10-1978

Washington v. Washington State Commercial Passenger Fishing Vessel Assn.

Lewis F. Powell Jr.

PRELIMINARY MEMORANDUM

February ~~24~~, 1978 Conference
List ~~1~~, Sheet 2

No. 77-983 CSX	Cert to Washington Supreme Ct from two decisions w/ various judges dissenting & concurring.[1]
WASHINGTON	
v.	
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASS'N.	State/Civil Timely

1. SUMMARY: Petrs Washington State, Washington State Department of Fisheries and the Director of that Department were enjoined by a

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1/ The first is Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson (hereinafter Tollefson). Judge Rosellini wrote for the majority which included Hamilton, Brachtenback and Hicks. Judges Stafford and Wright concurred in the result only. Judge Utter dissented. The second case is Puget Sound Guillnetters Ass'n v. Moos (hereinafter Moos). Judge Rosellini again wrote for the majority which this time included Judges Wright, Hamilton, Brachtenback and Armstrong. Judges Horowitz, Stafford and Utter concurred in part and dissented in part.

federal DC from enacting any laws or regulations which interferred with the fishing rights of the Indians under certain treaties (Medicine Creek Treaties). The Department, in an attempt to comply with the DC's order, then promulgated regulations which allowed the Indians to catch 50% of harvestable run of fish. The Washington Supreme Court struck down the regulations as being in excess of the Department's statutory authority and violative of the equal protection clause of the United States Constitution. Petrs raise a number of contentions, but they all seem to boil down to two questions: (1) whether the above mentioned treaties require the State to restrict fishing by non-Indians in order to provide a specified percentage of the fish to Indians; and (2) whether such a regulations would violate the equal protection clause. As explained below, I am not entirely sure that this case actually presents precisely those issues, but it is clear that the state and federal courts have interpreted the applicable treaty and the Constitutic of the United States in a conflicting manner. It is likewise possible those decisions place conflicting duties upon petrs.

2. FACTS: In the mid-1850's, the United States entered into a series of treaties with Indians in the Northwest in which "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." 10 Stat. 1132, Medicine Creek Treaty. These treaties have been the subject of a great deal of litigation.[2/] Of particular concern

2/ This Court has addressed questions arising under the treaties a number of times. See, e.g., United States v. Winans, 198 U.S. 371 (1905) Tulee v. Washington, 315 U.S. 681 (1942); Puyallup Tribe, Inc. v. Department of Game, 391 U.S. 392 (1968) (Puyallup I); Department of Game v.

in this case is an action commenced in 1970 by the United States against the State of Washington and its Department of Game and Fisheries to enforce compliance with the above mentioned treaties. The DC, in a lengthy opinion, ultimately enjoined the defendants in that action (petrs here) from enacting any laws or regulations which interfered with the fishing rights of the Indians under the treaties. In particular the DC held that while the state could promulgate reasonable regulations for the purpose of conservation, the State could not regulate treaty Indians from taking the harvestable run at their "usual accustomed grounds and stations" unless necessary to limit them to 50% of the harvest on these grounds. United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). Resps in the present action were not allowed to intervene, but, according to the DC and CA, filed extensive amicus briefs and participated almost as though they were parties at every stage of the proceedings.

Petrs then promulgated regulations restricting the number of fish that could be taken by non-Indians in order to allow the Indians to take 50% of the fish. One of the resps, an association of charter boat operators, challenged in state court the regulations as they reduced the daily salmon limit for sports fishermen. The lower court invalidated the regulations. The state Supreme Court initially dis-

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2/ (Continued):
Puyallup Tribe, Inc., 414 U.S. 44 (1973) (Puyallup II); Puyallup Tribe, Inc. v. Department of Game, 45 U.S.L.W. 4837 (June 23, 1977) (Puyallup III).

missed the case as moot because the season to which the regulations applied was over. Upon rehearing, it decided it should address the questions because they were important and of a recurring nature. (See Tollefson case, fn. 1, supra). The court, with two judges dissenting, affirmed the lower court, ruling that the Director of the Department did not have the statutory authority to make an unequal allocation of fish among members of the same class of user. The basis for this ruling was the court's finding that the Director did not promulgate the regulations as a conservation measure, but rather in order to comply with the federal DC's order and that such a regulation would violate the equal protection clause of the United States Constitution. The dissenting judges argued that this Court had rejected the argument that the treaty violates the equal protection clause unless interpreted to confer no greater rights than those held by non-treaty citizens. See United States v. Winans, 198 U.S., at 379, 381; Puyallup I, 391 U.S., at 398, 402 n.14; Puyallup II, 414 U.S., at 48-49. See also Antoine v. Washington, 420 U.S. 194, 205-206 (1975). They also disagreed with the majority's interpretation of the Director's powers. At about the same time, another one of the resps, a commercial fishing association, sought in state court a writ of mandamus requiring the Director to restrict fishing regulations to those necessary for conservation and to treat Indian and non-Indian fishermen equally. See Toos, fn. 1, supra. The Washington Supreme Court ultimately held in favor of resp, ruling that the Director had authority to issue only regulations for the purpose of

conservation and could not treat Indians and non-Indians differently because that result was not required under the treaties.[3/] The court thought the federal court action basically meaningless because not only had the federal court misinterpreted the treaty, but a federal court cann compel governmental officers to do what they are not authorized under sta law to do. Supervisors v. United States, 85 U.S. (18 Wall.) F1 (1873). Three judges concurred in part and dissented in part, agreeing the writ should not issue because it would place the Director under conflicting duties, but disagreeing on the court's further holding regarding the scop of the Director's powers. The United States and the Tribes did not seek party status in either of these cases, but filed amicus briefs.

It is these two decisions from which petrs seek cert. Other facts will be given as relevant.

3. CONTENTIONS: Petrs only touch briefly on the merits of these decisions. They argue that to the extent the state court decision bars allocation of fishing rights to Indians, it is probably in conflict with the applicable decisions of this Court. In particular, they stress a conflict with Puyallup III (see fn. 2, supra), in which this Court essentially approved an allocation of fish to treat Indians.

The thrust of petrs argument in favor of cert, however, is not the wrongness of the decision below, but the fact that there is now a conflict between the state and federal courts on the matter and that the conflict particularly effects petrs, subjecting them to apparently

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3/ The court initially declined to issue the writ because "the director will voluntarily abide by the court's decision." Resps renewed their request for a mandamus order, however, and petrs inform us that mandamus was issued on a preliminary basis by the Chief Justice of the Wash. Supreme Ct and is presently under consideration by the whole court.

conflicting duties. They point out that the federal DC repeatedly enjoined the state court from deciding the matter, but these injunctions were simply ignored. They also inform us that the Director has been ordered to show cause why he should not be held in contempt of court -- in both state and federal court. And yet, stresses the Director, it is impossible to comply with both the decisions.

A response has been filed by the commercial fishing association. It too thinks this Court ought to grant cert to resolve this conflict. The association particularly stresses the fact that this involves the construction of a treaty and the federal constitution, so it involves particularly important questions of federal law. It also stresses the violence engendered by the dispute between the Indians and non-Indians.

4. DISCUSSION: The conflict in this case is clear and the Director appears to be caught between the federal and state courts, but I am not entirely sure whether the problem can be resolved through review of this case.

