



10-1979

White Mountain Apache Tribe v. Bracker

Lewis F. Powell Jr.

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Views of SG
(Another Indian
embassy!!!)

6-14-79

The SG suggests you either grant
or hold for 78-630, Washington v.

Confederated Tribes, as the issues involved
are similar. As there is a substantial
jurisdictional question in Confederated
Tribes, I recommend you grant here
and argue in tandem with 78-630.

Paul

SG recommends
Grant or Hold
for 78-630

I will await
discussion. I
am reluctant to
take another
Indian case

PRELIMINARY MEMORANDUM

SL 1, Sh. 1

March 16, 1979 Conference
List 3, Sheet 3

No. 78-1177

WHITE MOUNTAIN
APACHE TRIBE, et al.

Cert. to Ariz. Ct. App.
(Eubank, Jacobson, Ogg)

v.

BRACKER, et al (Ariz.
state officials)

State/Civil

Timely

SUMMARY: Petitioners contend that various federal statutes preclude Arizona from collecting diesel fuel and gross receipts taxes from non-Indian logging operations performed on an Indian reservation under contract with an Indian lumber company.

FACTS AND DECISION BELOW: Petitioners are a federally recognized Indian tribe and two non-Indian companies who participate in a joint venture named Pinetop Logging Company. Under tribal

Call for views of SG.

Paul

law, the indians have created a lumber company named FATCO. FATCO operates a lumber operation on the tribe's reservation which is the major source of revenues for the tribal government. Under contract with FATCO, Pinetop cuts timber on the reservation and hauls it to the sawmill by truck. Pinetop has no operations in Arizona except on the reservation.

Timber on indian reservations is owned by the United States for the benefit of the indians. FATCO's operations are conducted pursuant to a contract with the Bureau of Indian Affairs (BIA), and the terms of FATCO's contract with Pinetop are dictated by BIA. All of FATCO's operations, including those performed by Pinetop, are subject to pervasive regulation by BIA. BIA actually designates the trees to be cut, and fixes the speed limits for Pinetops trucks. BIA's authority to approve or disapprove Pinetop's contract with FATCO allows it to control the price charged for Pinetop's services

The roads on the reservation result from the efforts of three parties: the state, the tribe, and Pinetop itself. The state contributes nothing to the construction and maintenance of roads built by the tribe or Pinetop. In the course of its operations, Pinetop principally uses roads built by itself and the tribe, but it sometimes travels for short distances over state roads.

Arizona imposes two taxes to pay for building and maintaining highways: a tax on sales of diesel fuel, and a tax on motor

vehicle contract carriers calculated at 2.5% of gross receipts. When Pinetop initially contracted to do logging for FATCO in 1969, the contract price was established on the basis of the expectation that it would not be required to pay these taxes in connection with its operations. In 1971, Arizona demanded payment of the fuel and carrier taxes in connection with Pinetop's operations, and Pinetop and FATCO agreed that FATCO would pay any taxes for which Pinetop ultimately was held liable.

Pinetop paid and has continued to pay the taxes under protest, and commenced this action in an Arizona court for a refund and a declaration that it was immune from the fuel and carrier taxes by operation of various federal statutes relating to indians. The challenge is limited to taxes allocable to operations over tribal and Pinetop roads: the company keeps accurate records of its use of state roads and concedes the propriety of the taxes allocable to that use. The trial court granted summary judgment dismissing the complaint, and the Court of Appeals affirmed.

First, the Court of Appeals held that the Arizona Enabling Act, which in terms deprived Arizona of all right, title and jurisdiction of indian reservations, does not preclude state taxation of non-indians, even in connection with activities on reservations. Second, the court found that the taxes were not barred by 25 C.F.R. § 1.4, which exempts property belonging to indians from all state laws regarding the regulation and devel-

opment of property. The court explained that the taxes were levied on Pinetop's business activities, not on the use of indian property.

Third, the court held that the taxes were not preempted by the pervasive regulation of indian lumbering operations by BIA and Congress. It asserted that the federal regulations demonstrated no concern for the prices charged by Pinetop, that there was no evidence of federal intent to oust state authority respecting the commercial activities of non-indians, and that the taxes would not impede FATCO's lumbering business so seriously as to conflict with the administration of any federal program. Finally, petitioners contended that the taxes would interfere with the tribal government in various ways, but the court dismissed the asserted interference as "more imaginary than real."

CONTENTIONS: Petitioners make the following contentions:

1. This case gives this Court its first opportunity to rule on the extent to which state taxation of lumbering operations on indian reservations is preempted by federal law, and this is a question of immense economic importance to indians.

2. The state taxes are preempted by the pervasive federal regulation of indian lumbering, under Warren Trading Post v. Arizona State Tax Commission, 380 U.S. 685 (1965). There, this Court held that federal law preempted an Arizona transaction tax as applied to a non-indian doing business as an indian trader on

an indian reservation. As in this case, the Court stressed that the trader's operations were subject to pervasive regulation for the benefit of the indians, and in particular that the taxes would interfere with the policies served by federal control of the prices charged by the trader.

3. The taxes are contrary to the Arizona Enabling Act. The Enabling Act imposes at least some limits on Arizona's governmental authority with respect to reservations. Thus, it imposes limits on state criminal jurisdiction, and prohibits state income taxation of indians living on the reservation, McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 175-76 (1973) (dictum). The lower court erred in disregarding the regulatory impact of the taxes with respect to the use of indian land.

4. 25 C.F.R. § 1.4, prohibiting the application of state law regulating the use and development of property to indian property, prohibits these taxes because they interfere with the development of the reservation. Other courts have held that the regulation applies to use of tribal property even by non-indians.

5. The taxes are prohibited under Williams v. Lee, 358 U.S. 218, 220 (1959) which prohibited states from interfering with tribal government. Thus, they infringe on the tribe's control of its roads, its management of its timber, and its ability to tax.

Respondents makes the following contentions:

1. The statutory and BIA regulation of forestry by indians

cannot preempt state taxation of non-indians doing business with the tribe. Thus, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) sustained application of a Montana cigarette tax on sales by an indian business to non-indians. Further, Kahn v. Arizona State Tax Commission, 16 Ariz. App. 17, 490 P.2d 846 (1971), appeal dismissed for want of a substantial federal question, 411 U.S. 941 (1973), sustained imposition of the Arizona income tax on a non-indian attorney who derived all of his income from work for the Navajo Tribe, subject to federal statutes and regulations governing contracts with indian tribes.

2. The Arizona Enabling Act only precludes Arizona from asserting a property interest in indian property, and numerous decisions of this Court hold that it or similar acts do not restrict state jurisdiction over non-indians on indian reservations. The taxes fall solely on non-indians who happen to do business on the reservation, and do not regulate the use of indian land.

