14,000,000 plus lands west of the Mississippi, then in
Indian Territory but now a part of Oklahoma. Pursuant
to promises in the treaties, the United States on
December 31, 1838, issued a patent to the Cherokees
describing the lands by metes and bounds and conveying
the lands in fee simple.

A portion of the Arkansas River is entirely within the
grant to the Cherokees. It is therefore a mystery why
all of the bed in that portion of the river was not conveyed
to the Cherokees. The river bed was not reserved
to the United States by the patent. The United States,
however, made other reservations: (1) right to permit
other Indians to get salt on the western part of the grant;
(2) any rights to lands assigned the Quapaws which
turn out to be within the bounds of these Cherokee

By
The
Court

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 25, 1970

Dear Thurgood:

Re: Nos. 41 & 59 - Choctaw Nation, etc.

I am still with you.

W. O. D.

W. O. D.

Mr. Justice Marshall

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

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SUPREME COURT OF THE UNITED STATES

Nos. 41 AND 59.—OCTOBER TERM, 1969

From: Douglas, J.

Circulated: 4/16/70

Recirculated:

The Choctaw Nation and the
Chickasaw Nation,
Petitioners,

41

v.

State of Oklahoma et al.

The Cherokee Nation or Tribe
of Indians in Oklahoma,
Petitioner,

59

v.

State of Oklahoma et al.

On Writs of Certiorari
to the United States
Court of Appeals for
the Tenth Circuit.

[April —, 1970]

MR. JUSTICE DOUGLAS, concurring.

While I join MR. JUSTICE MARSHALL's opinion, I add a few words.

The Cherokees, pursuant to treaties with the United States, exchanged their aboriginal domain in the East for more than 14,000,000 acres of land west of the Mississippi, then in Indian Territory but now a part of Oklahoma. Pursuant to promises in the treaties, the United States on December 31, 1838, issued a patent to the Cherokees describing the lands by metes and bounds and conveying the lands here in question in fee simple.¹

A portion of the Arkansas River is entirely within the grant to the Cherokees. It is therefore a mystery why all of the bed in that portion of the river was not conveyed to the Cherokees. The river bed was not reserved to the United States by the patent. The United States,

¹ In addition to the millions of acres conveyed to the Cherokees in fee simple, which included the land surrounding the segment of the Arkansas River here in question, they were guaranteed additional lands to the west of that tract as "a perpetual outlet west" which provided for "free and unmolested use" of those lands.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 25, 1970

RE: Nos. 41 & 59 - Choctaw & Cherokee
Nation v. Oklahoma

Dear Thurgood:

I agree with your opinion in the
above case.

Sincerely,


W.J.B. Jr.

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 13, 1970

41 & 59 - Choctaw Nation v. Oklahoma

Dear Thurgood,

I am glad to join your opinion in this case.
Please excuse my delay in letting you know this. I
mistakenly thought I had indicated my agreement long ago.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 25, 1970

Nos. 41 and 59 - Choctaw Nation v. Oklahoma et al.

Dear Thurgood,

I am glad to join your opinion for the
Court in these cases.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

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10. THE CHIEF JUSTICE
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
✓ Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Fortas
Mr. Justice Marshall

2

SUPREME COURT OF THE UNITED STATES

From: White, J.

Nos. 41 AND 59.—OCTOBER TERM, 1969

Circulated: 4-10-70

Recirculated: _____

The Choctaw Nation and the
Chickasaw Nation,
Petitioners,

41 v.
State of Oklahoma et al.

The Cherokee Nation or Tribe
of Indians in Oklahoma,
Petitioner,

59 v.
State of Oklahoma et al.

On Writs of Certiorari
to the United States
Court of Appeals for
the Tenth Circuit.

[April —, 1970]

MR. JUSTICE WHITE, dissenting.