It is clear the state and federal court disagree on the proper interpretation of the treaty. The state court held that the treaty granted the Indians simply an "equal opportunity to fish." The federal court held in essence that the Indians were entitled to 50% of the harvestable fish in their usual fishing places. Moreover, the state court held that granting the Indians 50% of the fish would violate the equal protection clause. In light of the cases cited in fn. 2, supra, particularly the three Puyallup cases, I am inclined to think the state

court is wrong on both counts. The problem, however, is that the very first holding in each of the state court cases appears to be that the Director does not have the power to issue regulations for any purpose other than conservation (and since the regulations were issued for the purpose of complying with a federal court order and not for the purpose of conservation, they were beyond the scope of the Director's authority). One still might argue that that presents a question of federal law because it directly involves compliance with a federal court order. I am not so sure, however. It seems to me that both petrs and the Washington Supreme Court simply misconceive the federal court order. As I read it, the DC did not order the state to promulgate regulations limiting the catch of non-Indians to 50%. Rather, it held that the state could not issue regulations which violated the Indians' treaty rights (e.g., the state could issue conservation regulations as long as they allowed the Indians at least 50% of the catch). Once the DC decree is formulated in those terms, it does not place the Director under conflicting obligations, at least not under the conflicting obligations the Director claims to be under. Rather, if, under state law, the Director cannot issue regulations which conform to the DC order, then the Director simply cannot issue any regulations which limit the Indians' rights. Then, I would think, if non-Indians take more than 50% of the fish, the United States government, as trustees for the Indians, or the Indians themselves can go into federal court and enjoin the guilty parties (the federal DC has continuing jurisdiction over

thinks he
the matter). Thus, the bind in which the Director/is placed may be more illusory than real and the threshold question in this case may really be one largely of state law.

I think there is enough doubt about the matter, however, that the Court ought to call for the views of the S.G. The federal government plays an important role with respect to these Indians and these treaties. The government also understands the exact scope of the DC's decision and can give us a much better idea of the exact nature of the conflict, the Director's supposedly conflicting duties, and the questions really presented for review in this case. And if, contrary to my initial impression, the case really presents for review those questions which petrs and resps claim are presented, then I think the case may well be certworthy.

There is <u>one</u> response.

2/13/78 CMS	Young	Wash. S. Ct. ops in petn.

No. 77-983 CSX
WASHINGTON v. WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASS'N.

The SG has filed an amicus brief. It supplements the factual statement in this memo by noting that, as the state court litigation gradually indicated that Washington would not be able to comply with the federal court's judgment, the United States and the tribes again invoked the continuing jurisdiction of the district court in United States v. Washington. That court issued a series of orders during August and September, 1977, designed to protect the Indians' treaty rights. By orders dated August 10 and 31, 1977, the federal court determined the treaty Indians' proper share of the 1977 harvest and expressly removed that share from the jurisdiction and control of the State of Washington.

The federal court also issued injunctions against the non-treaty fishermen, prohibiting all net salmon fishing in certain specifically described geographic areas except during such times and in such specific waters as were open by regulations conforming to the court's prior orders.

The SG urges that the petn for cert be denied or that action on it be deferred. Although the SG believes that the decisions by the state courts on which petrs seek cert are incorrect as a matter of federal law, he also believes that these cases do not provide an adequate or appropriate vehicle for resolution of the important conflict that exists between the federal and state courts. The cases awaiting decision by the federal court of appeals can be expected to provide a much more suitable vehicle, and review of the controversy by this Court should await their presentation.

The SG particularly emphasizes the incompleteness of the record below. He argues that the record in the federal cases pending before CA 9 on the same issues will be much more complete and review of those cases would, by any measure, be preferable to granting cert

in this case.

Finally, the SG questions whether there is presently any final judgment in Puget Sound Gillnetters Ass'n v. Moos from which the State of Washington can seek review. Despite its agreement with most of resps' arguments, the Wash. Sup. Ct. declined to issue a writ of mandamus against the State or its officials. Moreover, the proceeding has now been reopened by the filing of an emergency motion by resps. In the SG's view, this Court thus lacks jurisdiction over that case while it is still pending in the state court. Although a further order of the state court might remedy the defect, for this Court to grant cert now would be at least premature.

My own view is that cert should be denied. This Court can review the federal court judgment, now pending before CA 9, on a more complete record than afforded in the state court cases.

2/23/78 KE

No. 77-983 CSX
WASHINGTON v. WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASS'N.

Resps' Reply to SG's Amicus Brief has been received. It makes several contentions.

1. Resps take issue with the SG's assertion that the case pending before CA 9 will provide a more suitable vehicle for resolution of the issues presented in this petn. Resps claim that at the time of oral argument in CA 9, the "presiding judge" of the panel stated that the court would not review the interpretation of the "in common with" language in the treaty provision--the interpretation of which, petrs claim, is of vital importance.

I do not find this argument to be very strong. The interpretation of the "in common with" provision is not the paramount issue that resps would have us believe. In any event, I think the Court should not put too much stock in resps' prognosis as to what CA 9 will or will not decide when it issues its opinion.

2. The SG has argued that the record is incomplete in the state cases. Although resps claim that the issues to be decided are issues of law not requiring a complete record, resps state that they and petr are willing to permit the United States to include with the record before this Court all or any part of the record in United States v. Washington.

3. The SG objects that the United States and the Indian Tribes are not parties to the state cases. Resps contend that the U.S. and the Tribes were invited by the parties and the State Supreme Court to participate as intervenors in those cases, and they refused. On the other hand, two of the resps in the state cases petitioned to intervene in the federal case but their petitions were denied.

I see no particular relevance to resps' discussion on this point.

4. The SG questions whether there is presently any final judgment in Puget Sound Gillnetters Ass'n v. Moos (the state case) from which the state of Washington can seek review. Resps submit that the decision below became final on October 10, 1977, when the Washington Supreme Court denied a petn for rehearing in that case. Resps argue that their Oct. 7, 1977, emergency motion to which the SG refers was a motion for purely remedial relief. It in no way affects the finality of the decision of the state Supreme Court.

This disagreement is difficult to appraise without access to the emergency motion. However, I am inclined to credit the SG's interpretation of the finality question over that of the resps. The fact that resps have sought only "remedial" relief (as opposed, I guess, to prospective relief) in their emergency motion seems largely immaterial

to the finality question. If further relief may be forthcoming--based on the merits of the dispute--the case would seem to be non-final.

5. Lastly, resps state that, although they feel that the state cases before this Court are an adequate vehicle to review the major issues in United States v. Washington, particularly since the record in that case can be brought before this Court, resps are willing to have the cases presently pending before CA 9 consolidated with the state cases before this Court for review of all the issues raised by all these cases.

Because the two cases are so closely intertwined, it might be useful to hold this case until CA 9's decision is issued and cert is sought on that case. I am still of the view, however, that the federal case is the better vehicle for review of the issues here presented and resps offer no persuasive reasons why the cases would have to be consolidated.

3/1/78 Ellison Opinion in petn

No. 77-983 CSX, WASHINGTON v. WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSN.

This case was held for CA 9's decision in a related proceeding. CA 9's opinion and judgment having been received, the case is on the relist list for May 18, 1978.