3. 25 C.F.R. § 1.4 only prohibits the application of traditional land use regulations to indian property. In any event, the regulation is invalid because it is not authorized by any statute.

4. The fact that the taxes result in an indirect economic burden on the tribe does not constitute an impermissible infringement on tribal government.

DISCUSSION: The contentions that taxes on diesel fuel and

contract carriage by non-indians are impermissible regulations of the use of indian property or interfere with tribal government seem insubstantial.

There is some plausibility to the argument that the taxes are preempted as a result of pervasive federal regulation of all aspects of indian lumbering operations in light of the general federal policy that the reservation should be exploited for the benefit of the indians. Neither respondents nor the lower court deal convincingly with Warren Trading Post. The question certainly has substantial practical importance.

In any event, it would seem unwise to dispose of this petition one way or another without hearing from the Solicitor General.

There is a response.

3/6/79

Lacy

Opn in petn

Review 1/12 Greg's View

1. As to White Mountain (lumbering op.)

~~Both~~ Both the (1) motor carrier license tax, & (2) fuel use excise tax are preempted by extensive Fed Reg. of lumbering ops. on Reservations. Greg also advances a D/P argument - not relied on in Briefs - that Arizona provides no benefits (no roads, etc) that further lumbering op. - 7

BENCH MEMORANDUM

2. As to Central Machinery (sale of 11 tractors)

Different case from White Mountain. Central Machinery is a non-Indian Army Corp with its only place of business off-Reservation. To: Mr. Justice Powell 2 January 1980
From: Gregory May It is not regulated by Bureau of Indian Affairs as is the contractor on the lumbering op. in White Mt. The sales tax on this
No. 78-1177: White Mountain Apache Tribe v. Bracker

No. 78-1604: Central Machinery Co. v. Arizona State Tax

Commission sale of Indians is imposed on Central Machinery. The tax is passed on the Tribe - but taxes are ~~an~~ expense of

Questions Presented doing business. Other

1. Does federal regulation of Indian lumbering (White Mountain) and Indian trading (Central Machinery) preempt Arizona taxes that fall on certain non-Indians who engage in those activities within an Indian reservation? In other words, are these cases controlled by Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685 (1965)?
taxes - income, social security, unemployment comp., workmen comp, etc. increase cost of setting tractors to Indians.

2. Do the Arizona taxes on non-Indians who do business with the Indians impermissibly interfere with tribal self-government?

Facts

These straight-lined cases raise the same legal issues, but they involve altogether different facts. Since the briefs state the facts rather well, this summary will try to draw some opinionated conclusions. !

I. White Mountain (*lumbering op.*)

Petr Pinetop Logging Co. is a non-Indian enterprise. It works as an independent contractor for FATCO, the Indian corporation that manages the lumbering interests of petr White Mountain Apache Tribe. The entire Indian lumbering operation, including its contract with Pinetop, is extensively regulated and supervised by the BIA. Pinetop's job is to fell trees, cut them, and deliver them to FATCO's sawmills. An essential and expensive part of that job is the construction of roads through the forests on the reservation. These logging roads are constructed and maintained at the expense of Pinetop and FATCO without any help from the state. Pinetop also uses state roads within the reservation during the course of its operations, but taxes allocable to such use are not disputed.

Arizona has levied two road use taxes against Pinetop. The first is called a "motor carrier license tax." It taxes all contract motor carriers of property at 2.5% of their gross receipts. Ariz. Rev. Stat. Ann. § 40-641 (1979 Supp.). The tax

is conceived as a tax on the privilege of engaging in a business that makes inordinate use of public highways, see cases cited at Petr's Brief 13, and all revenues are ear-marked for maintenance and improvement of the state's highways. Ariz. Rev. Stat. Ann. § 40-641(C). The second tax is called a ²"fuel use excise tax." It levies an \$.08 per gallon exaction on all fuel used to propel a motor vehicle over a public highway within the state. Id. § 28-1551(4). The levy is "for the purpose of partially compensating the state for the use of its highways." Id. § 28-1552. Under state law (and perhaps BIA regulations), the logging roads within the reservation are "public." Thus, the state holds Pinetop responsible for both taxes. The tribe has agreed to indemnify Pinetop for this unanticipated tax liability, but that contractual undertaking should not affect analysis of the case. The legal incidence of the tax is still on non-Indians, and the Indians probably would bear the economic incidence in any case.

II. Central Machinery (sale of "farm tractors")

Appl Central Machinery Co. is a non-Indian, Arizona corporation with a single place of business off the reservation. It is not a federally licensed Indian trader. In 1973, Central Machinery went onto the Gila River Indian Reservation and sold eleven farm tractors to a tribal farming enterprise called Gila River Farms. Contract, delivery, and payment were made within

the reservation. The transaction was supervised and approved by local BIA officials.

Arizona levies what it calls a "transaction privilege tax" on persons doing business within the state. Ariz. Rev. Stat. Ann. § 42-1309. The tax exacts from retailers of tangible property an amount equal to 2% of "the gross proceeds of sales or gross income from the business." Id. § 42-1312(A). In this case, the gross receipts tax on the tractor sale (\$2,916.62) appeared as a separate item on the bill that Central Machinery gave to Gila River Farms. An early Interior Dep't opinion on the application of the tax to Indians also notes that, at that time, purchasers used token representing one mil to reimburse sellers for the Arizona gross receipts tax due on sales. 57 I.D. 124, discussed at Appe's Brief 27-28. The statutes themselves, however, contain no indication that this is a "sales" tax. And this Court's opinion in Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965), treats the tax as if it were a tax on business. Accord, Arizona State Tax Commission v. Garrett Corp., 291 P.2d 208 (Ariz. 1955); Arizona State Tax Commission v. Southwest Kenworth, Inc., 561 P.2d 757 (Ariz. App. 1977). Cf. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); General Motors Corp. v. Washington, 377 U.S. 436 (1964); Norton v. Department of Revenue, 340 U.S. 534 (1951) (all involving state gross receipt or privilege taxes on interstate business).

Gila River Farms paid the tax item on Central Machinery's bill under protest, and Central agreed to remit any recovery in this suit to Gila. Nevertheless, the legal incidence of the tax is on the non-Indian seller. Whether or not Arizona sellers routinely identify the tax as an item on their bills, the economic incidence of the tax probably is on buyers.

Discussion

In both cases, non-Indians claimed that Arizona could not tax their business with Indians. The Arizona courts rejected both claims. Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965) (hereinafter Warren), is the most relevant precedent. It involved the very tax at issue in Central Machinery. But White Mountain, rather than Central Machinery, is the case to which Warren most easily applies. White Mountain should be reversed; Central Machinery probably should be affirmed.

