10-1973

Dept. of Game v. Puyallup

Lewis F. Powell Jr.

lah/ss 1/9/73 -

DISCUSS

PRELIMINARY MEMO

Jan. 19, 1973 Conference
List 1, Sheet 2

No. 72-746

LAH
Call for response w motion (see p. 4)

PUYALLUP TRIBE v. DEPARTMENT OF GAME	Cert to Wash. SC (Hunter; Hale, Rossellini-- dissenting; 7-2 vote)	Timely

1. This petition involves the same general problem area involved in No. 72-481 and No. 72-5437 and should be read in conjunction with them.

2. The basic facts and procedural history of this case are established in my memo in No. 72-481. As there indicated, the

Washington SC in its most recent decision entered two holdings - (1) it ordered the Department to undertake an annual review of its conservation regulation with an eye to providing a commercial fishery for the Tribe (this is the issue in No. 72-481); and (2) approved the 1970 regulations which prohibited any commercial fishing for steelhead trout for that year because the "catchable" supply was taken up by sports fishermen. It is the propriety of that second ruling that is questioned by the SG here petitioning on behalf of the Tribe.

3. The Washington SC, in approving the 1970 regulations, found that

> "the catch of the sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river."

The SG contends that the regulation violates the Treaty of Medicine Creek by its failure to give the Indians any commercial fishery at all for any given period of time. The Court's opinion in Department of Game v. Puyallup Tribe, 391 U. S. 392 (1968) makes clear that the fishing activities of Indians may be regulated in the state's interest in conservation but that the Treaty right to fish "at all usual and accustomed grounds and stations" may not be totally abrogated (the opinion uses the term "qualified").

In view of that obligation to recognize the Tribe's commercial fishing rights under the Treaty, the SG argues that it is error for

the Department to give the sportsmen a preference. Instead, he argues that some accommodation between the sports and commercial interests must be worked out which will preserve some commercial fishing to the Tribe. The regulation, under the State SC opinion, must be reviewed annually by the Department but the SG contends that in view of the State Court's acceptance of this preferential treatment accorded sports fishing it is reasonable to suspect that the Indians will come up with the short end of the stick every year.

The SG notes that the present case is incompatible with two recent precedents: Sohappy v. Smith, 302 F. Supp. 899, 909-10 (D. Ore); State of Idaho v. Tinno, 497 P. 2d 1386, 1393. Both cases recognize the paramount nature of the Indian's treaty-guaranteed commercial fishing rights and suggest that it is improper to allocate scarce fishing resources to other groups until the Treaty obligations are satisfied.

4. DISCUSSION. The case merits a response from the Department of Game, although, based on its petition in 72-481, we may predict that the response will track pretty closely the reasoning stated in that petition, i. e., the only obligation falling on the State regulatory agency is to treat Indians on the same basis as other similarly situated citizens. As long as the regulations prohibit all commercial fishing and do not single out the Puyallups they are permissible under the Department's view of Justice Douglas' opinion

in Department of Game. It any event, a response should be requested and the Department might be instructed to file the response with reference to this petition as well as to the cross-petition in No. 72-5437.

There is no response.

Hammond

LAH/pls 1/9/73

Await Decisions — Included to defer to Indian Law experts on Court.

Thru Indian fishing right case — related to 72-746, 72-552 + 72-5437.

DISCUSS

PRELIMINARY MEMO

January 19, 1973
List 1, Sheet 2

No. 72-481

LAH Hold for responses in other cases. Case should be put on discuss list in order to avoid it coming down as a deny.

DEPARTMENT OF GAME OF STATE OF WASHINGTON	Cert to Wash SC (Hunter, Hale, Rosellini - dissenting; 7-2 vote)	Timely
v.		
PUYALLUP TRIBE		

1. This petition presents the Washington State Game Department's challenge to the recent judgment of the Washington Supreme Court regarding the commercial fishing rights of members of the Puyallup Indian Tribe under the Treaty of Medicine Creek. The petitions in No. 72-746 and

No. 72-5437 raise similar questions and should, therefore, be considered together with this petition. (The Treaty of Medicine Creek and the rights of members of the Puyallup Tribe are also involved in No. 72-552, Satiacum v. Washington. That case was on the discuss list for the January 5 Conference and the Conference has asked the SG to file a statement in that case. The issue in Satiacum appears to be whether the Puyallup Indians retain peculiar treaty rights to fish on the reservation. The Washington SC held that the reservation no longer exists and the petition raises the question whether that finding is correct. None of the three cases involved here depends on the result in that case since each touches on off-reservation fishing rights.)