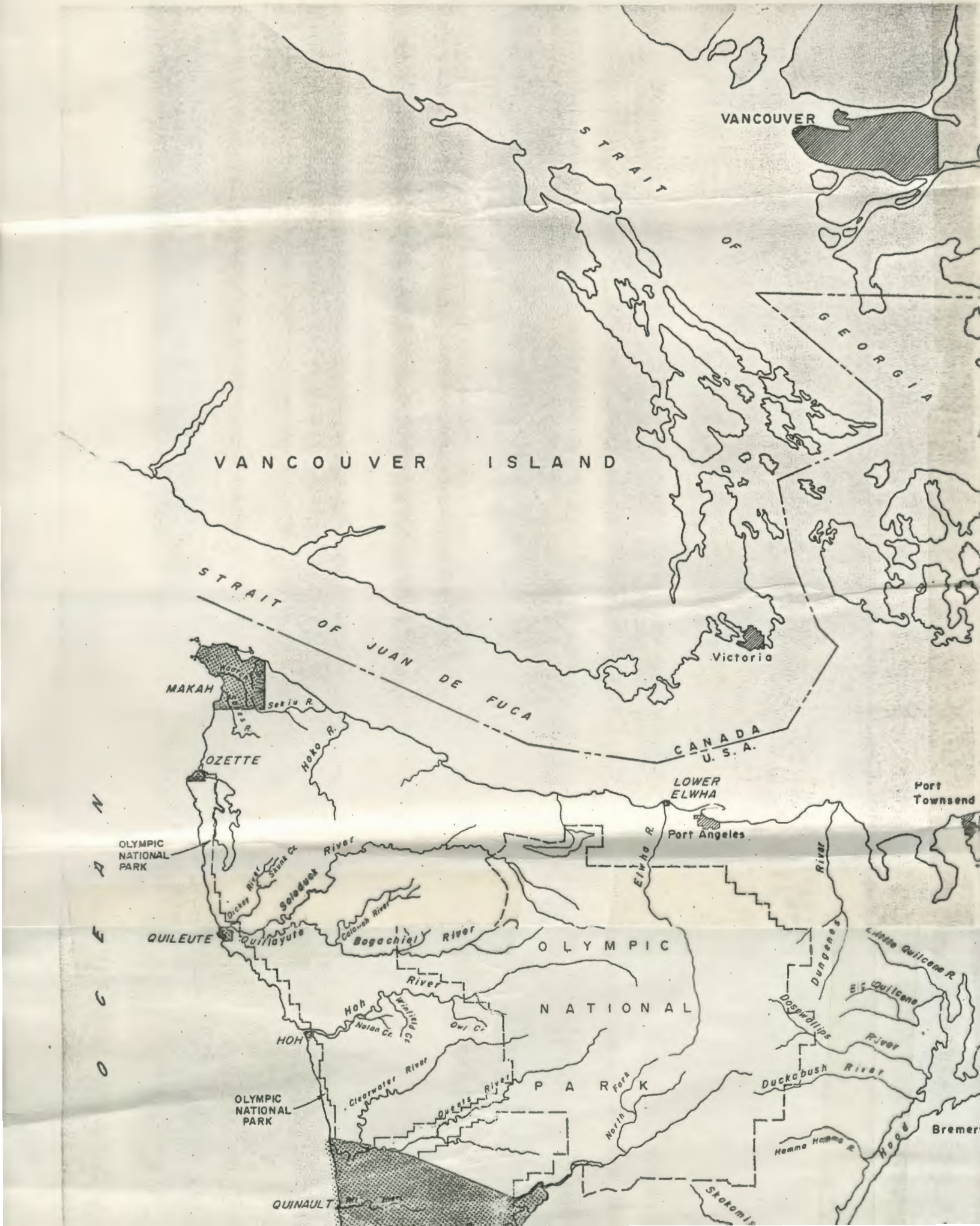
CA 9 affirmed the decision of the DC. It is now clear that the federal DC has, for all practical purposes, taken over management of fishing rights in the state of Washington. It is also clear that the state court decision (from which cert is being sought in No. 77-983) conflicts with the decision of the federal DC and the CA 9 as to the proper interpretation of the treaty.

Still, I do not think this case merits a grant. As explained in the preliminary memorandum, at p. 7, petrs and the Washington Supreme Court misconceive the federal court order (now affirmed by CA 9). The DC did not order the state to promulgate regulations limiting the catch of non-Indians to 50%. Rather, it held only that the state could not issue regulations which violated the Indians' treaty rights. Under this view of the DC's order, it does not place the Director of the Dept. of Fisheries under a conflicting set of obligations. If the Director cannot, under state law, issue regulations which conform to the DC order, then the Director simply cannot issue any regulations

that limit the Indians' rights. But, in any event, the resolution of this question obviously turns on Washington law, not federal law.

The significant federal law question--i.e., the proper interpretation of the treaty--is presented in the case just decided by CA 9. If the Court wants to consider the question, it will have a chance when cert is sought--as I am sure it will be--from CA 9's decision. In the interim, however, there is no need to hold this case further; I would deny.

5/17/78 KE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OZETTE
LOWER ELWHA
Port Townsend
Port Angeles
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Skunk Cr.
Soleduck River
Calawah River
Bogachiel River
QUILEUTE
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Elwha R.
Dungeness River
Little Quilcene R.
E.F. Quilcene
Dosewallips River
Duckabush River
OLYMPIC NATIONAL PARK
Hoh River
Winfield Cr.
Nolan Cr.
Owl Cr.
HOH
Clearwater River
Queets River
North Fork
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Bremer
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QUINAULT
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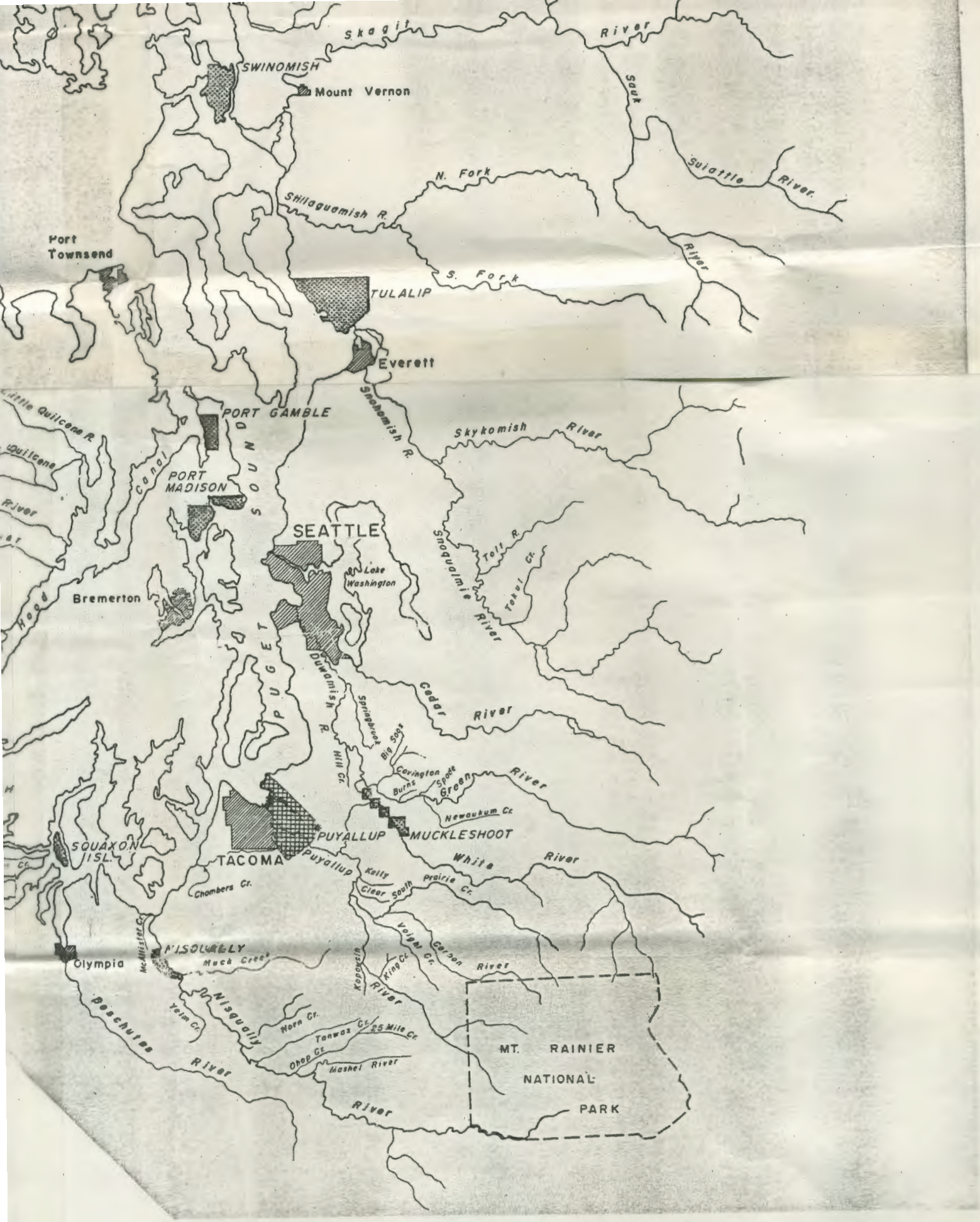

*PUYALLUP RESERVATION BOUNDARIES AS ESTABLISHED THROUGH 1874. PRESENT LEGAL EXISTENCE AND/OR BOUNDARIES OF THIS RESERVATION IS CURRENTLY IN DISPUTE AND IS SUBJECT OF OTHER PENDING LITIGATION.