I. White Mountain

The taxpayer in Warren was a federally licensed Indian trader who kept store within a reservation. The Court held that the pervasive federal regulations governing trading with the Indians preempted the Arizona gross receipts tax assessed for

the privilege of doing business within the state. "These apparently all-inclusive regulations and the statutes authorizing them," the Court said, "would seem in themselves sufficient to show that Congress had taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U.S. at 690. "[S]ince federal legislation has left the State with no duties or responsibilities respecting the reservation Indians," the Court continued, "we cannot believe that Congress intended to leave the State the privilege of levying this tax." Id. at 691.

Warren seems rather clearly to call for the invalidation of the contract carrier and fuel taxes imposed on Pinetop. (1) The federal regulations governing Indian lumbering are just as pervasive as (arguably, more pervasive than) the regulations governing trading with the Indians. See Petr's Brief 27-37 (an excellent review of the federal regulation of Indian timber). (2) Pinetop's allegedly taxable activities are conducted entirely within the reservation. (3) The allegedly taxable activities occur entirely on roads constructed and maintained by the Indians or their contractors. Since the state has no responsibility and incurs no expense for these roads, it cannot have the privilege of taxing Indian-related activities upon them.

Fed
Regs
governing
lumbering
are pervasive

D/P argument

The last point, which builds upon the last-quoted language from Warren, suggests a supportive argument that none of the parties mentions. A fundamental due process limitation upon a state's taxing jurisdiction is the notion that the state must have given the taxpayer some benefit for which the tax can ask return. See, e.g., Norfolk & Western Ry. Co. v. Missouri State Tax Commission, 390 U.S. 317, 325 (1968); Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940). Courts usually invoke this principle when they are asked to review the apportionment of state taxes on interstate business. But it seems apt in the present case. Since Arizona has nothing to do with the logging roads at issue here, its road use taxes ask return for a benefit never afforded. The counter argument, of course, is that the logging roads might have limited value if they did not connect to state highways. That may or may not be true on the facts.

II. Central Machinery

The taxpayer in Warren was trading with the Indians, and he was asked to pay the very tax now levied on Central Machinery. But there the similarity between Warren and Central Machinery ends. (1) Central Machinery is not in "the business of Indian trading on reservations." See Warren, 380 U.S. at 690 (emphasis added). It has no federal license. Federal regulations do not govern the way in which it does business.

It was approved by Fed Govt

(2) The transaction at issue here required no federal license. It was not subject to pervasive federal regulation. All the transaction required was the approval of the local BIA agents. That approval probably was directed more to the purchase--the expenditure of tribal resources--than to the sale. In short, Central Machinery simply engaged in a one-time sale to certain Indians. That its customers themselves are heavily regulation should make no difference. Nor should it matter that those customers are willing to transfer their tax immunity to Central Machinery by protesting a tax-based portion of the costs of doing business that were included in the sale price.

The Indians probably had jurisdiction to tax Central Machinery for the privilege of making a sale within the reservation. This case might come out differently had they done so, although something more than the forthcoming decision in Washington v. Confederated Tribes of the Colville Indian Reservation, No. 78-630, would be necessary to support that result. But the obvious business considerations that now counsel the Indians not to tax those who trade with them would disappear if this Court held that sellers who make BIA-approved sales are immune from otherwise applicable state business taxes.

Since the preemption analysis in Warren does not require reversal in this case, the Court must turn to the appl's argument that the state tax interferes with tribal self-government. Appl's rather truncated argument on this point has

two themes, both of which are unpersuasive. (1) Appl argues that a tax raising the price of farm equipment burdens the Indians' farming operation. Since the reservation was set aside for the very purpose of supporting Indian farming, it continue, the tax is inconsistent with federal policy. The response is obvious. The business tax at issue here is simply one of the seller's costs of doing business. It raises the price to the Indian no more directly than any other tax levied on the seller's total enterprise. Federal policy is not designed to immunize Indians from normal business costs. (2) Appl also argues that the state tax directly interferes with tribal self-government because it taxes Indians and because it would conflict with any tax that the tribe itself might levy. This argument is partly answered in the previous paragraph. The rest of the argument has no merit because there is no clear indication either in Warren or in the briefs now filed that the challenged tax is a sales tax on the buyer. Rather, the tax falls on the seller. The forthcoming decision in Confederated Tribes, supra, makes clear that state taxes are not invalid just because its economic incidence is on Indians. Instead, state taxes are invalid when they (1) reduce the revenues of the tribe itself, (2) place Indian business at a competitive disadvantage, and (3) inject state law into a transaction within the reservation that the Indians have chosen to subject to their own laws. See Third Draft of Confederated Tribes at 19-20. The

True

second two factors are the most important, and neither is present in this case.

Summary

Warren Trading Post held that the pervasive federal regulations governing trading with the Indians on a reservation preempted the gross receipts tax that Arizona was trying to assess against an on-reservation Indian trader for the privilege of doing business within the state. Warren should control the decision in both of these cases.

1. White Mountain: Arizona cannot levy road use taxes on petr Pinetop's activity because: (a) the federal regulations of Indian logging with which petr Pinetop must comply are just as pervasive as (arguably, more pervasive than) the regulations in Warren; (b) the state seeks to tax Pinetop for activities conducted entirely within the reservation and upon Indian roads for which the state has no responsibility. Reverse.

2. Central Machinery: Arizona can levy a business privilege (gross receipts) tax on appl Central Machinery because: (a) Central Machinery is not subject to the system of federal regulation involved in Warren since it is not "in the business of Indian trading on reservations," Warren, 380 U.S. at

690; (b) the transaction from which the tax arises was a one-time sale not subject to pervasive federal regulation; (c) a tax that falls on the non-Indian seller and does no more than raise his selling price by increasing his costs of business does not interfere with tribal self-government. Affirm.

(~~Retor~~ are Tribe & logging firms who log timber on Reservation. Qs are whether ~~where~~ Contractor's ~~truckers'~~ truckers' license tax measured by gross receipts, & fuel tax imposed for use of highways, are valid)

Warren Trading Post turned on persuasive req. governing trading.

Wake (for Indian Tribe)

Thousands of miles of roads on Reservations are used by logging contractors.

Loggers may use state roads to ~~some~~ limited extent. They keep records & pay state ~~state~~ fuel tax in proportion to this use. (8¢ per gal).

Fuel (diesel) is shipped into & stored on Reservation.

Brown (also for Tribe)

Q: in where burden of taxes fall.

What state calls tax is immaterial

The economic burden here falls ultimately on the Tribe

Miss Stelman (56) { ~~look to appropriate tax~~
on basis of use of Ind. + st.

Supports Tribe based on several mutually supportive considerations.

?? The 56 doc ~~does~~ not rely primarily on burden or on tribal sovereignty.

(next pg)

Stilman (SG - cont.)

Two Tests

1. Presumption
2. Interference ^{with} Tribal ~~of~~ self govt
(~~interference~~)
(Independence of Tribe from state - not fed - interference)

Comprehensive network of Fed laws & regs apply to tribal timber enterprises.