SG disagrees

2. The Puyallup Indians have longed claimed the right to engage in commercial fishing, utilizing nets, for steelhead trout on the Puyallup River in Washington. Article III of the Treaty of Medicine Creek, upon which they have relied, states in pertinent part:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory...."

In 1963 the State Game Department filed a suit for declaratory judgment in a State TC, seeking a judgment that the treaty did not override State conservation regulations. The State TC held that the tribe members had no fishing rights above those allowed to all citizens of the State. The State SC disagreed that the tribe retained no peculiar treaty rights with

respect to fishing and held that they maintained the right to fish at "usual and accustomed grounds and stations" but that they were required to comply with any "reasonable and necessary" conservation regulations. This Court then reviewed the case and, in a unanimous opinion by Mr. Justice Douglas, affirmed the State SC. Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392 (1968). This Court held that the tribe members retained fishing rights under the treaty but that they could be regulated by the State in the exercise of its police power to conserve the resource. The case was remanded to the State SC to consider whether the State regulations constituted "reasonable and necessary" conservation measures.

The State SC remanded the case for trial to the State TC. The Game Department sought to show that its regulatory prohibition of commercial steelhead trout fishing was a reasonable and necessary conservation measure but the TC dismissed the case on the ground the available criminal sanctions provided an adequate tool for the Department. Thus, the regulatory scheme was apparently abrogated. The Department appealed to the State SC and that court held, as pertinent here, that (1) the 1970 regulatory prohibition of all commercial fishing for steelhead trout was proper, and (2) that the Game Department must re-evaluate its regulations each year to determine whether an Indian fishery for that year is permissible consistent with conservation needs.

3. The Game Department seeks cert from the latter holding of

the State SC. Petitioner contends that the State SC has sanctioned and mandated special treatment for Indians under their treaty. The Department argues that it should be entitled simply to promulgate regulations prohibiting commercial fishing for steelhead altogether. It relies on the phrase "in common with the citizens of the territory" in the treaty as establishing the rule that Indian fishing rights are to be no broader than the rights of all other citizens of the State. The obligation to consider annually the propriety of an "Indian-only" commercial fishery violates, in the Department's opinion, the notion of equal treatment under the treaty. The Department contends that the State court judgment is incompatible with this Court's opinion. The culminating sentence in this Court's former Puyallup case stated:

> "Since the state court has given us no authoritative answer to the question (whether total prohibition of commercial fishing is a reasonable and necessary conservation measure), we leave it unanswered and only add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with.'" Id. at 403.

The Department reads these emphasized words as holding that the regulations would be proper so long as they impose no discrimination against Indians. Any favored treatment, by the same token, would separate Indians for peculiar advantage and thereby discriminate against other citizens of the State.

4. The SG responds for the tribe. He contends that the Department

has misread this Court's opinion in the Puyallup case. As construed by the Department, the tribe would sustain no benefit as a result of the treaty, a result specifically rejected in this Court's opinion:

> "To construe the Treaty as giving the Indians 'no rights but such as they would have without the Treaty'...would be 'an impotent outcome to negotiations and a convention, which seemed to promise more and to give the word of the Nation for more'...." Id. at 397.

In his view, the State SC acted in accord with this Court's opinion when it required the Department to give special consideration to the customary commercial fishing practices of the Indian Tribe members.

5. Discussion. This Court's opinion in Puyallup is susceptible to more than one interpretation. It does appear to incorporate notions of equal protection into enforcement of the treaty right. It is possible to read the opinion, as the Department has, as requiring only that the State's conservation regulations be necessary and reasonable and that they be evenly applied to all citizens in the State. Yet the opinion may also be read as requiring something more than mere equal treatment. It occurs to me that the interpretation problem regarding the treaty is a consequence of a major environmental shift over the last 100 years. When the treaty was promulgated in 1854, it may have seemed an adequate protection for the Indian Tribe to assure them the continued use of their customary fishing resources. The treaty does not appear to contemplate the possibility that at some point the resource might diminish to the

point at which it would become necessary to ration the supply. In the present conservation-conscious environment, then, it may become necessary to determine whether the intent behind the treaty was to guarantee to the Indians continued access even if it requires exclusion of other citizens, or whether the treaty was designed only to assure that all citizens - Indians and others alike - sink or swim together.

The case, viewed in the context of broader policy questions regarding the proper status of Indian treaty rights, raises important questions and may deserve plenary consideration along with one or more of the other related cases presently before the Court. It should be held pending receipt of the requested filing in No. 72-552, and for the responses in No. 72-5437 and No. 72-746 if they are requested by a member of the Court.

