



10-1972

## Tonasket v. Washington

Lewis F. Powell Jr.

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Court Wash. Supreme Ct.  
 Argued ..... 19...  
 Submitted ..... 19...

Voted on....., 19...  
 Assigned ..... 19...  
 Announced ..... 19...

No. 71-1031

LEONARD TONASKET, Appellant

vs.

*Relist*

WASHINGTON, ET AL.

2/12/72 Appeal filed.

*Agreed to  
 Request SG opinion  
 — There was  
 doubt (especially  
 on my part) as  
 to ~~what~~ Gov't's  
 position. There is  
 a special statute  
 involved - according to  
 J. White*

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....													
Rehnquist, J. ....						✓							
Powell, J. ....													
Blackmun, J. ....													
Marshall, J. ....						✓							
White, J. ....						✓							
Stewart, J. ....													
Brennan, J. ....						✓							
Douglas, J. ....													
Burger, Ch. J. ....						✓							

*Request SG*  
*Request SG*  
*Request S.G*  
*Request SG for Views*

3/24/72

Await Discussion.  
I see no merit, but possibly we should settle question of taxability of Indian

Another Indian case - activity -

claiming that a state excise tax on cigarettes being sold by an Indian in a shop on Indian land ~~is~~ is invalid.

DISCUSS

This is 3<sup>rd</sup> Indian tax case since ~~the~~ January. We have granted one. I think there is no merit to any of them, but

No. 71-1031 possibly we should settle question of taxability of Indian business  
Tonasket v. Washington  
Appeal from Wash SC: Rosellini, et al. activity,

~~xxxxxx~~ Appellant is a member of the Colville Confederated Tribes of American Indians. He has a business on tribal land xxxxxx in Wash selling xxxxxx cigarettes. Wash imposes a state excise tax on the sale of cigarettes which/~~xxx~~ <sup>appellant</sup> did not pay. The state initiated criminal proceedings against him for failure to pay the tax. Appellant then brought this state declaratory judgment action seeking to have the state law declared void as in ~~xxxxxx~~ conflict with the federal laws and with the federal Constitution. He ~~xxxx~~ lost in the state courts, and he brings this appeal from a decision of the highest state court upholding the constitutionality of the state law.

CONTROLLING CASE: Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965).



① Appellant raises three federal issues. The Wash statute provides that real and personal property may be levied on and sold to pay unpaid taxes. However, this Court has held on several occasions, most notably in Squire v. Capowman, 351 U.S. 1 (1956), that real or personal property held in trust by the federal govt for Indians may not be levied on by states. ~~Although~~ Appellant's store is on such trust property, and while the state has made no effort to attach that property as yet, the state is so authorized under the statutes. The state replies that the mere fact that its attachment law may not be applied to ~~xxxxxxx~~ trust property does not mean that the taxing statute is illegal. It seems to me that the state is clearly correct; no one has attempted to attach trust land.

② Second, appellant argues that the Federal Indian Trader Statutes apply and forbid the state from taxing x him. The Trader law applies ~~to~~ a complex ~~xxx~~ set of federal regulations to persons trading on reservations "other than an Indian~~x~~ of the full blood." Appellant is a full-blooded Indian, but he argues that by implication, he can trade freely on reservation land without a license. He sees the statute as saying non-Indians can trade only with a license, but ~~Indians~~ <sup>Indians</sup> can trade without being regulated. He then relies on the Court's opinion in Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965), which struck down an Arizona tax on a non-Indian trader on the ground that the federal govt had preempted the regulation of that ~~xxx~~ field. But as the state points out, one of the reasons for the federal pre-emption specifically

mentioned by the Court in Warren Trading Post was that the federal govt had not authorized state jurisdiction over the reservation. That is not true here. As a result of Public Law 83-280, the state of Wash was given ~~jurisdiction~~ civil and criminal jurisdiction over Indians and Indian land if the state chose to exercise it. Appellant's ~~xxx~~ tribe voted to ask Wash to exercise that jurisdiction, and the legislature complied. Thus, commerce on the reservation falls under the jurisdiction of the state, unlike the situation in ~~Warren~~ Warren Trading Post.

