10-1978

Wilson v. Omaha Indian Tribe

Lewis F. Powell Jr.

should be discussed. The amici briefs - from 30 states & American Land Title Association - think issue is important, & preference given Indians as to land ~~title~~ title — tho expressed in terms of preemptions - in unsettling to titles.

Possibly could join 3

10/31 Reply to Response - Please see p. 11

PRELIMINARY MEMORANDUM

November 3, 1978 Conference
List 1, Sheet 2

No. 78-160

WILSON, et al. (rival land claimants)	Cert to CA 8 (Lay, Stephenson, Henley)	
v.		
OMAHA INDIAN TRIBE & UNITED STATES	Federal/Civil	Timely
No. 78-161		
IOWA	(Same)	
v.		
OMAHA INDIAN TRIBE & UNITED STATES	(Same)	(Same)

I recommend denial. Comment on back.

Bruce

No. 78-162

RGP, INC., et al. (rival land claimants) (Same)

v.

OMAHA INDIAN TRIBE & UNITED STATES (Same) (Same)

1. SUMMARY: Petrs in these consolidated cases challenge a ruling by the CA 8 that reverses a DC judgment quieting title in petrs to 2900 acres of Iowa farmland on the east bank of the Missouri River. The effect of this reversal is to transfer this land to the United States as trustee and to the Omaha Indian Tribe whose reservation lies on the opposite side of the river. The United States and the Tribe claim that the land is a part of the reservation transferred to the Iowa side of the river by avulsive actions. Petrs to the contrary contend that the land is accretion to the Iowa riparian land or to the part of the bed of the river owned by the State of Iowa. The CA 8 held that neither petrs nor resps had proved accretion or avulsion, but that 25 U.S.C. § 194 put the burden of proof on petrs and therefore judgment had to be for resps. Petrs variously attack § 194 as a violation of their Fifth Amendment right to due process, as erroneously applied under the facts of these cases, and as improperly extended to cover the State of Iowa. They also challenge the CA 8's application of federal and not state common law with regard to accretion and avulsion, and claim that even if federal common law was the appropriate standard, it was improperly applied here.

2. FACTS & DECISIONS BELOW: In March of 1854 the United States

entered into a treaty with the Omaha Indian Tribe. By the terms of that treaty certain land located in an area known as Blackbird Bend was reserved by the Tribe, which ceded to the United States all other land west of the center of the main channel of the Missouri River. At the time of the treaty the reserved land within Blackbird Bend was located on the west side of the Missouri River. By 1923, however, the river had moved more than two miles to the west of its 1854 position. Petrs asserted before the DC and CA 8 that early movements of the Missouri River had washed away much of the land within the original Blackbird Bend area, and that the lands now claimed by the Tribe on the east side of the Missouri were the product of soil that had accreted to the Iowa riparian land. It therefore was not the same land that the Indians had obtained by treaty.

From the 1940's petrs and their predecessors had occupied and cultivated the land in dispute. In April of 1975, with the assistance of the Bureau of Indian Affairs and with the approval of the United States, the Tribe seized possession of the land and is now farming it. In conjunction with the United States, it also brought suit in the DC to establish its title to the land. Petrs counterclaimed to quiet title in their names.

The DC found that the Tribe and the United States had failed to prove that the river movements were controlled by the doctrine of avulsion and held that the river had changed by reason of the erosion of reservation land and accretion to Iowa riparian land. The CA reversed. The areas of disagreement between the CA and DC are as follows:

A. Choice of Law: The DC applied Nebraska law in evaluating the facts of the case. The Tribe and the government asserted that federal law controlled. Although the general rule is that state law determines the ownership of the banks and shore of waterways, the rule is subject to the caveat that a body of federal common law has developed to determine the effect of a change in the bed of a stream or river that forms an interstate boundary. See, e.g., Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 375 (1977). Federal common law is applicable even if a single state is involved in a controversy with a private party, as long as the interests of more than one state are sufficiently implicated in the potential outcome. Here, according to the CA, the reservation's boundary necessarily concerned the interstate boundary between Nebraska and Iowa. Also the applicability of federal law was dictated by the involvement of a reservation boundary that was originally created by treaty. See Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 677 (1974).

B. Burden of Proof: Section 194 of Title 25 of the United States Code provides:

> Trial of right of property; burden of proof
>
> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

(Emphasis added.) Section 194 was one of a number of protective laws that constituted the Indian Non-Intercourse Acts of 1834.