There is a response.

Hammond

DISCUSS

LAH 3/14/73

Important Indian rights cases — whether Treaty gives Tribe preferential treatment or mere right to equal treatment.

No. 72-481
Department of Game v. Puyallup Indian Tribe) grant

No. 72-746
Puyallup Tribe v. Department of Game } grant

No. 72-5437
Bennett v. Dept of Game) Held.

Responses were requested, and have now been received, in each of these cases. The Department's response in No. 72-746 agrees that there are important indians' rights issues presented in these cases and that cert should be granted.

RECOMMENDATION

Recall that there are, essentially, two issues here:

(1) May the State prefer sports fishermen for steelhead trout to the total exclusion of any commercial fishery for the Tribe?

(2) Must the Department reconsider on a yearly basis its regulations prohibiting Indian fishing in order to assure faithful adherence to the treaty rights?

The two questions are closely related. They turn largely on this Ct's previous Justice Douglas opinion in the Puyallup case. They each involve the question whether the Treaty of Medicine Creek (which is quite similar to other fishing-rights treaties in the Great Northwest) gives the Tribe a preference over other citizens or whether it merely assures then a variant of equal protection of the laws. If equal treatment is all that is required then the Department may properly write reasonable regulations, facially neutral, deeming a certain species of fish exclusively the game of fishermen for sport, thereby treating all indians and nonindians aline (no citizen can fish for steelhead commercially). Also, there is arguably no need for the Department to exercise special solicitude for the Tribe and to undertake the sort of annual review required by the Washington SC.

This is one of the few indian issues that stands a chance of being legitimately viewed as an important "indians' rights" case since it rests on the question whether treaty rights confer a preference or mere equality of treatment. I would grant the SG's petition in No. 72-746. I would also grant the Department's petn in No. 72-481. I would hold the petn in Bennett, No. 72-5437, since it raises the same issue as No. 72-746.

GRANT 72-481
GRANT 72-746
HOLD 72-5437

LAH

No. 72-481, DEPT. OF GAME v. PUYALLUP 10/15/73
72-746 PUYALLUP v. DEPT. OF GAME #481 - affirmed
746 - Reversed

Douglas

The ~~Chief Justice~~

Affirm. 481 (for Indians)
Rev. & Remand 746 (for 2nd)

Must be a weighing of conservation ~~&~~ problem. But State has not "hit right balance here".

Might remand both, but think Indians must be given fair share of whatever may be caught without endangering species.

~~Douglas, J.~~ C.J. 481 Affirm
746 - Reverse & Remand with some Guidelines.

Brennan, J. Affirm 481
Rev. 746

Agree with Douglas except he doesn't think we should attempt to give any guidance to Dept of Game.

Stewart, J. ~~Affirm~~ 481
Rev 746

Work. S/Ct was right.

Year 1970 is only year before us.

Tribe is right, but we can't write rules for Dept. of Game.

Dept of Game did not read our opinion in prior case correctly. Dept of Fisheries did read it correctly.

As of now 40% of fish are "natural run" - 60% are stocked.

White, J. Affirm 481
Rev 746

Agrees with Potter.

But if State increases available fish by stocking, sportsmen could be given priority.

In natural state, Indians under Treaty have right to fish commercially.

State certainly has right to preserve "the run".

Rev. on 746 because it foreclosed commercial fishing.

Marshall, J. Affirm 481
Rev 746

Blackmun, J. Affirm 481
Rev 746 E

Prior op. decided Indians are entitled to rights under the Treaty — but ~~conserva~~ reasonable conservation requirements also are necessary.

Powell, J. Aff. 481
Rev. 746

I follow Douglas & others.

Rehnquist, J. Affirm both.

Conf. 3/16/73

Court ..... *Voted on* ....., 19... 72-481

Argued ....., 19... *Assigned* ....., 19... No. 72-746

Submitted ....., 19... *Announced* ....., 19... 72-5437

DEPT. OF GAME OF WASHINGTON v. PUYALLUP TRIBE, INC. RELIST

PUYALLUP TRIBE v. DEPART. OF GAME OF WASHINGTON

vs.

BENNETT v. DEPT. OF GAME OF WASHINGTON

Bill Douglas, on authority of Tulee, Winters, Endians are wrong— but I'm not sure I understand his vote.

Grant 72-481
72-746

Hold 72-5437

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		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.		✓												

LFP/gg 7-24-73

No. 72-481 Department of Game, State of Washington v. The Puyallup Tribe, Inc.