Tax rates determined by State w/ no input ~~to~~ from Tribe.

Macpherson (Cont AG Ariz)

If Tribe owned the trucks & operated them itself, State would not tax

Pinecon operation occurred wholly w/in Res. These are state highways w/in Res, & tax is pd. for this use.

Other ~~to~~ roads are Bureau of Indian Affairs roads - that are public. There also are ~~other~~ strictly Tribal Rds.

Nothing in Fed statutes or Regs that preempts "costs". Congressional objective is to protect the forests, but this has nothing to do with cost of Indian timbering ops.

The Ariz. Ct Appeals makes no distinction bet. BIA and Tribal Rds. But Ariz does not intend to tax use of tribal roads. State argues that BIA rds. are public. True real Q is use of BIA rds. Pursuant to Fed Regs., these rds are open to public. Conceder Ariz exercises no power over BIA

Wake (Reply)

The issue is right of state to tax use of tribal roads - see Briefs. But counsel have learned over week end that state has not taxed use of all tribal roads.

State claimed right to tax all such roads & Army Ct/Supr upheld this right. Thus we should adhere that holding, despite concession of counsel.

In any event the ~~Tribal Roads~~ Bureau of Ind. Affairs roads issues remain.

BIA roads are on Trust land. Secretary operates these roads.

Revere 6-3
(I voted to Revere)

78-1177 White Mountain Apache v. Bracker

Conf. 1/16/80

The Chief Justice Revere

Providing service here. No difference

Mr. Justice Brennan Revere

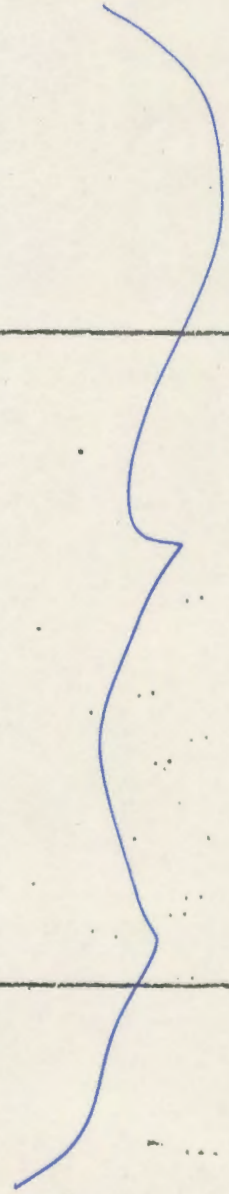
Mr. Justice Stewart Affirm (tentative)

Mr. Justice White Reverie

Mr. Justice Marshall Reverie

Mr. Justice Blackmun Reverie

Little



where mt

Mr. Justice Powell Revenue

Two Ariz taxes: (1) motor carrier license tax for maintenance of highways, (2) diesel fuel tax.

Neither tax properly applicable to Puetop logging op. entirely w/in Reservation on BIA + Tribal roads.

∴ Regulation of timbering is personally Warner Trading Post seems controlling.

Even may be a W/P argument. State conferred no benefit for these taxes

Mr. Justice Rehnquist

~~Appar~~ Revenue?

but an issue briefed would Appar. ?

Mr. Justice Stevens

Appar

Indian Commerce Clause argument in frivolous Warner Trading involves licensed trader.

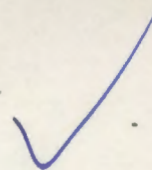
Might have due process issue - but not before us.

State can require ^{business} license regardless of where trucks are used.

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 20, 1980



RE: No. 78-1177 White Mountain Apache Tribe v. Bracker

Dear Thurgood:

I agree.

Sincerely,

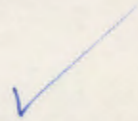
Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



March 20, 1980

Re: 78-1177 - White Mountain Apache Tribe
v. Bracker

Dear Thurgood:

In due course I will circulate a dissent.

Respectfully,

Mr. Justice Marshall

Copies to the Conference

GM:3-20-80

No. 78-1177: White Mountain Apache Tribe v. Bracker

Mr. Justice,

Mr. Justice Marshall now has circulated the majority opinion in this companion to Central Machinery Co. v. Ariz. State Tax Comm'n, No. 78-1604. You are in the majority in this case, but not in Central Machinery. Mr. Justice Stewart has written that he will write a dissent in Central Machinery; he probably will write the dissent in this case as well.

This is a much better opinion than the one circulated in Central Machinery. It is well put together, well-written, and sets forth a good summary of the Indian preemption cases. Still, the draft seems simply to throw up its hands and says that decisions in this area must be ad hoc. And the reasons it advances to show that these state taxes would interfere with federal regulation of Indian lumbering do not immediately strike one as overwhelming.

Since--as I suggested in my 15 Mar. note on Central Machinery--you probably will need to write a short opinion explaining why you distinguish these two Indian tax cases, I recommend you write to Mr. Justice Marshall that (a) you presently intend to vote with the majority in this case only, but (b) you

will not decide whether to join his opinion until you have considered what--if anything--you yourself should write to explain your unique view of the two cases.

Greg

March 20, 1980

78-1177 White Mountain Apache Tribe v. Bracker

Dear Thurgood:

I voted with the majority in this case, and think you have written a fine opinion. In Central Machinery, I was in dissent - the only Justice to be for the Indians in one and against them in the other.

I therefore probably will write explaining why I view these cases differently. Although my present intention is to join you in this case, I will await other writing - including the dissent in Central Machinery - before deciding finally whether to join your opinion.

Sincerely,

Mr. Justice Marshall

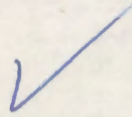
lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 24, 1980

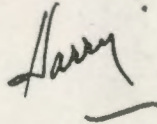


Re: No. 78-1177 - White Mountain Apache Tribe v. Bracker

Dear Thurgood:

Please join me.

Sincerely,



Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 27, 1980

Re: No. 78-1177 - White Mountain Apache Tribe
v. Bracker

Dear Thurgood,

I have read your proposed opinion and agree with a good deal of it.

Part III is the dispositive section, and I agree with its analysis and result. My sole concern is the implication of your statement on page 14 that "it is undisputed that the economic burden of these taxes will ultimately fall on the Tribe." In Confederated Tribes, the Court will uphold a State tax on non-Indians even though the economic burden of which falls on the Tribe. Could this statement be omitted or rephrased?