Fraser River
C A N A D A
U. S. A.
Nooksack River
LUMMI
Bellingham
S. Fork
Skagit River
SWINOMISH
Mount Vernon
Sauk
Suiattle River
N. Fork
Stillaguamish R.
Port Townsend
S. Fork
TULALIP
Everett
Snohomish R.
Skykomish River
PORT GAMBLE
Canal
PORT MADISON
SOUND
SEATTLE
Lake Washington
Bremerton
Snoqualmie River
Tolt R.
Tokul Cr.

LEGEND

INDIAN RESERVATION

UNITED STATES -v- WASHINGTON

(Civil No. 9213) Case Area

June 28, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

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

No. 77-983

WASHINGTON

vs.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSN.

Relisted.

Relist and Hold for CA9 case Heat is on its way. See Rehnquist's Memo (with which I disagree) 6/22/78

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

for completion of CA9 case.

Grant

BB 10/2/78

Important case involving
the near doom in Washington
as to regulation of fishing.
(State & fed courts in disagreement)
SG ~~recommends~~ does not oppose Grant.

PRELIMINARY MEMORANDUM

October 13,1978, Conference
List 1, Sheet 1

No. 78-119

WASHINGTON	Cert. to CA 9 (Chambers, Kennedy, and Jameson)	
v.		
UNITED STATES	Federal/Civil	Timely
PUGET SOUND GILLNETTERS ASSOCIATION	Cert. to CA 9 (Goodwin, Wallace, and Kennedy)	
v.		
USDC FOR WD OF WASHINGTON	Federal/Civil	Timely

Grant but only on

I recommend discussion with a view to granting both petitions, but only on the Puget Sound Gillnetters Assoc. case.

Brennan

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION	Cert. to CA 9 (Goodwin, Wallace, and Kennedy)	
v.		
USDC FOR WD OF WASHINGTON	Federal/Civil	Timely
UNITED STATES	Cert. to W.D. Washington (Boldt, D.J.)	
v.		
WASHINGTON	Federal/Civil	Timely

grant - cert only on

1. Summary: These two petitions arise from the continuing controversy over the proper construction and effective implementation of the fishing rights clauses contained in the treaties between the United States and the Pacific Northwest Indian tribes.

2. Facts: (a) Procedural Posture in this Court. In No. 78-119, the State of Washington seeks review of two decisions of the CA 9, Washington v. United States, 573 F.2d 1118 (April 24, 1978)("International Fishery case"), and Puget Sound Gillnetters Assn v. USDC for the WD Washington, 573 F.2d 1123 (April 24, 1978)("Washington Fishery case"). In No. 78-139, Puget Sound Gillnetters Association and other commercial fishers associations seek review of the Washington Fishery case. They also seek direct review of the decision in United States v. Washington, Civ.No. 9213 (W.D.Wash. June 6,

1978)("1978 Enforcement Order"). The United States has filed a single Brief in response to the two petitions.

The petitions in Nos. 78-119 and 78-139 are curve-lined. The two petitions are in turn straight-lined with Washington v. Washington State Comm'l Passenger Fishing Vessel Assoc., No. 77-983, and this Memorandum assumes familiarity with the facts stated in the Preliminary Memorandum in that case. The extensive Preliminary Memorandum in United States v. Washington, No. 75-588, cert. denied, 423 U.S. 1086 (1976)("Treaty Case"), is also helpful.

Prelim. Memo. attached.

Prelim. Memo attached.

(b) Facts in Washington Fishery Case. In response to the Washington state court litigation at issue in No. 77-983, the United States and the tribes invoked the continuing jurisdiction of the DC in the Treaty Case. The DC determined the Indians share of the 1977 harvest and removed that share from State jurisdiction. When it appeared that State law prevented the State's Department of Fisheries from enforcing the resulting limit on non-treaty fishermen, the DC issued injunctions against the non-treaty fishermen. The injunctions prohibited all net salmon fishing in specified geographic areas except during such times and in such places as are authorized by regulations conforming to the DC's basic allocation of the harvest between treaty and non-treaty fishermen. The DC directed the State and the United States to cite any fisherman who, having notice of the injunction, thereafter fished

illegally, and to require him to appear before the DC to show why he should not be held in contempt.

Both the non-treaty fishermen and the State sought review of the DC's orders. The CA 9 consolidated the appeals, and upheld the orders entered by the DC, in the Washington Fishery case.

(c) Facts in the 1978 Enforcement Order. In June 1978 the DC issued an order to govern fishing rights during the 1978 and subsequent fishing seasons. According to the SG, that order is in all material respects identical to the 1977 order at issue in the Washington Fishery case. A notice of appeal from the 1978 Enforcement Order has been filed and the matter is pending in the CA 9.

(d) Facts in the International Fishery Case. In the Treaty Case, the State argued that the Convention of May 26, 1930, between the United States and Canada abolished Indian treaty fishing rights with respect to Fraser River salmon. The Convention provides for an equal division of the catch of Fraser River salmon between Canadian and American fishermen and establishes the International Pacific Salmon Fisheries Comm'n (IPSFC) to implement the agreement. The IPSFC proposes regulations each year to govern fishing in the Fraser River, effective on approval of each nation.

The United States argued that the Convention was not intended to affect the allocation of United States fishing

rights between Indians and non-treaty fishermen. The CA 9 agreed, but also concluded that all fishermen were bound by IPSFC regulations. When the United States was unsuccessful in securing alteration of the IPSFC regulations to allow a special treaty fishery, it withdrew its approval of a portion of the 1975 regulations of the IPFSC. The DC then ordered the State, which had incorporated the IPSFC regulations into its own laws, to alter its regulations to permit a special treaty fishery on the Fraser River.

The State appealed, and the CA 9 dismissed the case as moot in the International Fishery decision.

3. Decisions Below: (a) Washington Fishery Case. The CA 9 began by reaffirming the construction given by it and the DC to the fishing rights clause in the Treaty Case. There the treaty provision securing to the Indians "[t]he right of taking fish, at all usual and accustomed grounds and stations ... in common with all citizens of the Territory" was interpreted to interdict State regulation of Indian fishing that would reduce the Indians' take below fifty percent of the annual harvest. The only exception is State conservation regulations essential to the preservation of a particular run.

The CA 9 held that the different treatment of Indians and non-Indians in the DC order is not an Equal Protection violation. In reaching its conclusion on this point, the CA 9 pointed to the quasi-sovereign status of the Indians under

their treaties with the United States, reasoning that the distinction drawn is a political and not a racial one.

The CA 9, noting the inability of the State to regulate the fisheries in a manner assuring the Indians their treaty rights, approved the 1977 regulation of the fisheries by the DC. It found that the DC regulations aimed at providing non-treaty fishermen with 55 percent of the total opportunity at the available harvest, and treaty fishermen 45 percent, and that this allocation was consistent with the treaties. It found the DC's regulations reasonably suited to assure that the Indians' share of the harvest would make it past the non-treaty fishermen and up the runs to the treaty fisheries.