Appellant argues, however, that Public Law 83-280 did not repeal other federal policies and laws--including the policy in favor of assisting Indians to improve the tribal economy and including the Trader law. But there is nothing in Public Law 83-280 to support this interpretation. It was enacted after the Trader law and its purpose was to remove the reservations from federal control except in a few specified instances. Thus the law ~~provides~~ provides that even though the state assumes jurisdiction, it can still not attach trust land and that it cannot deprive the Indians of hunting and fishing rights on trust land. But the rest of federal regulation is clearly pre-empted by this later statute.

3 Appellant's third federal claim is that Public Law 83-280 does not pre-empt all other federal laws not specifically excepted, but it would seem clear that this is not the case. More importantly, the opinion below only held that it pre-empted the Trader law which is clearly correct since to subject the ~~x~~ Indians to state jurisdiction but ~~excepted~~



exempting them from all ~~x~~ commercial regulation by the states as well as all taxing regulations would cut the heart out of the law.

Finally, as is asserted in all these cases, appellant asserts that the state regulation of his sale of cigarettes violates tribal sovereignty. Tribal sovereignty is of doubtful legal significance, but is always asserted in keeping with the new Indian ~~militancy~~ militancy. It is doubtful that it overrides state laws, but in this case, the tribe specifically ~~requested~~ requested the state to exercise ~~its~~ its jurisdiction granted to it under Public Law 83-280.

I do not think that there is a substantial federal question here and the Court should probably dismiss the case. It should be noted, however, that this is the third Indian-state tax case that I have written you a memo about. I do not know how many others there are kicking around. The Court has granted cert on one of these, Mescalero Apache. Perhaps it would be wise to take more of these cases and resolve the problem forever or to hold ~~all~~ all these cases for the one already granted.

DISSMISS & DENY

Fox

6/5/72

Note of  
set with other  
Indian Tax Cases

71-738

71-834

**DISCUSS**

No. 71-1031

SUPPLEMENTAL MEMO

Tonasket v. Washington

The SG has filed a brief at the Court's invitation in this case which concerns a state's power to tax Indian commerce conducted on the reservation. He recommends that the Court note jurisdiction. He says that the extent to which the law giving states criminal and civil jurisdiction over reservations affects trading is unclear. While a literal reading of the law seems to indicate that the state does have jurisdiction ~~can~~ and can tax Indian trade, there is apparently legislative history indicating that the measure was concerned primarily with criminal jurisdiction and civil torts. He argues that the Indians have a right to know definitely whether the state has any power to tax them. In light of this memo, and the persistency of these tax cases, I think the Court should note the case and set it with the other two Indian tax cases, Nos. 71-738 ~~and 71-834~~ and 71-834.

NPJ

Fox







*Reverse & Remand on  
Basis of New Statute*

DOUGLAS, J.

*Remand*

MARSHALL, J.

*R + R*

*Law 280 does not afford  
answer.*

*Reverse as to sales to  
Indians*

BRENNAN, J.

*Remand*

BLACKMUN, J.

*R + R*

*Vacate for Reconsideration*

STEWART, J.

*Remand*

POWELL, J.

*R + R*

*New state statute changes  
situation: (1) state <sup>now</sup> allows  
sales of not more than 2  
cans to non-Indians and  
(2) sales to Indians are  
not to be taxed.*

*(But for new statute,  
I'd affirm as to  
sales to non-Indians.)*

WHITE, J.

*Remand*

REHNQUIST, J.

*R + R*

*for reconsideration  
in light of new statute*

MEMO:

*C. J. ~~Opinion~~ R + R*

*The Tribe, under Sec 280, has accepted full citizenship  
This is dispositive. See House Report.*

*State law has been amended to exclude  
sales by Indians to ~~non~~ Indians.*

*Sally - no formal opinion will be written*

Tentative view: I would affirm. Petr.  
 here was engaged in retail sales of cigarettes  
 on Indian reservation property - but to Indians  
 & non-Indians (400 cartons per day) - & refused  
 to pay State sales tax. No special interest  
 of Indians is implicated. Not a tax on  
 their lands or use thereof. Congress has  
 not expressly ~~excluded~~ limited State's power  
 to tax retail sales. Indian is here competing  
 with non-Indians.

### Pixtle

Appellant borrowed Fed. funds  
 to operate a store on Reservation.  
 St. of Washington claims jurisdiction  
 over Indian trading

Argues that if we uphold S/Ct of  
 Washington, - the results will be  
 disastrous; will "repeal" Bush Act



Z county (also for appellant)

Gorton (<sup>The</sup> Atty Gen of Wash) { made a strong argument - see transcript.

Imp.

