

The Burger Court Opinion Writing Database

Montana v. United States

450 U.S. 544 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

March 17, 1981

Re: No. 79-1128, Montana v. United States

Dear Potter:

I join.



Regards,

Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

December 15, 1980

RE: 79-1128 Montana v. United States

Dear Thurgood and Harry:

We three were to affirm in the above. Would
you Harry be willing to undertake the dissent?

Sincerely,

Brennan

Mr. Justice Marshall

Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 26, 1981

RE: No. 79-1128 Montana v. United States

Dear Potter:

I'll await the dissent.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

March 16, 1981

RE: No. 79-1128 Montana v. United States

Dear Harry:

Please join me.

Sincerely,



Justice Blackmun

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

5 FEB 1981

1st DRAFT

Recirculated

SUPREME COURT OF THE UNITED STATES

No. 79-1128

State of Montana, et al., Petitioners,
v.
United States, et al. } On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit.

[February —, 1981]

JUSTICE STEWART delivered the opinion of the Court.

This case concerns the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians. Relying on its purported ownership of the bed of the Big Horn River, on the treaties which created its reservation, and on its inherent power as a sovereign, the Crow Tribe of Montana claims the authority to prohibit all hunting and fishing by non-members of the Tribe on non-Indian property within reservation boundaries. We granted certiorari, — U. S. —, to review a decision of the United States Court of Appeals for the Ninth Circuit that substantially upheld this claim.

I

The Crow Indians originated in Canada, but some three centuries ago they migrated to what is now southern Montana. In the 19th century, warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, 11 Stat. 749, in which the signatory tribes acknowledged various designated lands as their respective territories. The treaty identified approximately 38.5 million acres as Crow territory and, in Article 5, specified that, by making the treaty, the tribes did not "surrender the privilege of hunting, fishing, or pass-

See pp. 4, 10, 20
✓ for renumbered
after 5

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 17 FEB 1981

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1128

State of Montana, et al.,
Petitioners,
v.
United States, et al. } On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit.

[February —, 1981]

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Stylistic

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated:

19 MAR 1981

Recirculated:

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1128

State of Montana, et al.,
Petitioners,
v.
United States, et al. } On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit.

[February —, 1981]

JUSTICE STEWART delivered the opinion of the Court.

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 1, 1981

MEMORANDUM TO THE CONFERENCE

There is one hold for No. 79-1128, Montana v. United States: No. 80-778, New Mexico v. Mescalero Apache Tribe.

The Mescalero Tribe and the State have enacted inconsistent regulations governing hunting and fishing by non-Indians on tribal lands, and the Tribe brought suit to enjoin enforcement of the State's rules. The Tribe's economy depends heavily on revenue from sportsmen, and the Tribe has taken the primary role in stocking and conserving game on the reservation. The CA 10 affirmed the DC's decision barring enforcement of the state rules, relying on several overlapping grounds. First, the CA held that the Tribe had inherent authority to control hunting and fishing on reservation lands. Though the CA acknowledged that there was little proof that the Mescalero Apache Indians have traditionally depended on wildlife for their subsistence, the CA took the view that inherent authority over all wildlife was necessary to help the tribe adjust to changing needs and conditions. As a corollary, the CA held that the power to regulate hunting and fishing was an incident of the Tribe's inherent power over reservation territory. Next, the CA held the State's regulations implicitly preempted by federal law and policy. Specifically, the treaty creating the reservation gave the United States the power to pass all laws conducive to the welfare of the Tribe, and the tribal constitution, approved by the United States under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, gave the tribe the power to regulate and conserve wildlife. Next, the CA looked to cases in this Court declaring tribal authority to

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

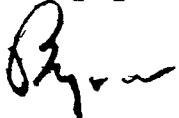
February 17, 1981

Re: 79-1128 - State of Montana
v. United States

Dear Potter,

Please join me in your 2/17/81
circulation.

Sincerely yours,



Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 5, 1981

Re: No. 79-1128 - State of Montana v. U.S.

Dear Potter:

I await the dissent.

Sincerely,

J.M.

T.M.

Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 13, 1981

Re: No. 79-1128 - Montana v. United States

Dear Harry:

Please join me in your dissent.

Sincerely,

T.M.
T.M.

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 15, 1980

Re: No. 79-1128 - Montana v. United States

Dear Bill:

I shall be willing to undertake the dissent in this case.

Sincerely,

Mr. Justice Brennan

cc: Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 5, 1981

Re: No. 79-1128 - Montana v. United States

Dear Potter:

In due course, I shall attempt a dissent in this case.