The CA 9 upheld the DC's orders that were directed at fishermen and fishing associations not parties to the Washington Fishery case. It reasoned that in litigation over the allocation of a natural resource held by the State in trust for its people, citizens of the State are in privity with the State. Fishing rights are State-created, and any right of private appropriation is derivative from State power and control. As authority, the CA 9 cited water law cases in which States litigate their rights to water, and appropriators under the States' laws are bound by those decisions without being parties.

Judge Kennedy, concurring, recognized that the Treaty Case made the "even apportionment" construction of the fishing

rights clause manadatory for the panel in the Washington Fishery case. But he also stated that "it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of those treaty rights." Judge Wallace joined Judge Kennedy's concurrence.

(b) The 1978 Enforcement Order. The 1978 Enforcement Order continues the DC's regulation of the fisheries. Review is sought prior to CA 9 review.

(c) International Fishery Case. The CA 9 dismissed this case as moot. The 1975 IPSFC regulations, the subject of the DC's order to the State, had been superseded by the time the CA 9 decided the appeal. Further, the United States has removed treaty fishermen from IPSFC jurisdiction and now regulates treaty fishing itself. Therefore, the CA 9 concluded, there is little chance that the challenged orders of the DC will be repeated.

4. Contentions: The State argues that the CA 9's basic construction of the fishing rights clause, in the Washington Fishery case, to require a fifty-fifty allocation is erroneous, especially where the fishery is open and available to all fishermen. The State relies on the decision in Department of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 44 (1973), to indicate this Court's rejection of a specific allocation based on the treaty, though the Court there only indicated that it would not announce an allocation formula but

would leave such a factual issue to the lower courts. The State stresses the misgivings of Judges Kennedy and Wallace, and emphasizes that because certiorari was denied in the Treaty Case, this Court has never passed on the merits of the treaty construction issue.

The State contends that the CA 9 has reached conclusions about the construction of the treaty and about the equal protection question that are in conflict with the decisions of the Washington Supreme Court at issue in No. 77-983. The State also contents that this Court's previous decisions have endorsed non-discriminatory regulation of fishing, directed at necessary conservation, as consistent with treaty rights, and that its regulation never went beyond conservation.

Regarding the International Fishery case, the State argues that the decision is not moot because the United States is still pursuing the policy of allocating the Fraser River harvest on a 50-50 basis between treaty and non-treaty fishermen.

In addition to the points made by the State, the petrs in No. 78-139 contend that the DC's orders in the Washington Fishery case and the 1978 Enforcement Order are significantly different from the orders at issue in the earlier Treaty Case. While the earlier order restrained the State from interfering with the opportunity of treaty fishermen to take up to 50

percent of the annual harvest, the present order runs against individual fishermen and sets numerical limits on the catch allowed to non-treaty fishermen.

These petrs stress the ruinous consequences of the DC order for their commercial fishing industry. They argue as well that the DC, by ordering the State Department of Fisheries to aid in enforcement of the DC's orders, has ignored the State Supreme Court's ruling thas the Department has no authority to engage in such activity.

Regarding the Enforcement Order of 1978, these petrs contend that no meaningful review is likely in the CA 9 because the 1978 Order is virtually the same as the 1977 order already reviewed in the Washington Fishery case. They urge the Court to settle this question of treaty rights expeditiously by accepting a direct appeal.

The SG does not oppose a grant of certiorari in the Washington Fishery case and the 1978 Enforcement Order, but does maintain that the International Fishery case is moot. The SG states that the conflicting decisions of the CA 9 and the Washington Supreme Court on both the treaty construction and the enforcement issues have caused a serious breakdown in the enforcement of fisheries regulations in Washington. The SG contends that only resolution of the conflict by this Court will allow a return of control of the fisheries to the State and ensure State enforcement of the treaty rights of the

Indians, relieving the federal government of the substantial enforcement burden it bears currently.

The SG identifies the central issue in the Washington Fishery case and the 1978 Enforcement Order as the interpretation of the fishing rights clause. He agrees with petrs that the conflict between the CA 9 and the Washington Supreme Court is substantial, and does not think that this Court's denial of certiorari in the Treaty Case forecloses the issue at the present time. The SG concludes that the Court should review both the Washington Fishery case and the Washington Supreme Court decisions in No. 77-983 on the treaty interpretation issue. The SG also urges the Court to resolve this litigation once and for all by also reviewing the DC's enforcement orders.

Respondent Yakima Nation urges the Court to deny certiorari. A grant, in this resp's view, will only strengthen the State's resistance to the DC's orders and thus provoke continued lawlessness in the fisheries. The resp urges a denial of the petitions accompanied by an opinion disapproving the State's position--a kind of summary affirmance of the CA 9 decision.

Other Indians tribes, as respondents, urge that the State cases in No. 77-983 are contrived. They also argue that the treaty interpretation question was decided in the Treaty Case, and should not be relitigated now. Further, they contend

that because the DC has now taken over the enforcement burden itself, removing jurisdiction over the fisheries from the State, the State cases are moot. Finally, they point out that review by this Court cannot cure the enforcement problems created by the state law incapacity of the Washinton Department of Fisheries to enforce any rules other than conservation measures.

5. Discussion: The misgivings of Judges Kennedy and Wallace about the justification for the "even apportionment" interpretation of the fishing rights clause argue in favor of reviewing that question. Now that the treaty interpretation first announced in the Treaty Case has been particularized fully in the DC's regulations, the issue is ripe for review.

Because all of the parties agree that the 1977 and 1978 DC regulations differ only in some details, there seems to be no reason to grant the petn for review of the 1978 Enforcement Order before a decision by the CA 9 in that case. The CA 9 will be able to apply a decision by this Court in the Washington Fishery case to the appeal of the 1978 Enforcement Order.

The basis for the SG's optimism about the effect of a decision by this Court on the willingness of the State to enforce the Indians' treaty rights is unclear. If no state officer is authorized by State law to undertake such duties, that incapacity will not be removed by this Court's holding on

federal treaty and constitutional issues.

Even if there is little likelihood that the State will assume the burden of enforcing the Indians' treaty rights, however, review of the state court decisions in No. 77-983 in conjunction with the Washington Fishery case still may be important. The Washington Supreme Court held not only that the State Department of Fisheries has no legal authority to enforce other than conservation regulations, but also that the Department has a statutory duty "to authorize the harvesting of salmon not required for spawning" and that it "may restrict the harvesting of salmon by the commercial fishermen only to the extent that no surplus exists and that the restriction is necessary to prevent the impairment of the supply of salmon". The Washington court held that the Department may not "allocate fish among competing claimants for purposes other than conservation," and may not "allocate fish to treaty Indians or to non-Indians." Any action by the Department that is consistent with this declaration of duty will be inconsistent with the interpretation of the fishing rights clause in the Treaty Case and the Washington Fishery case. But the Washington Supreme Court interpreted the fishing rights clause differently from the federal courts, holding that it only requires equal opportunity in the fisheries for all fishermen. As a consequence, State officials are under a state statutory duty to regulate in a manner inconsistent with federal law as

declared by the federal courts but consistent with federal law as declared by the Washington courts.

When the Washington Supreme Court reached its decisions in the cases in No. 77-983, it declined to issue mandamus to the Department of Fisheries because of its confidence that the Department would follow its directions. Subsequently, a state superior court ordered the Department of Fisheries to issue regulations inconsistent with the DC regulations upheld in the Washington Fishery case, and the DC enjoined the state superior court from enforcing its order against the Department of Fisheries. See Washington Fishery case, petn in No. 78-119, at A-20 to A-21. This episode exemplifies the possibility of continuing disputes between the state and federal courts until the disagreement over the requirements of the fishing rights clause and the Equal Protection clause is settled.