At issue in these cases is the ownership of the lands underlying the Arkansas River from its confluence with the Grand River in Oklahoma downstream to the western border of Arkansas. The Arkansas River is a navigable stream below, but not above, its junction with the Grand River. The contending parties are three Indian tribes on the one hand and the State of Oklahoma on the other. The Cherokees base their claim on a United States patent of 1838 and underlying treaties, the Choctaws and the Chickasaws on an 1842 patent also issued in fulfillment of prior treaty commitments. The State claims under the settled doctrine that a newly admitted State takes title to the beds of all navigable rivers within its borders; the State denies that the prior patents conveyed the river bed. The patent to the Cherokees included property on both sides of the Arkansas River from its confluence with the Grand River downstream to its junction with the Canadian River. From the Canadian River to the Arkansas border, the Arkansas River was the boundary

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To: The Chief Justice
 Mr. Justice Black
 Mr. Justice Douglas
 Mr. Justice Harlan
 ✓ Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice Fortas
 Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

from: White, J.

Nos. 41 AND 59.—OCTOBER TERM, 1969

Circulated: _____

Recirculated: 4-11-70

The Choctaw Nation and the
 Chickasaw Nation,
 Petitioners,

41 v.
 State of Oklahoma et al.

The Cherokee Nation or Tribe
 of Indians in Oklahoma,
 Petitioner,

59 v.
 State of Oklahoma et al.

On Writs of Certiorari
 to the United States
 Court of Appeals for
 the Tenth Circuit.

[April —, 1970]

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACK
 joins, dissenting.

At issue in these cases is the ownership of the lands
 underlying the Arkansas River from its confluence with
 the Grand River in Oklahoma downstream to the western
 border of Arkansas. The Arkansas River is a navigable
 stream below, but not above, its junction with the Grand
 River. The contending parties are three Indian tribes
 on the one hand and the State of Oklahoma on the other.
 The Cherokees base their claim on a United States patent
 of 1838 and underlying treaties, the Choctaws and the
 Chickasaws on an 1842 patent also issued in fulfillment
 of prior treaty commitments. The State claims under
 the settled doctrine that a newly admitted State takes
 title to the beds of all navigable rivers within its borders;
 the State denies that the prior patents conveyed the river
 bed. The patent to the Cherokees included property on
 both sides of the Arkansas River from its confluence
 with the Grand River downstream to its junction with
 the Canadian River. From the Canadian River to the
 Arkansas border, the Arkansas River was the boundary

STYLISTIC CHANGES THROUGHOUT
SEE PAGES: /

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
✓ Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Fortas
Mr. Justice Marshall

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SUPREME COURT OF THE UNITED STATES

From: White, J.

Nos. 41 AND 59.—OCTOBER TERM, 1969

Circulated: _____

Recirculated: 4-23-

The Choctaw Nation and the
Chickasaw Nation,
Petitioners,

41

v.

State of Oklahoma et al.

The Cherokee Nation or Tribe
of Indians in Oklahoma,
Petitioner,

59

v.

State of Oklahoma et al.

On Writs of Certiorari
to the United States
Court of Appeals for
the Tenth Circuit.

[April —, 1970]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE
and MR. JUSTICE BLACK join, dissenting.

At issue in these cases is the ownership of the lands underlying the Arkansas River from its confluence with the Grand River in Oklahoma downstream to the western border of Arkansas. The Arkansas River is a navigable stream below, but not above, its junction with the Grand River. The contending parties are three Indian tribes on the one hand and the State of Oklahoma on the other. The Cherokees base their claim on a United States patent of 1838 and underlying treaties, the Choctaws and the Chickasaws on an 1842 patent also issued in fulfillment of prior treaty commitments. The State claims under the settled doctrine that a newly admitted State takes title to the beds of all navigable rivers within its borders; the State denies that the prior patents conveyed the river bed. The patent to the Cherokees included property on both sides of the Arkansas River from its confluence with the Grand River downstream to its junction with the Canadian River. From the Canadian River to the Arkansas border, the Arkansas River was the boundary

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas

SUPREME COURT OF THE UNITED STATES From: Marshall, J.