Sincerely,



Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun
MAR 12 1981
Circulated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1128

State of Montana, et al., Petitioners,
v.
United States, et al. } On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit.

[March —, 1981]

JUSTICE BLACKMUN, dissenting in part.

Only two years ago, this Court reaffirmed that the terms of a treaty between the United States and an Indian tribe must be construed "in the sense in which they would naturally be understood by the Indians." *Washington v. Fishing Vessel Assn.*, 443 U. S. 658, 676 (1979), quoting from *Jones v. Meehan*, 175 U. S. 1, 11 (1899). In holding today that the bed of the Big Horn River passed to the State of Montana upon its admission to the Union, the Court disregards this settled rule of statutory construction. Because I believe that the United States intended, and the Crow Nation understood, that the bed of the Big Horn was to belong to the Crow Indians, I dissent from so much of the Court's opinion as holds otherwise.¹

I

As in any case involving the construction of a treaty, it is necessary at the outset to determine what the parties intended. *Washington v. Fishing Vessel Assn.*, 443 U. S., at 675. With respect to an Indian treaty, the Court has said that "the United States, as the party with the presumptively

¹ While the complaint in this case sought to quiet title only to the bed of the Big Horn River, see *ante*, at 4, n. 1, I think it plain that if the bed of the river was reserved to the Crow Indians before statehood, so also were the banks up to the high water mark.

February 11, 1981

79-1128 Montana v. United States

Dear Potter:

I think your opinion in this case is excellent. I do raise a couple of points that perhaps you can clarify by relatively modest changes or additions.

First, is it not desirable to make clear that the regulation of hunting and fishing must be nondiscriminatory. It is possible, I suppose, that influential sportsmen might persuade the state to allow larger bag limits within an Indian reservation than the limits applicable at reasonably comparable locations elsewhere.

I wonder also whether your opinion might be construed as preventing a tribal government from enacting nondiscriminatory land use or zoning laws that might prohibit altogether hunting or the use of firearms. For example, it is illegal, I believe, to fire even an air rifle in the city limits of Richmond, Virginia. I am inclined to think a tribe would be able to impose prohibitions of this kind on all the residents of a reservation.

I have never been clear as to the extent of a tribe's civil jurisdiction within a reservation with respect to use of land owned by non-Indians. A tribe certainly needs some powers to further its collective welfare, but on some reservations a majority of the land is owned by non-Indians. I assume your opinion does not go beyond anything we have said in the past with respect to a tribe's general civil jurisdiction.

I expect to join your opinion, but would like to know what you think about the foregoing.

Sincerely,

Mr. Justice Stewart

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 17, 1981

79-1128 Montana v. United States

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 13, 1981

Re: No. 79-1128 Montana v. United States

Dear Potter,

Please join me.

Sincerely,

Rehnquist

Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 11, 1981

Re: 79-1128 - Montana v. United States

Dear Potter:

Because I had some doubts about this case at the time of Conference, I will await the dissent. However, after reading your persuasive opinion, I think I may well end up by joining you.

Respectfully,



Justice Stewart

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

79-1128 - Montana v. United States

From: Mr. Justice Stevens

Circulated, MAR 17 '81

Recirculated: _____

JUSTICE STEVENS, concurring.

In its opinion in Choctaw Nation v. Oklahoma, 397 U.S. 620, the Court repeatedly pointed out that ambiguities in the governing treaties should be resolved in favor of the Indian Tribes.¹ That emphasis on a rule of construction favoring the

¹ The Court described this rule of construction, and explained the reasoning underlying it:

"[T]hese treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them, see e.g., Jones v. Meehan, 175 U.S. 1, 11 (1899), and any doubtful expressions in them should be resolved in the Indians' favor. See Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). Indeed, the Treaty of Dancing Rabbit Creek itself provides that 'in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favourably towards the Choctaws.' 7 Stat. 336." Choctaw Nation v. Oklahoma, 397 U.S. 620, 631.

The Court went on to base its decision on this rule of construction:

TO: THE CHIEF JUSTICE
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAR 19 '81

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1128

State of Montana et al.,
Petitioners,
v.
United States, et al. } On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit,

[March —, 1981]

JUSTICE STEVENS, concurring.

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The Court went on to base its decision on this rule of construction:

"[T]he court in *Holt State Bank* [270 U. S. 49] itself examined the circumstances in detail and concluded 'the reservation was not intended to effect such a disposal.' 270 U. S., at 58. We think that the similar conclusion of the Court of Appeals in this case was in error, given the circumstances of the treaty grants and the countervailing rule of construction that well-founded doubt should be resolved in petitioners' favor." 397 U. S., at 634.