The International Fishery case was dismissed properly as moot.

There are several responses to each of the two petitions.

10/4/78 Boisture Opinion in petns

BB 10/2/78

G

PRELIMINARY MEMORANDUM

October 13,1978, Conference
List 1, Sheet 1

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION	Cert. to CA 9 (Goodwin, Wallace, and Kennedy)	
v.		
USDC FOR WD OF WASHINGTON	Federal/Civil	Timely
UNITED STATES	Cert. to W.D. Washington (Boldt, D.J.)	
v.		
WASHINGTON	Federal/Civil	Timely

Please see Preliminary Memorandum in No. 78-119.

Argued Case

BB 10/6/78

SUPPLEMENTAL MEMORANDUM

To: Justice Powell

Re: No. 78-119, Washington Fishery and International Fishery Cases

The State has filed a Reply to the SG's Response to the petn. The State renews its argument that the International Fishery case is not moot. In support of this argument, it includes copies of two letters. Both concern Canadian protests against the United States' domestic regulation of Indian fisheries on the Fraser River.

As I understand it, the DC ordered only that the State rescind a portion of the 1975 IPSFC regulations. It did not order the U.S. to undertake domestic regulation of the fisheries previously regulated by the IPSFC, nor did it approve such regulation. The continuing dispute between the IPSFC and the U.S. State Dep't does not affect the mootness of the International Fishery case.

October 13, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

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

No. 78-139

PUGET SOUND GILLNETTERS ASSN.

vs.

U. S. DIST. CT., WASH.

G
Consolidate
with 77-983
77-119

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

October 13, 1978

Court .....
Argued ....., *19*...
Submitted ....., *19*...

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

No. 78-119

WASHINGTON

vs.

UNITED STATES

G

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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October 13, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

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

No. 77-983

WASHINGTON

vs.

WASH. STATE COMMERCIAL

Relisted.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Burger, Ch. J.		✓											
Brennan, J.		✓											
Stewart, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.	✓			AFF	CA9								
Stevens, J.	✓			1'		1'							

Dessure

1. Consolidate;
2. Set briefing schedule as appears on p. 2;
3. Set argument division as appears in discussion on p. 4;
4. But, if Wash.'s reply is not received before Conference, relist motions for 11/10 Conf.

Richman

November 3, 1978 Conference
List 3, Sheet 3

No. 77-983 WASH. v. WASH. STATE COMMERCIAL PASSENGER FISHING	Motion of Solicitor General to Consolidate. Also Motion of Certain Indian Tribes to Consolidate.
No. 78-119 WASH. v. UNITED STATES	(Same)
No. 78-139 PUGET SOUND GILLNETTERS ASSN. v. USDC FOR WD WASH.	(Same)

FACTS AND CONTENTIONS: On October 16, the Court granted cert in these three cases, consolidating the second two (~~state~~ CA 9 cases) and setting them for argument (1 hr.) in tandem with the first (a ~~federal~~ Wash. S. Ct. case). The SG moves for consolidation of all three cases for briefing and argument. Please see back.

1. The SG requests consolidated briefing because all the cases turn on the nature and scope of the treaty fishing rights reserved by Indians of the Pacific Northwest, although there are certain differences between the issues raised. Judicial economy would best be served if each party was able to address this question in a single opening brief. Further, the cases raise issues concerning the proper division of authority between the state and federal judicial systems, which can be addressed most logically, efficiently, and clearly in single briefs. Consolidation would eliminate considerable duplication and cross-referencing. Moreover, the SG believes that the parties to the state case are not true adversaries, since the goal of both is to overturn the original decision in United States v. Washington, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). */

The Indian Tribes and the fishing associations agree the cases should be consolidated. The Clerk has spoken with Wash. by telephone and it too agrees the cases should be consolidated.

2. The SG suggests the following briefing schedule:

> Opening brief for Wash. 45 days from grant.
>
> Opening brief for non-Indian fishing associations 20 days from receipt of Wash.'s brief.
>
> Resp's briefs from U.S. and Indians 30 days later.
>
> Reply briefs from Wash. and fishing associations as permitted by Rule 41(3).

All parties concur in this schedule except Wash., which advised the Clerk it was mailing its own proposed schedule on October 31. (Apparently, Wash. believes the SG's schedule gives the U.S. too much time).

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*/The Indians' motion was filed on behalf of all Tribes except the Yakima Indian Nation; there is no explanation for this exclusion.

3. The SG also proposes that the two hours allotted for argument of these cases be divided as follows:

30 minutes for Wash.

30 minutes for fishing associations

30 minutes for U.S.

30 minutes for Indians

This division recognizes the four distinct entities in these cases. The present division would give the parties opposing United States v. Washington 90 minutes to argue, and those supporting the decision only 30 minutes. The Indians concur with this proposal.

The fishing associations recognize that the present allocation of time may be "marginally disproportionate," but think the SG's suggestion goes too far in the other direction. They suggest the following:

40 minutes for Wash.

40 minutes for fishing associations

40 minutes for United States and Indians

This recognizes that the Indians and the United States, which sued as their trustee, have identical interests. On the other hand, the state and the associations differ on whether the state has the authority to enforce a preferential division of the catch in favor of the Indians. Furthermore, the state has no interest at all in whether the associations may be bound by the original federal proceedings, to which they were not parties, on a theory of privity with the state; in fact, the state consented to the issuance of federal orders running directly against the associations.

Wash. is also submitting its views on an appropriate division of argument time.

DISCUSSION: 1. The consolidation of these cases seems desirable and is supported by all parties.*/

2. The proposed briefing schedule is reasonable, and is supported by all except Wash. If Wash.'s submission has not been received before Conference, the Court might want to relist the motions for next week. (The Clerk advises this would not upset his schedule, although obviously the sooner the parties know about consolidation, the better.)

3. Neither of the suggested divisions of argument seem satisfactory. Essentially this is a dispute between the U.S. and Wash., the former representing the Indians and the latter its citizens. Thus, the bulk of the time should go to the main parties, with some time allowed for the Indians and the associations to present their special views or issues. This view is reflected in the following schedule:

45 minutes for Wash.

15 minutes for the associations

45 minutes for the U.S.

15 minutes for the Indians

However, the Court might want to wait for Wash.'s views.

There is a reply from the fishing associations.

11/1/78
PJC

Richman

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*/If the Court does not consolidate, the SG alternatively requests 15 minutes to argue as amicus in the state case, with no additional time for the other side. The fishing associations agree with this request; Wash.'s views are not known.

The Indians also move alternatively for 15 minutes to argue as amicus in the state cases, with no additional time for the other side.

~~I agree with Richman on the consolidation and briefing schedule issues.~~

~~On the division of argument question,~~

Marc Richman's suggestions on consolidation and briefing schedule seem like good ones to me.

The division of argument is more troublesome. In general terms, the cases present two questions: ① interpretation of the treaty, and ② coordination of federal and state authority, once treaty interpretation is settled. The Indians and fishing associations are concerned most directly with the treaty interpretation. On the broader question of federal-state relations, the Court can expect more help from the U.S. and the State of Washington. The SG's suggestion (p. 3) also has the advantage of even-handedness among the parties.

Pending receipt of the State's views, I would favor accepting the SG's recommendation.

Bruce

November 3, 1978

Court .....

Argued ....., 19...

Submitted ....., 19...

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

Assigned ....., 19...

Announced ....., 19...

No. 77-983

WASHINGTON

vs.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING ETC.

Motion of Solicitor General to consolidate for purposes of briefing and argument or in alternative for leave to participate in oral argument, as amicus curiae. Also motion of certain Indian Tribes to consolidate for purposes of briefing and argument or in the alternative for leave to participate in oral argument, as amicus curiae.