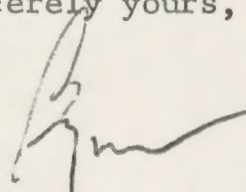
I have some difficulties with Part II and in light of Part III, wonder about its necessity. As you note, generalizations in Indian law are treacherous. I am concerned that some of the broader statements in Part II, taken out of context, might be applied in an inappropriate way in future cases. For example, at page 7 you quote Bryan v. Itasca County, 426 U.S. 373 (1976), for the proposition that "Indians stand in a special relation to the Federal Government from which the States are excluded unless Congress has manifested a clear purpose to . . . allow States to treat Indians as part of the general community." This statement was unexceptionable in Bryan, where the question was whether Pub. L. 280 permitted the States to tax Indian property which was clearly exempt from taxation under Moe and McClanahan. It makes sense in this context to say that State taxation is excluded unless Congress has permitted it. But it is questionable whether the same rule applies in cases involving State taxation of non-Indians doing business on the reservation. Indeed, Moe seems to the contrary, since the State was there permitted to tax non-Indian purchasers from Indian-operated reservation smoke shops despite the absence of federal statutes clearly intended to allow State taxation.

Similarly, you state at page 7 that the Court has "rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required." This is certainly true in some cases, such as cases involving only Indians or cases involving relations between non-Indians and Indians on the reservation. It is not true, however, in cases involving relations between non-Indians and Indians off the reservation. Rather, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law. . . ." Mescalero Apache Tribe v. Jones, 411 U.S. 148-149 (1973).

At page 8 you cite Moe for the proposition that "'automatic exemptions as a matter of constitutional law' are unusual." At least the clear implication in Moe was that automatic exemptions of this type are not recognized at all.

Finally, you say at page 8 that in the case of non-Indians conducting activities on the reservation, the pre-emption inquiry is "designed to determine whether, in the specific context, the exercise of state authority would undermine some federal policy." While I agree that federal policies are relevant, this statement might suggest an inquiry into the broad policies of encouraging Indian self-government and strengthening reservation economies without due attention to the specific language and provisions of the relevant statutes.

Sincerely yours,

A handwritten signature in black ink, appearing to be a stylized name, possibly 'A. M.', written in a cursive style.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 28, 1980

Re: No. 78-1177 - White Mountain Apache Tribe
v. Bracker

Dear Byron:

Thank you for your comments on my proposed opinion in this case. I think that I can accommodate almost all of your concerns.

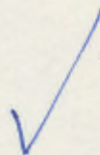
With respect to the statement on p. 14, you are of course correct in suggesting that the fact that the economic burden falls on the Tribe is not dispositive. It is, however, relevant, as Warren Trading Post makes clear. My reference to the economic burden was intended to be read in conjunction with the immediately following sentence, which demonstrates that it is not the economic burden itself, but the Federal regulatory scheme in general, that leads to the result we reach. Would your concern be met if I added a footnote stating explicitly that the incidence of the economic burden is not controlling and distinguishing Moe and/or Confederated Tribes?

I do believe that Part II is necessary in order to set up a framework with which to approach the case. However, I am willing to adopt in full three of your four suggestions by (1) deleting the quotation from Bryan on p. 7; (2) adding a footnote on p. 7 to quote the statement in Mescalero with respect to Indians going beyond reservation boundaries; and (3) altering the sentence immediately before Part III to conclude, "whether, in the specific context, the exercise of state authority would violate federal law."

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 31, 1980



Re: No. 78-1177 - White Mountain Apache
Tribe v. Bracker

Dear Thurgood,

Thank you for your letter of March 28. Your suggested changes for the most part satisfy me and I join your opinion. Although I would have preferred that you eliminate the word "automatic" from the statement in footnote 18, I shall leave the matter in your hands.

Sincerely yours,

Mr. Justice Marshall

Copies to the Conference

I do not agree that the statement in footnote 18 in Moe--referring to "automatic exemptions as a matter of constitutional law"--should be read as broadly as you suggest. Certainly the language of the footnote does not extend that far. Moreover, a number of our cases recognize the principle that the exercise of state authority over the reservation may be impermissible, not because it is "preempted" in the ordinary sense, but because it infringes on tribal self-government. See Williams v. Lee and the cases cited on p. 6 on my proposed opinion. This principle, I think, is difficult to reconcile with the view that "automatic" or "constitutional" exemptions are not recognized at all.

Sincerely,

T.M.

T.M.

Mr. Justice White

cc: The Conference

P. 7, 8, 14
Footnotes renumbered

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

From: Mr. Justice Marshall

Circulated: _____

Recirculated: 1 APR 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1177

White Mountain Apache Tribe
et al., Petitioners,
v.
Robert M. Bracker et al. } On Writ of Certiorari to the
Court of Appeals of Arizona,
Division One.

*I am
filing a
concurring
opinion.*

LJP

[March —, 1980]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we are once again called upon to consider the extent of State authority over the activities of non-Indians engaged in commerce on an Indian reservation. The State of Arizona seeks to apply its motor carrier license and use fuel taxes to petitioner Pinetop Logging Company (Pinetop), an enterprise consisting of two non-Indian corporations authorized to do business in Arizona and operating solely on the Fort Apache Reservation. Pinetop and petitioner White Mountain Apache Tribe contend that the taxes are pre-empted by federal law or, alternatively, that they represent an unlawful infringement on tribal self-government. The Arizona Court of Appeals rejected petitioners' claims. We hold that the taxes are pre-empted by federal law, and we therefore reverse.

I

The 6,500 members of petitioner White Mountain Apache Tribe reside on the Fort Apache Reservation in a mountainous and forested region of northeastern Arizona.¹ The

¹The Fort Apache Reservation was originally established as the White Mountain Reservation by an Executive Order signed by President Grant on November 8, 1871. By the Act of Congress of June 7, 1897, 30 Stat. 64, the White Mountain Reservation was divided into the Fort Apache and San Carlos Reservations.

2 WHITE MOUNTAIN APACHE TRIBE *v.* BRACKER

Tribe is organized under a constitution approved by the Secretary of the Interior under the Indian Reorganization Act, 25 U. S. C. § 476. The revenue used to fund the Tribe's governmental programs is derived almost exclusively from tribal enterprises. Of these enterprises, timber operations have proved by far the most important, accounting for over 90% of the Tribe's total annual profits.²

The Fort Apache Reservation occupies over 1,650,000 acres, including 720,000 acres of commercial forest. Approximately 300,000 acres are used for the harvesting of timber on a "sustained yield" basis, permitting each area to be cut every 20 years without endangering the forest's continuing productivity. Under federal law, timber on reservation land is owned by the United States for the benefit of the Tribe and cannot be harvested for sale without the consent of Congress. Acting under the authority of 25 CFR § 141.6 and the tribal constitution, and with the specific approval of the Secretary of the Interior, the Tribe in 1964 organized the Fort Apache Timber Company (FATCO), a tribal enterprise that manages, harvests, processes, and sells timber. FATCO, which conducts all of its activities on the reservation, was created with the aid of federal funds. It employs about 300 tribal members.