The DC held that § 194 was not applicable in the instant controversy. It's reasoning apparently was that application of § 194 would require the court to presume that the land originally occupied by the Indians was exactly the same land that is the subject of these cases. The CA disagreed, stating that the trial court's reasoning would eviscerate the § 194 statutory burden, because it could be overcome by a mere allegation that the Indian land had been destroyed by erosion. That an 1867 survey established that land in the area now under dispute belonged to the Tribe was sufficient to "make out a presumption of title . . . from the fact of previous possession or ownership."

C. Merits: The CA then turned to the merits and the lore of accretion and avulsion. It rejected the trial court's position that avulsion occurs only (1) when there is a sudden and erratic jump or movement of the thalweg (the navigable channel of a river) and (2) the land across which the thalweg moves remains identifiable. And viewing the evidence it concluded that petrs had only raised speculative inferences that the thalweg moved by accretion rather than avulsion. Therefore, under § 194 petrs had failed to meet their burden of proof and title vested in the Tribe.

3. CONTENTIONS:

A. No. 78-160: Petrs' central contention is that § 194 is invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. The issue was only discussed in a footnote by the CA and was not discussed at all by the DC. The CA relied on the following

passage from Morton v. Mancari, 417 U.S. 535, 554-55 (1974):

> On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. This unique legal status is of long standing and its sources are diverse. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

(Citations omitted.) Petr claims that the CA 8 should have subjected § 194 to strict scrutiny.

Petrs also argue that the CA misconstrued § 194; it refers to individual Indians, not to tribes. Moreover, the CA construed § 194 to apply to all non-Indians, whether states, corporations or individuals. Petrs cite an 1880 case of this Court where the term "white person," as used in an Indian protection statute similar to § 194, was held not to include black persons. United States v. Perryman, 100 U.S. 235 (1880). Also they claim that the Tribe has to prove avulsion before § 194 comes into play, because as a logical matter the Tribe could not have had "previous possession or ownership" of the land if it was the product of accretion.

Petrs also attack the application of federal common law. They argue that no state boundary issue is involved in this case. As of 1943 Iowa and Nebraska have agreed to a permanent boundary line and there is no question in this case but that the land at issue is in Iowa. Nor is there any showing of conflict between federal policy and state law warranting application of federal law. Moreover, according to petrs, the CA did not even apply federal law correctly. Their principal complain

is with the CA's holding that the absence of identifiable land in place, i.e., land that can be identified as having been severed from the opposite bank of the river, is of little probative value in deciding the accretion/avulsion issue. It is not the rapidity of the change but the character of the change which is important.

Finally, they claim the CA's conclusion on accretion is contrary to the evidence.

B. No. 78-161: The State of Iowa emphasizes that it is a state, not a white person, and the CA erred in applying the § 194 presumption to it. Generally it makes the same arguments as petrs in No. 78-160.

C. No. 78-162: Petrs in this case focus on what they term § 194's invidious discrimination on the basis of race. They also note that the statute is arbitrary, there is no rational link between ownership in 1867 and ownership in 1977. And since accretion/avulsion issues with a 100 year time-frame are simply impossible, the party with the burden of proof loses. Therefore, petrs conclude that § 194 is also, for all practical purposes, an irrebuttable presumption. Section 194 has essentially lain dormant for 140 years, but, according to petrs, it will increasingly be resorted to now in Indian land disputes, which have had a much publicized resurgence in recent years. Therefore this Court should subject it to plenary review at this time. They distinguish Mancari, supra. There this Court was concerned with a statutory preference for Indians as employees of the Bureau of Indian Affairs. That preference was obviously rationally related to the activities of BIA.

D. Resps: Responses have been filed by the SG and the Omaha Indian Tribe. The SG relies on this Court's opinions in Mancari, supra, and United States v. Antelope, 430 U.S. 641 (1977), for the proposition that legislation that singles out Indians for special treatment will be upheld as long as the special treatment is rationally related to fulfillment of Congress' unique obligations toward the Indians. Here the special obligation is protection of the most valuable asset of Congress' Indian wards -- their land. The SG also argues that the § 194 issue is not ripe for review. This is a case of first impression and there is no conflict in the circuits. The constitutionality of § 194 was only given cursory scrutiny by the courts below. For the same reason he would counsel against plenary review of the various statutory interpretation issues raised by petrs. He defends those interpretations by invoking the maxim that statutes enacted for the protection of the Indians should be liberally construed. See, e.g., Bryan v. Itasca County, 426 U.S. 373, 392 (1976). He adds that to construe the statute to only apply to claims of individual Indians, and not to those of tribes, would be to rob the statute of most of its protective qualities, since as a general matter whatever title an Indian has is shared with the tribe. He also argues that the CA 8's broad reading of "white person best comports with the statute's purpose.