Grant motion to Consolidated & (Relist for 11/10

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Powell, J.													
Rehnquist, J.													
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November 3, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

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

No. 78-119

WASHINGTON

vs.

UNITED STATES

Motion of Solicitor General to consolidate for purposes of briefing and argument or in alternative for leave to participate in oral argument, as amicus curiae. Also motion of certain Indian Tribes to consolidate for purposes of briefing and argument or in the alternative for leave to participate in oral argument, as amicus curiae.

Relist
11/10

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Rehnquist, J.													
Stevens, J.													

November 3, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

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

No. 78-139

PUGET SOUND GILLNETTERS ASSN.

vs.

USDC FOR WD WASHINGTON

Motion of Solicitor General to consolidate for purposes of briefing and argument or in alternative for leave to participate in oral argument, as amicus curiae. Also motion of certain Indian Tribes to consolidate for purposes of briefing and argument or in the alternative for leave to participate in oral argument, as amicus curiae.

Relist 11/10

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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November 3, 1978 Conference
List 3, Sheet 3

No. 78-139

PUGET SOUND GILLNETTERS
ASSN.

v.

USDC FOR WD WASH.

Motion of Solicitor General to Consolidate.
Also Motion of Certain Indian Tribes to Consolidate.

See Memorandum No. 77-983.

11/1/78 Richman

PJC

SUPPLEMENTAL MEMORANDUM

November 10, 1978 Conference
List 3, Sheet 3

No. 78-139

PUGET SOUND GILLNETTERS
ASSN.

v.

USDC FOR WD WASH.

Response of Wash. to Motion of Solicitor General to Consolidate and Also to Motion of Certain Indian Tribes to Consolidate

See Memorandum No. 77-983.

11/8/78 Richman

PJC

SUPPLEMENTAL MEMORANDUM

November 10, 1978 Conference
List 3, Sheet 3

No. 78-119

WASH.

v.

UNITED STATES

Response of Wash. to Motion of Solicitor General to Consolidate and Also to Motion of Certain Indian Tribes to Consolidate

See Memorandum No. 77-983.

11/8/78 Richman

PJC

November 3, 1978 Conference
List 3, Sheet 3

No. 78-119

WASH.

v.

UNITED STATES

Motion of Solicitor General to Consolidate.
Also Motion of Certain Indian Tribes to Consolidate.

See Memorandum No. 77-983.

11/1/78 Richman

PJC

November 10, 1978

Court .....
Argued ....., *19*...
Submitted ....., *19*...

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

No. 78-139

PUGET SOUND GILLNETTER ASSN.

vs.

USDC FOR WD WASHINGTON

Response from State of Washington received.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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November 10, 1978

Court .....
Argued ....., *19*...
Submitted ....., *19*...

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

No. 78-119

WASHINGTON

vs.

UNITED STATES

Response from State of Washington received.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Burger, Ch. J.													
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Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

1. Consolidate; Deny
2. Adopt SG's briefing schedule (top of p.3 of original memo);
3. Adopt my suggested division of argument (p.4 of original memo);
4. Direct Clerk regarding appendix as discussed on p. 20 of this memo. (para. at bottom of page).

Rehnquist

SUPPLEMENTAL MEMORANDUM

November 10, 1978 Conference
List 3, Sheet 3

No. 77-983	Response of Wash. to Motion of Solicitor General to Consolidate and Also to Motion of Certain Indian Tribes to Consolidate
WASH.	
v.	
WASH. STATE COMMERCIAL PASSENGER FISHING	
No. 78-119	(Same)
WASH.	
v.	
UNITED STATES	
No. 78-139	(Same)
PUGET SOUND GILLNETTERS ASSN.	
v.	
USDC FOR WD WASH.	

WASH.'S CONTENTIONS: 1. Wash. does not object to the proposed consolidation. However, it asks the Court not to require a single appendix for both sets of cases, because the designations have already been sent to opposing counsel. A requirement that the appendices be

Comment on back.

consolidated would require service of additional designations on counsel not in both suits. This would delay preparation of the appendices, which must be filed by November 30.

2. Wash. objects to the proposed division of argument on the same grounds as the fishing associations, and agrees with their counter proposal. Wash. stresses that their positions are adverse on the question of state power.

3. Wash. objects that the proposed briefing schedule gives the government and the Indians 50 days to prepare their responses to the state's brief. Wash. suggests the following schedule:

Wash.'s Brief	-	November 30, 1978
Associations' Brief	-	December 14, 1978
SG and Indians	-	January 6, 1979

This would give the U.S. and Indians 37 days to respond to the state's brief and 23 days to respond to the fishing associations' brief; and would allow adequate time for a reply brief, if the case is set for argument during the February 20-28 session.

DISCUSSION: Under the SG's proposed briefing schedule, the government's brief would be due January 19, leaving more than a month for a reply brief. The SG will probably need at least 50 days anyway, so there is no reason to cut down on its time. Nothing in the response changes my suggestion for division of argument (p. 4 of original memo).

A single appendix would be more convenient for the Court. Wash.'s problem is illusory, because it can simply put its two separate appendices under one cover (with one index and numbered straight through), and eliminate any duplication of documents. If the Court agrees, it can instruct the Clerk to so advise the parties.

11/8/78 Richman

PJC

I recommend accepting the SG's briefing schedule, which appears to allow the State adequate time (1 month) for a reply brief.

On argument schedule, I still favor the SG's proposal. See comment on previous memo, attached.

BG

November 10, 1978

Court .....
Argued ....., *19*...
Submitted ....., *19*...

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

No. 77-983

WASHINGTON

vs.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING

Response from State of Washington received.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Stewart, J.													
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Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

DW 2/21/79

Bobtail Bench Memorandum

To: Justice Powell

Re: (1) Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, No. 77-983 Wash S/Ct held that grant Indians a preference would violate E/P clause

(2) Washington v. United States, No. 78-119 Never on cert to CA9. 9th affirmed 1977 injunction of DC against non-Indians fishing

(3) Puget Sound Gillnetters Ass'n v. U.S. District Court, 78-139 DC 1978 Order - not passed on by CA9

In these cases the Court is called upon to review the decisions of three different courts--the Ninth Circuit, the Western District of Washington, and the Washington Supreme Court--concerning a single, long-standing dispute over Indian fishing rights in the area of the Puget Sound. Three basic

questions are presented. First, is the correct interpretation of two treaties concerning fishing rights a question properly before the Court, even though the question was raised in prior proceedings in which the Court denied certiorari? Second, what is the correct interpretation of the fishing rights treaties? Third, what is the proper remedy for violations of the Indians' rights under the treaties, and against whom may this remedy be directed?

The dispute in this case centers around two mid-nineteenth century treaties between the United States and the Indians, in which the Indians gave up substantial tracts of land in exchange for a promise that they would be allowed fishing rights off of their reservation "in common" with the citizens of what then was a territory. At the outset, the precise meaning of these words was not important, as there was an ample supply of fish for Indians and non-Indians alike. By the middle of this century, however, the supply had dwindled, and the question of apportioning in time of scarcity was raised for the first time. Thus, in 1970 the United States, acting on behalf of the Indians, brought suit in the Western District of Washington, asking the court to determine what the Indians' fishing rights were under the treaties, and whether Washington State fishing regulations were inconsistent with those rights, insofar as they liberally allowed non-Indians to fish in the Puget Sound area.