No. 72-746 The Puyallup Tribe v. Game Department

Summer Memorandum

This is a brief memorandum, dictated after having read most of the briefs. It is entirely preliminary and, in large degree superficial. Further study is indicated.

Statement of the Case

The Puyallup Tribe (Tribe) is recognized as such by the U.S. Government, and is one of the tribes which was a party to the Treaty of Medicine Creek of December, 1954 duly ratified by the Senate.

The controversy is over the off-reservation fishing rights reserved by the Tribe under the Treaty. The Puyallup River is apparently famous both for its salmon and steel-head trout, both of which use and spawn in the river. For reasons unclear, the Department of Fisheries regulates and is responsible for the conservation of the salmon and the Department of Game has this responsibility for the steel-head trout. Apparently the distinction is based on the fact that the trout are fresh water game fish. The Indian Tribe claims the right under the Treaty to conduct net fishing (using gill nets which are fairly lethal weapons against miserable fish trying to swim upstream). As a conservation measure, the Washington State

Department of Game adopted regulations which totally prohibit net fishing by anyone, and limits sports fishing to an annual take of 12,000 to 18,000 trout per year. The Department of Fisheries allows regulated Indian net fishing for salmon, although not unlimited fishing.

The critical provision of the Treaty reads as follows:

> "The right of taking fish, at all usual and and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory . . ." (Article 3 of the Treaty, 10 Stat. 1132).

The case was before this Court in Puyallup Tribe v. Department of Game, 391 U.S. 392, where the Court held (among other things) that the Treaty is controlling, that the fishing rights are independent of the Tribe's reservation of land, that the Treaty should not be construed as "giving the Indians no rights but such as they would have without the Treaty . . .", that - however - Indian off-reservation fishing rights are subject to State conservation laws if those laws give adequate recognition to the Treaty rights, and are "necessary for the conservation of fish" and do not "discriminate against the Indians". The Court remanded the case for a determination by the Courts of Washington as to whether the prohibition of the use of net fishing was reasonable and necessary as a conservation measure, and admonished the courts below that"any ultimate finding on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with' "(at 403).

On remand, and relying primarily on the testimony of three biologists, the Supreme Court of Washington (reversing a Washington lower court), upheld the prohibition of net fishing, concluding that fishing regulations must be made each year and supported by "facts and data that show the regulation is necessary for the conservation" of the species of the fish in question. In upholding the 1970 prohibition, the Washington court held that "the catch of steel-head sports fishery alone in the River leaves no more than a sufficient number of steel-head for escapement necessary for the conservation of the steel-head fishery in that river." *

Question

As stated by the SG (who represents the Indian Tribe in this case), the question is whether the absolute prohibition against net fishing, rather than limiting sports fishing, is necessary for the conservation of fish and does not discriminate against the Indians.

Discussion

As we have several "Indian specialists" on the Court, including those who wrote and participated in the earlier case, and as I neither know nor want to know anything about

* It is not clear to me - without having the opinions below before me - why the State of Washington is also appealing this decision as it seems essentially to have won.

Indian law, I will await the discussion in conference before making even a tentative decision as to how I am leaning in this case.

Accordingly, I will refrain from any extended discussion, I do note that the principal thrust of the SG's brief is not that there should be no regulation whatever in the interest of conservation, but that the effect of the action by the Department of Game is to place the entire burden of the conservation program on the Tribe rather than on sports fishermen. It is true, perhaps, that the Indians are more inclined to "meat fishing" and "commercial fishing" than the ordinary sportsman, and have less inclination to fish merely for sport or fun.

On the other hand, the Treaty itself limits the right of Indians to the "taking of fish . . . in common with all other citizens of the territory". On the surface, this suggests that a regulation fairly and uniformly enforced in the interest of conservation does not discriminate against Indians. But this leaves open the question, raised by the Court's prior opinion, as to what additional rights, if any, does the Treaty give the Indians with respect to fishing?

JCJjr/gg 10-3-73

MEMORANDUM

TO: Justice Powell

FROM: John Jeffries DATE: October 3, 1973

No. 72-481 Dept. of Game of Washington v. Puyallup Tribe

No. 72-746 Puyallup Tribe v. Dept. of Game of Washington

These cases pose a choice between conflicting interpretations of Mr. Justice Douglas' opinion for a unanimous Court in Puyallup Tribe v. Dept. of Game of Washington, 391 U.S. 392 (1968). The parties dispute the meaning of the following passage:

> "The right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State . . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians. " 391 U.S., at 198.