The SG also contends that the CA was correct to apply federal law. Although the boundary between Iowa and Nebraska is, as of 1943, governed by a compact, the changes at issue in this case occurred before that

time, therefore they did implicate an interstate boundary. Also, citing Oneida, supra, he relies on the special federal interest in the protection of possessory rights to tribal land. The SG also adopts the CA's position on the proper characteristics of an avulsion.

The Tribe argues that the constitutionality of § 194 need not be considered in this case. It argues that petrs voluntarily assumed the burden of proof because they attempted to show in the trial court that the land did not in fact belong to the Tribe. As best as I understand it, this contention seems to be that if a defendant voluntarily submits evidence on the ultimate issue at trial, he voluntarily assumes the burden of proof. I know of no precedent for that argument and the Tribe cites none.

In response to the constitutional and statutory challenges to the CA's reading of § 194, the Tribe relies heavily on this Court's traditional deference to Indian legislation. The Tribe also questions whether Iowa has any land at issue in this case.

E. Amici: There are four briefs for Amici Curiae, representing 30 states, the American Land Title Association, and farm owners in Iowa. All were filed in support of petrs.

4. DISCUSSION: Of the numerous issues raised in these petns, some are clearly not certworthy. It would be extremely difficult for this Court to articulate a useful definition of avulsion for purposes of federal common law. The only salutery outcome might be the discarding of the metaphysics of accretion/avulsion entirely. But this case

essentially involves burdens of proof, the CA found that the DC's finding of accretion was erroneous and that the evidence was too speculative to draw any conclusion on avulsion or accretion. So it does not provide an appropriate vehicle for dealing with the accretion/avulsion issue.

The argument that § 194 applies only to actions by individual Indians, not tribes, is hypertechnical and unconvincing and would clearly undermine the protection that section affords. The same is true of the DC's argument that the Indians must prove an avulsion before § 194 comes into play at all. The application of federal common law is more questionable, but defensible insofar as movements of the Missouri during the times at issue (largely pre-1943) also altered the boundary between Nebraska and Iowa. It would not independently warrant cert.

The constitutional and statutory interpretation challenges to the CA's handling of § 194 are substantial. The CA s definition of "white man" is inconsistent with this Court's interpretation of a similar phrase in another statute. United States v. Perryman, 100 U.S. 235 (1880). And although this Court has time and again upheld legislation that singled out Indians for special treatment; e.g., United States v. Antelope, 430 U.S. 641 (1977); Fisher v. District Court, 424 U.S. 382 (1976); most of these cases have relied on the special sovereignty attributes of the Indian tribe. That logic is not clearly applicable to legislation like § 194.

The preference legislation such as that at issue in Mancari is

most closely analogous. But in Mancari the Court did feel compelled to analyze whether the employment preference statute was "directly related to a legitimate, nonracially based goal." It found two such goals: furthering the cause of Indian self-government and making the BIA more responsive to the needs of its constituent groups. Section 194 is more similar to a statute the Court emphasized was not before it in Mancari: a blanket civil service preference for Indians.

There are responses by SG and Tribe.

10/25/78 Haar CA & DC ops in app.
CMS

Reply to Response

The petrs assert that the issues of constitutional law and statutory interpretation are squarely present despite the absence of any conflict in the circuits.

The petrs also assert once again that the questions are of great public importance, given the possible impact on land titles.

They point out that the presumption supplied by § 194 was of critical importance to the holding of the CA.

1. Statutory interpretation of § 194. The SG points out that the phrase "white person" in the reparation statute considered in Perryman had a legislative history that specifically excluded blacks from the ambit of the statute. Prior to 1834, the Perryman Court noted, the statute had made the United States liable for injuries to the property of friendly Indians by any person. As the Court also noted, in 1834 the Cherokee nation was about to remove from Ga. to its new western lands. By restricting the coverage of the reparation statute to "white persons," Congress aimed at making the Indians less likely to tolerate fugitive black slaves in their country. As the SG points out, there is no comparable history of the phrase "white person" in §194.

2. Constitutionality of § 194. If the § 194 burden of proof were applied to a title dispute between a single Indian and another person over fee land unassociated with an Indian reservation, then the case might be analogous to the general civil service preference law mentioned in Mancari. But here, where the title dispute has to do with part of the Omaha Tribe's reservation, I think the special treatment of the Indians is justifiable by reference to their sovereign status and the history of relations between them and the United States.

Argued ....., 19... *Assigned* ....., 19... No. 78-161

Submitted ....., 19... *Announced* ....., 19...

IOWA

vs.

OMAHA INDIAN TRIBE

Grant
(Relisted
for Byron
to clarify
questions)

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.			✓										
Brennan, J.		✓		limited to Q 1 + Q 4									
Stewart, J.		✓											
White, J.		✓		"				"			"		
Marshall, J.													
Blackmun, J.													
Powell, J.		✓		limited									
Rehnquist, J.		✓											
Stevens, J.		✓											

Jan 3 (?)

