

The Burger Court Opinion Writing Database

New Mexico v. Mescalero Apache Tribe

462 U.S. 324 (1983)

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

June 1, 1983

Re: No. 82-331, New Mexico v. Mescalero Apache Tribe

Dear Thurgood:

I join.

Regards,

Justice Marshall

Copies to the Conference



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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 27, 1983

No. 82-331

New Mexico, et al.
v. Mescalero Apache Tribe

Dear Thurgood,

I agree.

Sincerely,

Justice Marshall

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 3, 1983

82-331 - New Mexico v. Mescalero Apache Tribe

Dear Thurgood,

Please join me in your third
circulation.

Sincerely,



Justice Marshall

Copies to the Conference

cpm

3, 4, 7, 10, 13, 14, 15, 17, 19

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-331

**NEW MEXICO, ET AL., PETITIONER v. MESCALERO
APACHE TRIBE**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT**

[May —, 1983]

JUSTICE MARSHALL, delivered the opinion of the Court.

We are called upon to decide in this case whether a State may restrict an Indian Tribe's regulation of hunting and fishing on its reservation. With extensive federal assistance and supervision, the Mescalero Apache Tribe has established a comprehensive scheme to regulate hunting and fishing within its reservation. Federally approved Tribal ordinances regulate in detail the conditions under which both members of the Tribe and nonmembers may hunt and fish. New Mexico seeks to apply its own laws to hunting and fishing by nonmembers on the reservation. We hold that this application of New Mexico's hunting and fishing laws is preempted by the operation of federal law.

I

The Mescalero Apache Tribe (Tribe) resides on a reservation located within Otero County in south central New Mexico. The reservation, which represents only a small portion of the aboriginal Mescalero domain, was created by a succession of Executive Orders promulgated in the 1870's and 1880's.¹ The present reservation comprises more than

¹See 1 C. Klapper, *Indian Affairs, Laws and Treaties* 870-873 (1904). The final boundaries were fixed by the Executive Order of Mar. 24, 1883

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pp. 8-9, 12, 19

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: JUN 3 1983 _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-331

**NEW MEXICO, ET AL., PETITIONER v.
MESCALERO APACHE TRIBE**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[June —, 1983]

JUSTICE MARSHALL, delivered the opinion of the Court.

We are called upon to decide in this case whether a State may restrict an Indian Tribe's regulation of hunting and fishing on its reservation. With extensive federal assistance and supervision, the Mescalero Apache Tribe has established a comprehensive scheme for managing the reservation's fish and wildlife resources. Federally approved Tribal ordinances regulate in detail the conditions under which both members of the Tribe and nonmembers may hunt and fish. New Mexico seeks to apply its own laws to hunting and fishing by nonmembers on the reservation. We hold that this application of New Mexico's hunting and fishing laws is preempted by the operation of federal law.

I

The Mescalero Apache Tribe (Tribe) resides on a reservation located within Otero County in south central New Mexico. The reservation, which represents only a small portion of the aboriginal Mescalero domain, was created by a succession of Executive Orders promulgated in the 1870's and 1880's.¹ The present reservation comprises more than

¹See 1 C. Klapper, *Indian Affairs, Laws and Treaties* 870-873 (1904). The final boundaries were fixed by the Executive Order of Mar. 24, 1883

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 6, 1983

Re: No. 82-331 - New Mexico v. Mescalero Apache Tribe

Dear Thurgood:

Please join me.

Sincerely,



Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 27, 1983

82-331 New Mexico v. Mescalero Apache Tribe

Dear Thurgood:

You have written a fine opinion and - subject to one suggestion - I will be happy to join you. On p. 12, 4th sentence of the first full paragraph, your draft opinion states:

"A State seeking not merely to tax but to regulate a tribal activity is under a greater burden to advance a significant State interest, since duplicative and potentially conflicting regulation is generally more disruptive than double taxation."

As I read Washington v. Confederated Tribes, 447 U.S. 143, 159, I am not sure that it goes quite this far. Moreover, as a general proposition I would think that some types of regulation could be less "disruptive" of tribal activity than heavy double taxation. The extent of interference with tribal activity would depend on the facts and circumstances. Thus, it seems unnecessary - certainly in this case - to draw a distinction between the burden of justification required by the state.

If you are disposed to delete this sentence, I will be happy to join you.

Sincerely,



Justice Marshall

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 2, 1983

82-331 New Mexico v. Mescalero Apache Tribe

Dear Thurgood:

Please join me.

Sincerely,

Lewis

Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 7, 1983

Re: No. 82-331 New Mexico v. Mescalero Apache Tribe

Dear Thurgood:

Please join me.

Sincerely,



Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 27, 1983

Re: 82-331 - New Mexico v. Mescalero Apache
Tribe

Dear Thurgood:

Although I am not sure that all of part II of the opinion is necessary to explain the result, I think I can join you if you will accommodate me on one point. Towards the top of page 12 you describe language out of the Bracker opinion at pages 149 and 143 describing the "overriding federal objective" as one of promoting "tribal self-sufficiency and economic development." Actually, however, the "overriding federal objective" that your opinion referred to at page 149 was the objective "of guaranteeing Indians that they will 'receive ... the benefit of whatever profit [the forest] is capable of yielding.'" I would not convert the specific profit-making objective in that case into an overriding objective of promoting Indian economic development in whatever context might be present in future cases. I wonder therefore if you would consider revising the sentence at page 12 along these lines:

"Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of state authority may be preempted if it threatens to interfere with the successful accomplishment of the federal purpose."