The Indians contend that the state regulation does discriminate against them because it totally prohibits the commercial net fishing of steelhead trout which is their practice but allows an annual take of 12,000 to 18,000 steelhead by sport fishermen. This position is indirectly supported by

* This is not an Indian Reservation rights case — the net fishing here is not confined to a Reservation.

other authority, In Tulee v. Washington, 315 U.S. 681 U.S. 681 (1942), this Court reversed the conviction of a Yakima Indian for failing to obtain a fishing license on the basis of treaty language substantially identical with that involved in this case. The treaty with the Yakimas was also considered in United States v. Winans, 198 U.S. 371, in which this Court held that a construction of the treaty which gave the Indians "no rights but such as they would have without the treaty" would be "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." 198 U.S., at 380, quoted in 391 U.S., at 392. These decisions clearly accorded the Indians special fishing rights, above and beyond those available to citizens generally.

The state focuses on the last sentence of the opinion remanding this case:

> "Since the state court has given us no authoritative answer to the question [whether the regulations were reasonable and necessary for conservation], we leave it unanswered and only add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with [all citizens].' " 391 U.S., at 403.

The state argues that it need not make special provision to allow commercial fishing by Indians (i.e., restrict the take allowed sport fishermen) but is required only to ensure that the regulations it seeks

to enforce against Indians in the name of conservation are "reasonable and necessary" to that purpose and that they accord to Indians the same fishing rights available to citizens generally.

I find little to choose between these positions. The tribe's position is more firmly grounded in the precedents, but I am inclined to favor the state on policy grounds. The state has expended considerable funds (provided in part by the licensing of sport fishermen) to maintain and increase the stock of steelhead trout. The state contends that over 50% of the steelhead now available are the result of the state's artificial propagation and planting program. It does not seem to me entirely fair to require the state to allow commercial fishing by the Indians when it is clear that no other citizens may do so. They would then have rights not held "in common with all citizens" as provided in the treaty.

In any event, I fully join in your statement that "I neither know nor want to know anything about Indian law." In light of Mr. Justice Douglas' expertise in this case and the sometime interest of Mr. Justice Blackmun in Indian law, I would defer to them. If the experts disagree, I would be inclined to favor the state.

JCJjr

No. 72-481 Dept. of Game of Washington v. THE PUYALLUP TRIBE Argued
No. 72-746 PUYALLUP TRIBE v. DEPT. OF GAME 10-10-73

Two cases (cross appeals) attacking opn. of S/Ct of Wash.

State appeals because of principles enunciated by S/Ct's opinion

SG appeals because of factual holding which in effect forbids net (commercial) fishing in interest of conservation.

Am inclined to agree with State (reverse 481 & affirm 746) but consider case close & can be persuaded otherwise at Conference. Will be interested in Bill Douglas' views.

(After discussion at Conference, I decided Bill Douglas knows far more about this than I. So I voted with him).

Coniff (Asst A/G Washington)

Wash. Dept of Fisheries has not sought review.
" " " " in here & relies on state law.

Puyallup I employed the "E/P concept implicit in Treaty language" (" in common with other citizens"). That is deemed controlling by the A/G.

Relies heavily on Ward v Racehorse 163 U.S. 504 (Br 11) — treaty there was similar to language here involved.

Also relies on distinction bet. "on" & "off" Reservation rights drawn in Mescalero Apache Tribe v. Jones (last Term — Br 15).

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* Treaty was made in 1854 prior to 14th Amend

No. 72-481 Dept. of Game of Washington v. THE PUYALLUP TRIBE
No. 72-746 PUYALLUP TRIBE v. DEPT. OF GAME

Argued 10-10-73

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Coniff (cont)

Washington is not here infringing upon any "on" Reservation laws or regulations.

Indians may fish anywhere on same basis as other citizens. They are here claiming an additional right by virtue of Treaty. Indians already have exclusive right to fish & hunt within Reservation.

St. of Wash. argues here that same rule must apply to salmon as well as steelhead — indeed to all fish. Treaty refers to all fish.

Sachse (for S.G.) (He thinks State's position is frivolous — but for reading)

"Petr. argument would jeopardize almost every Indian Treaty" ?? Why?

State is now "totally" misconstruing the opinion in Puyallup Tribe I.

→ John — what about this.

Real issue is whether Regulation is necessary for conservation of fish. T/C found not, & State S/Ct affirmed in part. (There may be a 'correct definition of the issue in view of Douglas' op. in Puyallup I ¶. But if there is sole issue, are we not bound by fact findings of T/C — if supported by any substantial ev.? Do we have to review ev.? (But see next page)

Sochse (cont).

check this.