PRELIMINARY MEMORANDUM

November 3, 1978 Conference
List 1, Sheet 2

No. 78-161

IOWA

v.

OMAHA INDIAN TRIBE & UNITED STATES

Cert to CA 8
(Lay, Stephenson, Henley)

Federal/Civil

Timely

Please see Preliminary Memo No. 78-160, Wilson v. Omaha Indian Tribe & United States.

10/24/78
CMS

Haar

November 3, 1978

Court .... Voted on ...., 19...

Argued ...., 19... Assigned ...., 19... No. 78-160

Submitted ...., 19... Announced ...., 19...

WILSON

vs.

OMAHA INDIAN TRIBE

River bed moved by avulsion. D C applied law of Neb. CA held fed law applied, & ~~[illegible]~~ applied burden of proof statute. ~~[illegible]~~ Q3 in 78-160 presents fed/state law issue.

Grant on Q 3

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.			✓										
Brennan, J.		✓		on	Q		3						
Stewart, J.		✓		"		"							
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.			✓										
Powell, J.					Join		3						
Rehnquist, J.		✓											
Stevens, J.		✓		on	two		Q.						

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 7, 1978

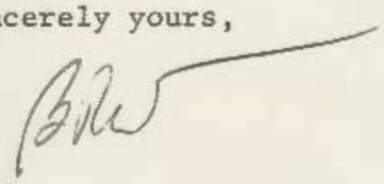
MEMO TO THE CONFERENCE

Re: Nos. 78-160, 78-161 & 78-162 -

Wilson v. Omaha Indian Tribe
Iowa v. Omaha Indian Tribe
RGP, Inc., v. Ohama Indian Tribe

The Conference was interested in limiting the possible grants in these cases to the questions of whether federal or state law controlled and whether § 194, the burden of proof section, applied against a state. With this in mind, the grant in No. 78-160 should be limited to question 2, which includes the issue whether Iowa should be considered a "white person" for the purposes of § 194 and question 3 going to the federal-state law issue. In No. 78-161, the state's petition, question 1 poses the § 194 matter and question 4 the controlling law issue. No. 78-162 raises neither question but perhaps should be held.

Sincerely yours,



Argued ....., 19... *Assigned* ....., 19... No. 78-160

Submitted ....., 19... *Announced* ....., 19...

WILSON

vs.

OMAHA INDIAN TRIBE

Relisted for Mr. Justice White.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

Argued ....., 19... *Assigned* ....., 19... No. 78-161

Submitted ....., 19... *Announced* ....., 19...

IOWA

vs.

OMAHA INDIAN TRIBE

Relisted for Mr. Justice White.

Grist

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

May 29, 1979

78-160 Wilson v. Omaha Indian Tribe

Dear Byron:

Please show on the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 30, 1979

Re: 78-160 - Wilson v. Omaha Indian Tribe
78-161 - Iowa v. Omaha Indian Tribe

Dear Byron:

Although I had originally intended to write a dissent, your opinion has convinced me to join. Please join me.

Respectfully,

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 30, 1979

RE: Nos. 78-160 & 161 Wilson & Iowa v. Omaha Indian Tribe

Dear Byron:

I was the other way but I give up. Your very persuasive opinion carries the day with me. Please join me.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 31, 1979

Re: 78-160 and 78-161 - Wilson v. Omaha Indian Tribe, etc.

Dear Byron:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 31, 1979

Re: Nos. 78-160 & 161 - Wilson & Iowa v. Omaha Indian Tribe

Dear Byron:

I give up. Please join me.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 31, 1979

Re: Nos. 78-160 and 78-161 - Wilson v. Omaha Indian Tribe, et al.

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 4, 1979

Re: No. 78-160 - Wilson v. Omaha Indian Tribe
No. 78-161 - Iowa v. Omaha Indian Tribe

Dear Byron:

Please join me. I shall be writing a paragraph in separate concurrence.

Sincerely,

HAB.

Mr. Justice White

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
			4/2/79					
Join BRW 6/5/79	Join BRW 5/30/79	Join BRW 5/31/79	1st Draft 5/29/79	Join BRW 5/31/79	Join BRW 6/4/79	cert letter 5/29/79	Join BRW 5/31/79	Join BRW 5/31/79
Join HAB 6/12/79			2nd Draft 6/4/79 3rd Draft 6/6/79		Con opinion typed Draft 6/11/79			
			3rd Draft 6/5/79		1st Draft 6/12/79			
				78-160 Wilson v. Omaha Indian Tribe				