The United States has entered into contracts with FATCO, authorizing it to harvest timber pursuant to regulations of the Bureau of Indian Affairs. FATCO has itself contracted with six logging companies, including Pinetop, which perform certain operations that FATCO could not carry out as economically on its own.³ Since it first entered into agreements with FATCO in 1969, Pinetop has been required to fell trees, cut them to the correct size, and transport them to FATCO's sawmill in return for a contractually specified fee. Pinetop

² In 1973, for example, tribal enterprises showed a net profit of \$1,667,091, \$1,508,713 of which was attributable to timber operations.

³ FATCO initially attempted to perform some of its own logging and hauling operations but found itself unable to do these tasks economically.

employs approximately 50 tribal members. Its activities, performed solely on the Fort Apache Reservation, are subject to extensive federal control.

In 1971 respondents⁴ sought to impose on Pinetop the two state taxes at issue here. The first, a motor carrier license tax, is assessed on “[e]very common motor carrier of property and every contract motor carrier of property.” Ariz. Rev. Stat. Ann. § 40-641 (A)(1). Pinetop is a “contract motor carrier of property” since it is engaged in “the transportation by motor vehicle of property, for compensation, on any public highway.” Ariz. Rev. Stat. § 40-601 (A)(7). The motor carrier license tax amounts to 2.5% of the carrier’s gross receipts. Ariz. Rev. Stat. Ann. § 40-641 (A)(1). The second tax at issue is an excise or use fuel tax designed “[f]or the purpose of partially compensating the state for the use of its highways.” Ariz. Rev. Stat. Ann. § 28-1552. The tax amounts to eight cents per gallon of diesel fuel used “in the propulsion of a motor vehicle on any highway within this State.” *Ibid.* The use fuel tax was assessed on Pinetop because it uses diesel fuel to propel its vehicles on the state highways within the Fort Apache Reservation.

Pinetop paid the taxes under protest,⁵ and then brought suit in state court, asserting that under federal law the taxes could not lawfully be imposed on logging activities conducted exclusively within the reservation or on hauling activities on Bureau of Indian Affairs and tribal roads.⁶ The Tribe agreed

⁴ Respondents are the Arizona Highway Department, the Arizona Highway Commission, and individual members of each entity.

⁵ Between November 1971 and May 1976 Pinetop paid under protest \$19,114.59 in use fuel taxes and \$14,701.42 in motor carrier license taxes. Since that time it has continued to pay taxes pending the outcome of this case. Refund litigation is pending in state court with respect to the five other non-Indian contractors employed by the Tribe, and that litigation has been stayed pending the outcome of this suit.

⁶ For purposes of this action petitioners have conceded Pinetop’s liability for both motor carrier license and use fuel taxes attributable to travel on state highways within the reservation. Pinetop has maintained records

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to reimburse Pinetop for any tax liability incurred as a result of its on-reservation business activities, and the Tribe intervened in the action as a plaintiff.⁷

Both petitioners and respondents moved for summary judgment on the issue of the applicability of the two taxes to Pinetop. Petitioners submitted supporting affidavits from the manager of FATCO, the head forester of the Bureau of Indian Affairs, and the Chairman of the White Mountain Apache Tribal Council; respondents offered no affidavits disputing the factual assertions by petitioners' affiants. The trial court awarded summary judgment to respondents,⁸ and the petitioners appealed to the Arizona Court of Appeals. The Court of Appeals rejected petitioners' pre-emption claim. 585 P. 2d 891 (1978). Purporting to apply the test set forth in *Commonwealth of Pennsylvania v. Nelson*, 350 U. S. 497 (1956), the court held that the taxes did not conflict with federal regulation of tribal timber, that the federal interest was not so dominant as to preclude assessment of the challenged state taxes, and that the federal regulatory scheme did not "occupy the field." The court also concluded that the state taxes would not unlawfully infringe on tribal self-government. The Arizona Supreme Court declined to review the decision of the Court of Appeals. We granted certiorari. — U. S. — (1980).

of fuel attributable to travel on those highways, and computations would evidently be made in order to allocate a portion of the gross receipts taxable under the motor carrier license tax to state highways.

⁷ When Pinetop contracted to undertake timber operations for FATCO in 1969, both Pinetop and FATCO believed that it would not be required to pay state taxes. After respondents assessed the taxes at issue, FATCO agreed to pay them to avoid the loss of Pinetop's services.

⁸ After the trial court entered summary judgment on the issue of the applicability of the state taxes, the case proceeded to trial on the state-law issue of the manner of calculating the motor vehicle license tax. Final judgment was entered for respondents on all issues after trial. The Arizona Court of Appeals reversed the decision of the Superior Court on the calculation of the motor vehicle license tax. 585 P. 2d 891, 900 (1978).

II

Although “[g]eneralizations on this subject have become . . . treacherous,” *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 148 (1973), our decisions establish several basic principles with respect to the boundaries between State regulatory authority and tribal self-government. Long ago the Court departed from Mr. Chief Justice Marshall’s view that “the laws of [a State] can have no force” within reservation boundaries, *Worcester v. Georgia*, 6 Pet. 515, 559 (1832).⁹ See *Moe v. Salish & Kootenai Tribes*, 425 U. S. 463, 481–483 (1976); *New York ex rel. Ray v. Martin*, 326 U. S. 496 (1946); *Utah & Northern Ry. v. Fisher*, 116 U. S. 28 (1885). At the same time we have recognized that the Indian tribes retain “attributes of sovereignty over both their members and their territory.” *United States v. Mazurie*, 419 U. S. 544, 557 (1975). See also *United States v. Wheeler*, 435 U. S. 313, 323 (1978); *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 55–56 (1978). As a result, there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members. The status of the tribes has been described as “an anomalous one and of complex character,” for despite their partial assimilation into American culture, the tribes have retained “a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.” *McClanahan v. Arizona Tax Comm’n*, 411 U. S. 164, 174 (1973), quoting *United States v. Kagama*, 118 U. S. 375, 381–382 (1886).

⁹The shift in approach is discussed in *Williams v. Lee*, 358 U. S. 217, 219 (1959); *Organized Village of Kake v. Egan*, 369 U. S. 60, 71–75 (1962); and *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164, 172 (1973).

Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3. See *United States v. Wheeler, supra*, 435 U. S., at 322-323. This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. See, e. g., *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U. S. 685 (1965); *McClanahan v. Arizona State Tax Comm'n, supra*. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U. S. 217 (1958). See also *Washington v. Yakima Indian Nation*, — U. S. —, — (1979); *Fisher v. District Court*, 424 U. S. 382 (1976); *Kennerly v. District Court of Montana*, 400 U. S. 423 (1971). The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," *McClanahan v. Arizona State Tax Comm'n, supra*, 411 U. S., at 172, against which vague or ambiguous federal enactments must always be measured.