J. Stewart read from ops. of S/Ct Wash. which found that conservation required restriction of commercial fishing. (I don't have Petition for Cert in my package of briefs & can't check ops. of S/Ct below at this time). (See SG's Br 7, 8)

SG says. that decision ~~by~~ by S/Ct discriminates vs. Indians in favor of sports fishermen. That is a denial of Treaty Rights. It is also discriminatory, as Indians can't afford to engage in sports fishing.

Conn

Judge Hall's dissenting op. states law correctly.

I in total confusion as to who claims what on these X-appeals.

S/Ct of Washington reached right result as to 1970 but for wrong reasons (standards). ~~SG. thinks~~.

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

From: Douglas; J.

2nd DRAFT

Circulate: 10-23

Recirculated:

SUPREME COURT OF THE UNITED STATES

Nos. 72–481 AND 72–746

Department of Game of the State of Washington, Petitioner,
72–481 *v.*
The Puyallup Tribe, Inc., et al.

Puyallup Tribe, Petitioner,
72–746 *v.*
Department of Game of the State of Washington.

On Writ of Certiorari to the Supreme Court of Washington.

Join 10/25

[November —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1963 the Department of Game and Fisheries of the State of Washington brought this action against the Puyallup Tribe and some of its members, claiming they were subject to the State's laws that prohibited net fishing at their usual and accustomed places and seeking to enjoin them from violating the State's fishing regulations. The Supreme Court of the State held that the tribe had protected fishing rights under the Treaty of Medicine Creek and that a member who was fishing at a usual and accustomed fishing place of the tribe may not be restrained or enjoined from doing so unless he is violating a state statute or regulation "which has been established to be reasonable and necessary for the conservation of the fishing." 70 Wash. 2d 245, 262, 422 P. 2d 754, 764.

On review of that decision we held that, as provided in the Treaty of Medicine Creek, the "right of taking fish, at all usual and accustomed grounds and stations [which] is . . . secured to said Indians, in common with all citizens of the Territory" extends to off-reservation fishing but that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." 391 U. S., at 395, 398. We found the state court decision had not clearly resolved the question whether barring the "use of set nets in fresh water streams or at their mouths" by all, including Indians, and allowing fishing only by hook and line in these areas was a reasonable and necessary conservation measure. The case was remanded for determination of that question and also "the issue of equal protection implicit in the phrase in common with" as used in the Treaty. *Id.*, 401–403.

In Washington the Department of Fisheries deals with salmon fishing while steel head trout are under the jurisdiction of the Department of Game. On our remand the Department of Fisheries changed its regulation to allow Indian net fishing for salmon in the Puyallup River (but not in the bay nor in the spawning areas of the river). The Department of Game, however, continued its total prohibition of net fishing for steel head trout. The Supreme Court of Washington upheld the regulations imposed by the Department of Fisheries which as noted were applicable to salmon; and no party has brought that ruling back here for review. The sole question tendered in the present cases concerns the regulations of the Department of Game concerning steel head trout. We granted the petitions for certiorari. —— U. S. ——.

The Supreme Court of Washington, while upholding the regulations of the Department of Game prohibiting fishing by net for steel head in 1970, 80 Wash. 2d 561, 497 P. 2d 171, held (1) that new fishing regulations for the Tribe must be made each year, supported by "facts and data that show the regulation is necessary for the conservation" of the steel head; (2) that the prohibition of net fishing for steel head was proper because "the catch of the steel head sports fishing alone in the Puyallup River leaves no more than a sufficient number of steel head for escapement necessary for the conservation of the steel head fishing in that river." *Id.*, at 573.

The ban on all net fishing in the Puyallup River for steel head [1] grants in effect the entire run to the sports fishermen. Whether that amounts to discrimination under the Treaty is the central question in these cases.