[December 10, 1969]

Circulated: DEC 10 1969

Recirculated:

MEMORANDUM TO THE CONFERENCE

From MR. JUSTICE MARSHALL

Re: Nos. 41 and 59

The attached opinion is the result of a change of mind on my part. I voted to affirm and was assigned the opinion. Research and labor convinced me to change and I submit the following draft for a majority or dissenting opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 41 AND 59.—OCTOBER TERM, 1969

<p>The Choctaw Nation and the Chickasaw Nation, Petitioners,</p> <p>41 v.</p> <p>State of Oklahoma et al.</p> <p>The Cherokee Nation or Tribe of Indians in Oklahoma, Petitioner,</p> <p>59 v.</p> <p>State of Oklahoma et al.</p>	<p style="font-size: 3em;">}</p>	<p>On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit.</p>
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[December —, 1969]

MR. JUSTICE MARSHALL.

This case involves a dispute over the title to land underlying the navigable portion of parts of the Arkansas River in the State of Oklahoma. As a practical matter, what is at stake is the ownership of the minerals beneath the river bed and of the dry land created by navigation projects that are narrowing and deepening the river channel.

In December 1966, petitioner Cherokee Nation brought suit in the United States District Court for the Eastern District of Oklahoma against the State of Oklahoma and various corporations to which the State had leased oil and gas and other mineral rights. In its complaint, the Cherokee Nation sought both to recover the royalties derived from the leases and to prevent future interference with its property rights, claiming that it had been since 1835 the absolute fee owner of certain land below the mean high water level of the Arkansas River. Subsequently, petitioners Choctaw and Chickasaw Na-

STYLISTIC CHANGES THROUGHOUT.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas

2

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

Nos. 41 AND 59.—OCTOBER TERM, 1969

Circulated: _____

Recirculated: MAR 25 1970

The Choctaw Nation and the
Chickasaw Nation,
Petitioners,

41

v.

State of Oklahoma et al.

The Cherokee Nation or Tribe
of Indians in Oklahoma,
Petitioner,

59

v.

State of Oklahoma et al.

On Writs of Certiorari
to the United States
Court of Appeals for
the Tenth Circuit.

[March —, 1970]

MR. JUSTICE MARSHALL delivered the opinion of the
Court.

This case involves a dispute over the title to land underlying the navigable portion of parts of the Arkansas River in the State of Oklahoma. As a practical matter, what is at stake is the ownership of the minerals beneath the river bed and of the dry land created by navigation projects that are narrowing and deepening the river channel.

In December 1966, petitioner Cherokee Nation brought suit in the United States District Court for the Eastern District of Oklahoma against the State of Oklahoma and various corporations to which the State had leased oil and gas and other mineral rights. In its complaint, the Cherokee Nation sought both to recover the royalties derived from the leases and to prevent future interference with its property rights, claiming that it had

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For The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

Nos. 41 AND 59.—OCTOBER TERM, 1969

Circulated:

Recirculated: APR 23 1970

The Choctaw Nation and the
Chickasaw Nation,
Petitioners,

41 v.
State of Oklahoma et al.

The Cherokee Nation or Tribe
of Indians in Oklahoma,
Petitioner,

59 v.
State of Oklahoma et al.

On Writs of Certiorari
to the United States
Court of Appeals for
the Tenth Circuit.

[April —, 1970]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves a dispute over the title to land underlying the navigable portion of parts of the Arkansas River in the State of Oklahoma. As a practical matter, what is at stake is the ownership of the minerals beneath the river bed and of the dry land created by navigation projects that are narrowing and deepening the river channel.

In December 1966, petitioner Cherokee Nation brought suit in the United States District Court for the Eastern District of Oklahoma against the State of Oklahoma and various corporations to which the State had leased oil and gas and other mineral rights. In its complaint, the Cherokee Nation sought both to recover the royalties derived from the leases and to prevent future interference with its property rights, claiming that it had