The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise

of state authority has been pre-empted by operation of federal law. *Moe v. Salish & Kootenai Tribes, supra*, 425 U. S., at 475. As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.¹⁰ Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. See *McClanahan v. Arizona State Tax Comm'n, supra*, 411 U. S., at 174-175, and n. 13. We have thus rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required.¹¹ *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U. S. 685 (1965). At the same time any applicable regulatory interest of the State must be given weight, *McClanahan v. Arizona State Tax*

¹⁰ For example, the Indian Financing Act of 1974, 25 U. S. C. § 1451 *et seq.*, states: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." Similar policies underlie the Indian Self-Determination and Education Assistance Act, 25 U. S. C. § 450 *et seq.*, as well as the Indian Reorganization Act of 1934, 25 U. S. C. 461 *et seq.*, whose "intent and purpose . . . was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 152 (1973), quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). See also *Santa Clara Pueblo v. Martinez*, 436 U. S. 49 (1979). Cf. Gross, *Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Policy*, 56 *Tex. L. Rev.* 1195 (1978).

¹¹ In the case of "Indians going beyond state boundaries," however, "a nondiscriminatory state law" is generally applicable in the absence of "express federal law to the contrary." *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 148-149.

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Comm'n, supra, 411 U. S., at 171, and “automatic exemptions ‘as a matter of constitutional law’” are unusual. *Moe v. Salish & Kootenai Tribes, supra*, 425 U. S., at 481, n. 18.

When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. See *Moe v. Salish & Kootenai Tribes, supra*, 425 U. S., at 480-481; *McClanahan v. Arizona State Tax Comm’n, supra*. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of State or tribal sovereignty, but has called for a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. Compare *Warren Trading Post Co. v. Arizona State Tax Comm’n, supra*, and *Williams v. Lee, supra*, with *Moe v. Salish & Kootenai Tribes, supra*, and *Thomas v. Gay*, 169 U. S. 264 (1898). Cf. *McClanahan v. Arizona State Tax Comm’n, supra*, 411 U. S., at 171; *Mescalero Apache Tribe v. Jones, supra*, 411 U. S., at 148.

III

With these principles in mind, we turn to the respondents’ claim that they may, consistent with federal law, impose the contested motor vehicle license and use fuel taxes on the logging and hauling operations of petitioner Pinetop. At the outset we observe that the Federal Government’s regulation of the harvesting of Indian timber is comprehensive. That reg-

ulation takes the form of Acts of Congress, detailed regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs. Under 25 U. S. C. §§ 405–407, the Secretary of the Interior is granted broad authority over the sale of timber on the reservation.¹² Timber on Indian land may be sold only with the consent of the Secretary, and the proceeds from any such sales, less administrative expenses incurred by the Federal Government, are to be used for the benefit of the Indians or transferred to the Indian owner. Sales of timber must “be based upon a consideration of the needs and best interests of the Indian owner and his heirs.” 25 U. S. C. § 406. The statute specifies the factors which the Secretary must consider in making that determination.¹³ In order to assure the continued produc-

¹² Federal policies with respect to tribal timber have a long history. In *United States v. Cook*, 19 Wall. 591 (1874), and *Pine River Logging & Improvement Co. v. United States*, 186 U. S. 279 (1902), the Court held that tribal members had no right to sell timber on reservation land unless the sale was related to the improvement of the land. At the same time the Court interpreted the governing statute as designed “to permit deserving Indians, who had no other sufficient means of support, to cut . . . a limited quantity of . . . timber . . . and to use the proceeds for their support . . . , provided that 10 percent of the gross proceeds should go to the stumpage or poor fund of the tribe from which the old, sick, and otherwise helpless might be supported.” *Id.*, at 285–286.

The Attorney General interpreted the holding in *Cook* to mean that Indians had no right to reservation timber. See 19 Op. Atty. Gen. 194 (1888). This interpretation was overturned by Congress by Act of June 25, 1910, ch. 431, 36 Stat. 855, as amended, 25 U. S. C. § 407, and also repudiated in *United States v. Shoshone Indians*, 304 U. S. 111 (1938). Thus, as the Court summarized in *United States v. Algoma Lumber Co.*, 305 U. S. 415 (1939), “under . . . established principles applicable to land reservations created for the benefit of the Indian tribes, the Indians are beneficial owners of the land and the timber standing upon it and of the proceeds of their sale, subject to the plenary power of control by the United States, to be exercised for the benefit and protection of the Indians.” See 25 U. S. C. § 196; *United States v. Mitchell*, — U. S. — (1980).

¹³ Those factors include “(1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the bene-

tivity of timber-producing land on tribal reservations, timber on unallotted lands "may be sold in accordance with the principles of sustained yield." 25 U. S. C. § 407. The Secretary is granted power to determine the disposition of the proceeds from timber sales. He is authorized to promulgate regulations for the operation and management of Indian forestry units. 25 U. S. C. § 466.

Acting pursuant to this authority, the Secretary has promulgated a detailed set of regulations to govern the harvesting and sale of tribal timber. Among the stated objectives of the regulations is the "development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform." 25 CFR § 141.3 (a)(3). The regulations cover a wide variety of matters: for example, they restrict clear-cutting, § 141.5; establish comprehensive guidelines for the sale of timber, § 141.7; regulate the advertising of timber sales, §§ 141.8-141.9; specify the manner in which bids may be accepted and rejected, § 141.11; describe the circumstances in which contracts may be entered into, §§ 141.12-141.13; require the approval of all contracts by the Secretary, § 141.13; call for timber cutting permits to be approved by the Secretary, § 141.19; specify fire protective measures, § 141.21; and provide a board of administrative appeals, § 141.23. Tribes are expressly authorized to establish commercial enterprises for the harvesting and logging of tribal timber. § 141.6.

Under these regulations, the Bureau of Indian Affairs exercises literally daily supervision over the harvesting and

fit of the owner and his heirs, (2) the highest and the best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs." 25 U. S. C. § 406.

management of tribal timber. In the present case, contracts between FATCO and Pinetop must be approved by the Bureau; indeed, the record shows that some of those contracts were drafted by employees of the Federal Government. Bureau employees regulate the cutting, hauling, and marking of timber by FATCO and Pinetop. The Bureau decides such matters as how much timber will be cut, which trees will be felled, which roads are to be used, which hauling equipment Pinetop should employ, the speeds at which logging equipment may travel, and the width, length, height, and weight of loads.

The Secretary has also promulgated detailed regulations governing the roads developed by the Bureau of Indian Affairs. 25 CFR Part 162. BIA roads are open to "[f]ree public use." § 162.8. Their administration and maintenance are funded by the Federal Government, with contributions from the Indian tribes. §§ 162.6–162.6a. On the Fort Apache Reservation the Forestry Department of the Bureau has required FATCO and its contractors, including Pinetop, to repair and maintain existing BIA and tribal roads and in some cases to construct new logging roads. Substantial sums have been spent for these purposes. In its federally approved contract with FATCO, Pinetop has agreed to construct new roads and to repair existing ones. A high percentage of Pinetop's receipts are expended for those purposes, and it has maintained separate personnel and equipment to carry out a variety of tasks relating to road maintenance.