We know from the record and oral argument that the present run of steel head trout is made possible by the planting of young steel head trout called smolt and that the planting program is financed in large part by the license fees paid by the sports fishermen. The Washington Supreme Court said:

> "Mr. Clifford J. Millenback, Chief of the Fisheries Management Division of the Department of Game, testified that the run of steelhead in the Puyallup River drainage is between 16,000 and 18,000 fish annually; that approximately 5,000 to 6,000 are native run which is the maximum the Puyallup system will produce even if undisturbed; that approximately 10,000 are produced by the annual hatchery plant of 100,000 smolt; that smolt, small

[1] "ANNUAL CATCH LIMIT—STEELHEAD ONLY: Thirty steelhead over 20″ in length . . ." 1970 Game Fish Seasons and Catch Limits, 3 (Dept. of Game).

steelhead from 6 to 9 inches in length, are released in April, and make their way to the sea about the first of August; that during this time all fishing is closed to permit their escapement; that the entire cost of the hatchery smolt plant, exclusive of some federal funds, is financed from licensee fees paid by sports fishermen. The record further shows that 61 per cent of the entire sports catch on the river is from hatchery planted steelhead; that the catch of steelhead by the sports fishery, as determined from "card count" received from the licensed sports fishermen, is around 12,000 to 14,000 annually; [2] that the escapement required for adequate hatchery needs and spawning is 25 per cent to 50 percent of the run; that the steelhead fishery cannot therefore withstand a commercial fishery on the Puyallup River." 80 Wash. 2d, at 572.

At oral argument counsel for the Department of Game represented the catch of steel head that were developed from the hatchery program were in one year 60% of the total run and in another 80%. And he stated that approximately 80% of the cost of that program was financed by the license fees of sports fishermen. Whether that issue will emerge in this ongoing litigation as a basis for allocating the catch between the two groups, we do not know. We mention it only to reserve decision on it.

At issue presently is the problem of accommodating net fishing by the Puyallups with conservation needs of the river. Our prior decision recognized that net fishing by these Indians for commercial purposes was covered by the Treaty. 391 U. S. 398–399. We said that "the

[2] The Washington Supreme Court noted "that substantially all the steel head fishing occurs after their entrance into the respective rivers to which they return." 80 Wash. 2d, at 575.

manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated by the State in the interest of conservation, provided the regulation . . . does not discriminate against the Indians." *Id.*, 398. There is discrimination here because all Indian net fishing is barred and only hook and line fishing, entirely pre-empted by whites, is allowed.

Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook and line fishermen now catch all the steel head which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and white sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steel head that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook and line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.

The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

We do not imply that these fishing rights persist down to the very last steel head in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steel head is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steel head from following the fate of the passenger

pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steel head until it enters their nets.

We reverse the judgment below insofar as it treats the steel head problem and remand the case for proceedings not inconsistent with this opinion.

So ordered.

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

From: White, J.

Circulated: 10-24-73

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 72–481 AND 72–746

Department of Game of the State of Washington, Petitioner,
72–481 *v.*
The Puyallup Tribe, Inc., et al.

Puyallup Tribe, Petitioner,
72–746 *v.*
Department of Game of the State of Washington.

On Writ of Certiorari to the Supreme Court of Washington.

Join

[November —, 1973]

MR. JUSTICE WHITE, concurring in the opinion and judgment.

I agree that consistently with the Treaty commercial fishing by Indians cannot be totally forbidden in order to permit sports fishing in the usual volume. On the other hand, the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen. The opinion below, as I understand it, indicates that the river, left to its own devices, would have an annual run of 5,000 or 6,000 steelhead. It is only to this run that Indian Treaty rights extend. Moreover, if there were no sports fishing and no state-planted steelhead, and if the State, as the Court said it could when this case was here before, may restrict commercial fishing in the interest of conservation, the Indian fishery cannot take so many fish that the natural run would suffer progressive depletion. Because the Court's opinion appears to leave room for this approach and for substantial, but fair, limits on the Indian commercial fishery, I am content to concur.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 24, 1973

Re: No. 72-481 - Dept. of Game of Washington
v. Puyallup Tribe
No. 72-746 - Puyallup Tribe v. Dept. of
Game of Washington

Dear Bill:

Please join me in your circulation of October 23.

Sincerely,

H.A.B.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 24, 1973

RE: Nos. 72-481 and 72-746 - Department of Game of the State of Washington v. The Puyallup Tribe, Inc.

Dear Bill:

I agree.

Sincerely,

Bill

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

October 24, 1973

72-481 - Wash. Game Dept. v. Puyallup Tribe

Dear Byron,

Please add my name to your concurring opinion in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

October 25, 1973

No. 72-481 Dept. of Game of Washington v. Puyallup Tribe
No. 72-746 Puyallup Tribe v. Dept. of Game of Washington

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Douglas

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 25, 1973

Re: No. 72-481 -- Dept. of Game of Washington
v. Puyallup Tribe
No. 72-746 -- Puyallup Tribe v. Dept. of
Game of Washington

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

October 25, 1973

Re: No. 72-481 - Department of Game, State of Washington v. Puyallup Tribe
No. 72-746 - Puyallup Tribe v. Department of Game, State of Washington

MEMORANDUM TO THE CONFERENCE:

At Conference, I voted to reverse the Supreme Court of Washington and remand for further proceedings. Bill's circulation accomplishes this result and remands the case for further proceedings consistent with the opinion.