Then a first case in which an Indian claims a personal right to engage in private business in competition with other citizens.

Congress has been explicit in specifying tax exemptions for Indians.

Gorton says Reservations are unlike Navajo Res. in Arizona

Indian Trader Act affords no exemption.

State is not now trying to impose the tax on sales to Indians - the tax is to be imposed only on sales to non-Indians.

(If I write, I should look at maps used in oral argument which show location of Reservations & extent to which Indians & non-Indians have been integrated in ~~the~~ living & doing business in same communities

Gorton (cont).

Ultimate burden of cig. tax is passed on to consumer. Wholly unlike real est. or income or estate taxes.

Appellant is a citizen of Wash. entitled to every right of other citizens - schools, police, etc.

The way to an equal protection issue here: Congress compelled Wash. to confer citizenship on Indians. If state may ~~not~~<sup>not</sup> tax \$ business of an Ind., there is discrimination vs. competing non-Indians.



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

1st DRAFT

SUPREME COURT OF THE UNITED STATES <sup>White, J.</sup>

No. 71-1031

Circulated: 4-18-73

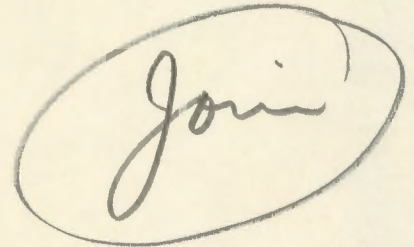
Recirculated: \_\_\_\_\_

Leonard Tonasket, Appellant, } On Appeal from the  
v. } Supreme Court of  
Washington et al. } Washington.

[April —, 1973]

PER CURIAM.

The judgment of the Supreme Court of Washington is vacated, and the case is remanded to that Court for reconsideration in light of §§ 6 and 7 of c. 157, 1972 Session Laws of the State of Washington, and this Court's decision in *McClanahan v. Arizona State Tax Comm'n*, No. 71-834 (March 27, 1973).



April 18, 1973

No. 71-1031 Tonasket v. Washington et al

Dear Byron:

Please join me in your per curiam.

Sincerely,

Mr. Justice White

cc: The Conference



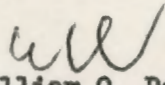
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

April 18, 1973

Dear Byron:

Please join me in your per curiam  
in 71-1031, Tonasket v. Washington.

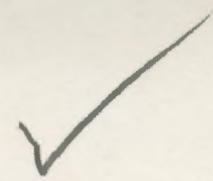
  
William O. Douglas

Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST



April 19, 1973

Re: No. 71-1031 - Tonasket v. Washington

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 POTTER STEWART

April 19, 1973

71-1031 - Tonasket v. Washington

Dear Byron,

I agree with the Per Curiam you have  
circulated in this case.

Sincerely yours,

P.S.  
✓

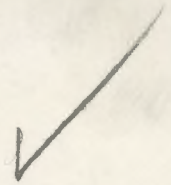
Mr. Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 19, 1973



Re: No. 71-1031 - Tonasket v. Washington

Dear Byron:

Please join me in your per curiam.

Sincerely,

*H. A. B.*

Mr. Justice White

cc: The Conference



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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

April 19, 1973

RE: No. 71-1031 Tonasket v. Washington

Dear Byron:

I agree with the Per Curiam you have  
prepared in this case.

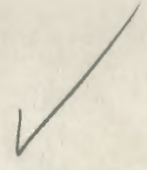
Sincerely,

*Bill*

Mr. Justice White

cc: The Conference

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



CHAMBERS OF  
THE CHIEF JUSTICE

April 19, 1973

Re: No. 71-1031 - Tonasket v. Washington

Dear Byron:

Please join me in your per curiam.

Regards,

Mr. Justice White

Copies to the Conference



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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

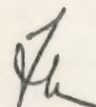
April 19, 1973

Re: No. 71-1031 - Tonasket v. Washington

Dear Byron:

I agree with your per curiam.

Sincerely,



T.M.

Mr. Justice White

cc: Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
join BRW 4/19/73	join BRW 4/19/73	PC 12/15/72 <del>circulated</del> <del>4/18/73</del>	join BRW. 4/19/73	circulated 1st draft 4/18/73	join BRW 4/19/73	join BRW 4/19/73	join BRW 4/18/73	join BRW 4/19/73
		join BRW 4/19/73						
					No. 71-1031	Tonasket v.	Washington	