In these circumstances we agree with petitioners that the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case. Respondents seek to apply their motor vehicle license and use fuel taxes on Pinetop for operations that are conducted solely on Bureau and tribal roads within the reservation.¹⁴ There is

¹⁴ In oral argument counsel for respondents appeared to concede that the asserted state taxes could not lawfully be asserted on tribal roads and

no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. And equally important, respondents have been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation.

At the most general level, the taxes would threaten the overriding federal objective of guaranteeing Indians that they will "receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . ." 25 CFR § 141.3 (a)(3). Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, subject only to administrative expenses incurred by the Federal Government. That objective is part of the general federal policy of encouraging tribes "to revitalize their self-government" and to assume control over their "business and economic affairs." *Mescalero Apache Tribe v. Jones*, *supra*, 411 U. S., at 151. The imposition of the taxes at issue would undermine that policy in a context in which the Federal Government has undertaken to regulate the most minute details of timber production and expressed a firm desire that the Tribes should retain the benefits derived from the harvesting and sale of reservation timber.

In addition, the taxes would undermine the Secretary's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber. The Sec-

was unwilling to defend the contrary conclusion of the court below, which made no distinction between Bureau and tribal roads under state and federal law. Tr. of Oral Arg., at 34-37. Contrary to respondents' position throughout the litigation and in their brief in this Court, counsel limited his argument to a contention that the taxes could be asserted on the roads of the Bureau of Indian Affairs. *Ibid.* For purposes of federal pre-emption, however, we see no basis, and respondents point to none, for distinguishing between roads maintained by the Tribe and roads maintained by the Bureau of Indian Affairs.

retary reviews and approves the terms of the Tribe's agreements with its contractors, sets fees for services rendered to the tribe by the Federal Government, and determines stumpage rates for timber to be paid to the Tribe. Most notably in reviewing or writing the terms of the contracts between FATCO and its contractors, federal agents must predict the amount and determine the proper allocation of all business expenses, including fuel costs. The assessment of state taxes would throw additional factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors.

Finally, the imposition of state taxes would adversely affect the Tribe's ability to comply with the sustained-yield management policies imposed by federal law. Substantial expenditures are paid out by the Federal Government, the Tribe, and its contractors in order to undertake a wide variety of measures to ensure the continued productivity of the forest. These measures include reforestation, fire control, wildlife promotion, road improvement, safety inspections, and general policing of the forest. The expenditures are largely paid for out of tribal revenues, which are in turn derived almost exclusively from the sale of timber. The imposition of state taxes on FATCO's contractors would effectively diminish the amount of those revenues and thus leave the Tribe and its contractors with reduced sums with which to pay out federally required expenses.

As noted above, this is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate regulatory interest served by the taxes it seeks to impose. They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads. Pinetop's business in Arizona is conducted solely on the Fort Apache Reservation. Though

at least the use fuel tax purports to "compensat[e] the state for the use of its highways," Ariz. Rev. Stat. Ann. § 28-1552, no such compensatory purpose is present here. The roads at issue have been built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors. We do not believe that respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber.

Respondents' argument is reduced to a claim that they may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary. That is simply not the law. In a number of cases we have held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject. See *Warren Trading Post*, *supra*; *Williams v. Lee*, *supra*; *Kennerly v. District Court of Montana*, *supra*. The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits. "The cases in this Court have consistently guarded the authority of Indian governments over their reservations." *United States v. Mazurie*, *supra*, 419 U. S., at 558, quoting *Williams v. Lee*, 358 U. S. 217, 223 (1959). Moreover, it is undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe.¹⁵

¹⁵ Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted, as *Moe v. Salish & Kootenai Tribes*, 425 U. S. 463 (1976), makes clear. Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which, like that in *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U. S. 685 (1965), leaves no room for the additional burdens sought to be imposed by state law.

Where, as here, the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.¹⁰

Both the reasoning and result in this case follow naturally from our unanimous decision in *Warren Trading Post Co. v. Arizona Tax Commission*, *supra*. There the State of Arizona sought to impose a "gross proceeds" tax on a non-Indian company which conducted a retail trading business on the Navajo Indian Reservation. Referring to the tradition of sovereign power over the reservation, the Court held that the "comprehensive federal regulation of Indian traders" prohibited the assessment of the attempted taxes. No federal statute by its terms precluded the assessment of state tax. Nonetheless, the "detailed regulations," specifying "in the most minute fashion," *id.*, at 689, the licensing and regulation of Indian traders, were held "to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Id.*, at 690. The imposition of those burdens, we held, "could disturb and disarrange the statutory

¹⁰ Respondents also contend that the taxes are authorized by the Buck Act, 4 U. S. C. § 105 *et seq.*, and the Hayden-Cartwright Act, 4 U. S. C. § 104. In *Warren Trading Post Co. v. United States*, 380 U. S. 685, 691, n. 18 (1965), we squarely held that the Buck Act did not apply to Indian reservations, and respondents present no sufficient reason for us to depart from that holding. We agree with petitioners that the Hayden-Cartwright Act, which authorizes state taxes "on United States military and other reservations," was not designed to overcome the otherwise preemptive effect of federal regulation of tribal timber. We need not reach the more general question whether the Hayden-Cartwright Act applies to Indian reservations at all.

plan” because the economic burden of the state taxes would eventually be passed on to the Indians themselves. We referred to the fact that the Tribe had been “largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.” *Ibid.* And we emphasized that “since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.” *Id.*, at 691. The present case, we conclude, is in all relevant respects indistinguishable from *Warren Trading Post*.

The decision of the Arizona Court of Appeals is

Reversed.

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

CHAMBERS OF
THE CHIEF JUSTICE

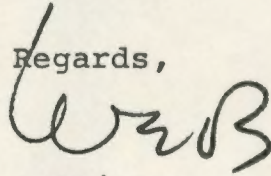
May 21, 1980

RE: 78-1177 - White Mountain Apache Tribe v.
Bracker

Dear Thurgood:

I join.

Regards,



Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

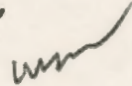
June 20, 1980

Re: No. 78-1177 White Mountain Apache Tribe v. Bracker

Dear John:

Please join me in your dissenting opinion in this case.

Sincerely,



Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 20, 1980

Re: 78-1177 - White Mountain Apache Tribe
v. Bracker

Dear John:

Please add my name to your dissenting
opinion.

Sincerely yours,

P.S.
/

Mr. Justice Stevens

Copies to the Conference