I agree fully with the general reasoning of the opinion which tracks generally the position of the Government on behalf of the Indians. However, since the Court is remanding "for proceedings not inconsistent with this opinion," I wonder if the opinion should not set forth more clearly the criteria appropriate for the state court's consideration on remand -- and for future litigation? For example, the opinion does not clearly answer -- at least for me -- the question whether the Indians, under the Treaty, must be permitted all those fish which the needs of conservation do not require go elsewhere or must simply be permitted to participate in the allocation of the resource. (See draft opinion p. 5). The treaty language and the holding of Puyallup I clearly seem to say that they must simply be allowed to participate on an equal footing with other uses -- not have their entire needs completely satisfied before anyone else gets a part of the catch. It seems to me we should perhaps more affirmatively adopt the second approach. The literature in this field often speaks in terms of proportionate allocation on a basis of economic need (reminding that the Indians signed the Treaty expecting to receive protection of their traditional livelihood as fishermen). If we want to preclude this interpretation and simply place the Indian on equal footing with others, would it

not help to be more explicit?

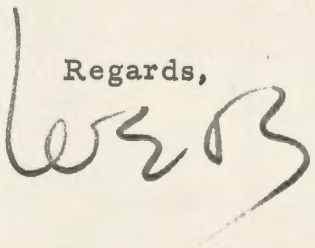
Justice White's concurring opinion deals, up to a point with the unanswered question, i.e., the degree to which the Indians must be permitted, under the Treaty, to participate in the allocation of the fish resource. He notes:

> (1) The Treaty does not oblige the State to subsidize the Indian fishery with planted fish paid for by sports fishermen. The Indians' Treaty rights extend only to the natural run.
>
> (2) Even in regard to the natural run, the Indian fishery cannot take so many fish as to deplete the natural run.

This approach seems to give the Washington court more positive guidance than that contained in the circulated draft opinion. It still does not reach, however, the hard question -- whether, in regard to the natural run, the Indians are to be treated as co-equal users with the other users or are to have an absolute "first lien" on the natural run, at least until it begins to suffer progressive depletion. The point might be made, I think, that, even in regard to the natural run, the Indian use is only a co-equal use with other legitimate uses.

Perhaps I am missing something that will be crystal clear to the state court judges; if so, I would be glad to see just what it is I am missing.

Regards,



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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 12, 1973

Re: No. 72-481 - Department of Game v. Puyallup;
No. 72-746 - Puyallup v. Department of Game

Dear Bill:

Please join me.

Sincerely,

WHR

Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 12, 1973

MEMO TO THE CONFERENCE:

In re 72-481 and 72-746, Dept. of Game v. Puyallup Tribe and Puyallup Tribe v. Dept. of Game

I have reread the briefs and the transcript of the oral argument in these cases and, while not necessarily disagreeing at all with Byron, I think the questions should be reserved. I think the draft you presently have effectively does that and will mention the matter at our Conference November 13 at 3 p.m. to see if the opinion can be cleared for Wednesday the 14th or Monday the 19th.

William O. Douglas

The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

November 14, 1973

Re: 72-481) - Dept. of Game of State of Wn. v. Puyallup Tribe
72-746) - Puyallup Tribe v. Dept. of Game of State of Wn.

Dear Byron:

Please join me in your concurring opinion.

Regards,

WEB

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

November 14, 1973

Re: 72-481 - Dept. of Game of State of Wn. v. Puyallup Tribe
72-746 - Puyallup Tribe v. Dept. of Game of State of Wn.

Dear Bill:

In light of your recent memo, I am content to join you. I will also join Byron.

Regards,

WOD

Mr. Justice Douglas

Copies to the 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.
	10-16-73							
join WOD 11/14/73	2nd draft 10/23/73	agree 10/24/73	join BRW 10/24/73	Concurring opinion 1st draft 10/24/73	join WOD 10/25/73	join WOD 10/29/73	join WOD 10/26/73	join WOD 11/12/73
join BRW 11/14/73						~~join BRW~~ 10/29/73		
					No. 72-481 Dept. of Game of Wash. v. Puyallup Tribe			
					No. 72-746 Puyallup Tribe v. Dept. of Game of Wash.			