If you could see your way clear to changing this sentence to this or something similar, I will join your opinion.

Respectfully,



Justice Marshall



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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 31, 1983

Re: 82-331 - New Mexico v. Mescalero Apache Tribe

Dear Thurgood:

Please join me.

Respectfully,

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 27, 1983

Re: No. 82-331, New Mexico v. Mescalero Apache Tribe

Dear Thurgood,

As you know, I voted with the majority in this case. Because of my position in Rice v. Rehner, however, I am having some difficulty with some of the language in your proposed opinion. As soon as I can get to it, I will either send along some possible specific suggestions or will circulate a separate concurrence in the result.

Sincerely,



Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 31, 1983

Re: New Mexico v. Mescalero Apache Tribe, No. 82-³³¹~~231~~

Dear Thurgood,

I am essentially in agreement with both the result and your approach in this case.

As I mentioned to you in my earlier letter, I am having some difficulty with certain portions of your proposed opinion due to my hope that it can be compatible with my draft opinion in Rice v. Rehner. My specific problems are these:

1. On page 8, in the first full paragraph, you quote Mescalero and Confederated Tribes for the proposition that Indians on reservations have been historically immune from all state control, and that they retain this immunity insofar as it is consistent with federal objectives. I think it would be more accurate to say that "Because of their sovereign status, tribes and their reservation lands have, in some circumstances, possessed 'historic immunity from state and local control,'" This would avoid conveying the impression that Indians have enjoyed a tradition of immunity from state law in all areas.

2. Also on page 8, in the second full paragraph going over to page 9, you state that "our cases establish that a State may not assert its authority over the activities of members on a reservation in the absence of express tribal consent or congressional grant." Again, I think that this statement would be more accurate if it were to read: "our cases establish that where there is a tradition of tribal sovereign immunity, the State"

3. On page 12, in the carryover paragraph, you state: "Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority is preempted to the extent that it 'threaten[s] the overriding federal objective' of promoting 'tribal self-sufficiency and economic development.'" I think the implication of this statement is too broad and contrary to the balancing structure for preemption analysis established in Bracker. The statement suggests that anytime state authority threatens the federal policy in favor of Indian economic self-development, state regulation is preempted. To me this is contrary to the spirit of Bracker. The threat to a federal policy is only one factor to be considered. There is no preemption "to the extent" there is a threat, as the opinion suggests. In short, some financial burdens imposed by state regulation may be perfectly permissible depending on the outcome of balancing federal and tribal interests against state interests. I suggest that the sentence be changed to read: "Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be weighed against any threat to an "overriding federal objective" of promoting "tribal self-sufficiency."

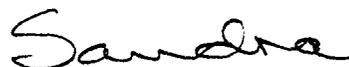
4. Also on page 12, in the first full paragraph, you suggest that when a State seeks to impose additional burdens on a tribal enterprise, it must ordinarily justify those burdens by performance of services. I think that it would be appropriate to mention in this context our decisions in Confederated Tribes and Moe, which held that the State may tax certain on-reservation transactions, and may impose burdens on Indian businesses to aid in collecting and enforcing that tax.

5. Also on page 12, in the first full paragraph, you state: "A State seeking not merely to tax but to regulate a tribal activity is under a greater burden to advance a significant State interest, since duplicative and potentially conflicting regulation is generally more disruptive than double taxation." As far as I know, we have never required that States advance a "significant interest" in order to impose a regulation when non-members are involved, or where there is no tradition of tribal immunity. Perhaps this sentence could be changed to read: "When a State seeks to regulate traditionally immune transactions between tribal members on a reservation, the State must have a significant interest in order to impose the regulation."

6. On page 19, you suggest that even if the State sought to characterize the licensing requirement as a tax, "the State's financial interests are insufficient to justify the exercise of concurrent jurisdiction." As you acknowledge, the State defends the licensing requirement only as a proper exercise of its regulatory power. I see no reason to discuss what would happen if the State characterized the requirement here as a proper tax measure. Moreover, I would prefer to avoid any suggestion that the tribes have a sovereign interest in sales of "hunting packages" to non-members of the tribe for purposes of state taxation of those "packages." That would seem to create a tension with our decisions in Confederated Tribes and Moe.

I think none of the suggested changes would alter your essential approach and if you could accommodate these concerns, I would be happy to join your opinion.

Sincerely,



Justice Marshall

Copies to the Conference

FD

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 3, 1983

Re: New Mexico v. Mescalero Apache Tribe, No. 82-331

Dear Thurgood,

Thank you for accommodating my suggestions in order to remove any inconsistency with Rice v. Rehner, No. 82-401. Please join me.

Sincerely,



Justice Marshall

Copies to the Conference