In 1974, the District Court issued its opinion in

which it found that "in common" as used in the treaties meant that neither Indians nor non-Indians could take so many fish as to endanger the resource, and that each was entitled to a "fair share" of the fish. The court concluded that the Indians were not allowed such a share under Washington regulations, as non-Indians harvested most of the crop of Salmon and Trout before the fish reached the upstream locations where the Indians were allowed to fish. Accordingly, the court ordered State officials: (1) to stop regulating Indian fishing, save insofar as regulation was required to preserve the resource of the fishery; and (2) to enact regulations restricting non-Indian fishing to a certain percentage (roughly 50%) of the harvest. The Ninth Circuit affirmed the District Court decision in virtually all respects in 1975, and in 1976 this Court denied certiorari. All the subsequent litigation, including each of the three cases now before the Court, grew out of the District Court's attempts to enforce the judgment it entered in 1974.

From 1974 through 1976 various actions were filed in Washington courts in which injunctions were sought and obtained against State officials' complying with the federal district court order. Finally, in 1977 the Washington Supreme Court ruled that State officials could not adopt regulations giving special concessions to Indian fishermen. The court based its decision on two theories. First, it said that such regulations were beyond the state officials' authority to promulgate as a matter of state law. Second, it opined that giving a

preference to Indians would violate the Equal Protection Clause. This is the decision before the Court now as No. 77-983.

With the 1977 Washington Supreme Court ruling, compliance with the 1974 District Court order came to a halt. In response, the District Court in 1977 issued an enforcement order in which it did three things. First, it took upon itself the task of allocating the 1977 fishery among Indians and non-Indians, reasoning that if this task was beyond the ken of Washington officials, it had to be handled by the federal courts. Second, the court enjoined State officials from permitting non-Indians to harvest fish over the limit the court set. Finally, the court issued an injunction directly against the non-Indian fishermen, reasoning that, although the fishermen were not themselves parties to the federal proceedings, they were in privity with the State of Washington. Thus, the State had largely been representing their interests throughout the litigation, and the fishermen had been participated as amici at virtually every phase of the litigation. On appeal, the Ninth Circuit affirmed. This enforcement ruling is the second case now before the Court for review, No. 78-119.

Finally, in 1978 the Federal District Court issued an enforcement order similar to its 1977 order. Although this case has not been passed upon by the Ninth Circuit, it is before this Court on writ of certiorari in case No. 78-139.

1. Is the treaty interpretation before the Court?

The SG urges the Court not to reconsider the District Court's 1974 interpretation of the treaty, noting that that decision was before the Court in 1976 and certiorari was denied. Indeed, the Government argues that the 1974 decision would have been final, but for the parties' blatant disobedience of the federal court orders. Thus, the SG suggests that it would be wasteful to review this decision at this date and, what is worse, review would encourage parties in future law suits to do their best to frustrate federal court orders in order to keep an issue alive.

There is a great deal of appeal to the SG's position, as it seems to me that the non-Indian fishermen and the Washington courts have been remarkably intransigent throughout this litigation. Nonetheless, I am reluctant to allow an issue of this magnitude and controversy to be resolved without some authoritative word from this Court. I fear, therefore, that the merits of the Ninth Circuit's interpretation of the treaties should be reviewed.

2. Treaty interpretation

If the Court reaches the question of the interpretation of the provision for "common" fishing in the treaties, it will face a difficult question. On the one hand, it seems ridiculous that .027% of the population of Washington should be entitled to 50% of the fish. On the other hand, at the time the treaties were drafted the Indians in the region

outnumbered the non-Indians and so, insofar was the parties to the treaty were concerned, it probably would not be remarkable that the Indians would get at least half of the fish. The real difficulty, of course, is that the parties to the treaty never considered the problem presented here. The Government, however, seems right in contending that the treaties must have meant something more than just that the Indians would be allowed to fish like everyone else--they had this right absent the treaty. If it is assumed that the treaties preserved some special rights of the Indians to fish, it is hard to draw a line short of the lower courts' 50%.

Treaty must have meant some-thing

3. Relief in this case

The State and commercial fishing associations' weakest argument, it seems to me, is with the extraordinary remedies resorted to by the District Court. From the description in the Government's brief, it appears that the District Court has been taxed beyond all reasonable bounds, and that it has been forced to resort to draconian methods of protecting its jurisdiction.

In sum, I think I would affirm the federal courts' rulings, and reverse the Washington Supreme Court ruling. I hasten to add, however, that I have spent only a few hours on the 26 briefs filed in this case, and so my attention has largely been devoted to figuring out the proceedings, rather than analyzing the law.

2/27/79 David

77-983 WASHINGTON v. WASHINGTON STATE Argued 2/28/79

Gorton (AG of Wash)

All issues in these cases turn on meaning of phrase "in common with the citizens of the Territory" in the Treaty.

State's view is that they merely confer an ~~equal~~ "equal opportunity to fishery". Commercial fishing is "licenced" in Washington on all persons except Indians - who not required to obtain or pay for licenses. Thus there are more Indians engaged in Commercial fishing than all other persons. Indians receive benefit of hatcheries that are sustained by license fees - pd by others.

The Treaties affect Washington fishery. They do not require a 50/50 allocation.

American citizens had right to fish in these waters prior to Treaty, as did the Indians. Purpose of Treaty was to prevent the State (Territorial) from discriminating against them.

Gorton (cont).

Puyallup dealt with discriminatory legislature vs commercial fishery. There Puyallup I - III are distinguished. Those cases dealt with sports fishing whereas in this case we are concerned only with commercial fishery.

This case also involves marine salt water fishery. All prior cases have dealt with fresh water fishery. (There is a limited amt. of fresh water fishing by Indians involved in this case).

The DC found a permanent right

* Locavara (for Cowlitz Peter) (filed a "Salmon" colored brief)

Agreed with State of Wash.

Non-Indian commercial fishermen have rights that have been ignored.

Indians do have certain rights against State that non-Indians do not have. But the latter nevertheless have rights

Nothing in Treaties that guarantees the DC's (Judge Bolt's) granting of a virtual monopoly to Indians

---

* Represents Puget Sound Gillnetters

Kosaana (Rehnquist - cont.)

Concedes that Treaty does confer some benefits of Indians (e.g. not subject to licence reg.) that are not available to non-Indians.

The DC did not find discrimination in the Puyallup cases

~~The inquiry, as in Puy II,~~

Absent discrimination (as in Puyallup) there is no justification for a 50/50 allocation - or indeed for any allocation.

Morisset (for Indian Tribes)

CA9 said State had rendered Treaties "nugatory".

John asked good point: These were successive Treaties with different Tribes all of which used the "in common" language. Could Congress have intended to allocate 50% of all fish to each?

Clarborne (SG)

Concede that State may regulate for conservation purposes.

~~Pow, Q in what~~

Q is whether the Indians' right is a mere access to fish - like all other persons, or whether the Treaty allocated a property right in a proportion of the total fishery. (Cts below found a 50% right.)

Treaty given more than a right of access to water; it ~~gr~~ grants an interest in fish. See Puyallup III.

The word "secured" is illuminating.

The purpose of Treaty was to guarantee a right to fish for 50% - can't guarantee that Indians will catch that many fish.

The Treaties designate the areas in which they have these rights. Each area is different, & there is some overlap.

There are five different Treaties (Conceded, in effect, that the 50% allocation to all Tribes adds up to much more than ~~50~~ 50%

(See back)

77-983 Washington v. Washington State Conf. 3/2/79
78-114

The Chief Justice

CJ may be "Out": Did not take part.

Mr. Justice Brennan Affirm CAG case Reverse Wash S/Ct.

Wash. S/Ct has acted badly in this litigation.

Agree with SG that comity prevents us from reviewing afresh what has been decided. There is not res judicata or estoppel. It is policy of "Doctrine of finality." repose.

If we reach merits, would agree with the J Bolty.

This leaves only the remedies. All are perfectly proper. ~~To~~ Affirm all three.

By ~~affirming~~ reversing CAG (983), we would in effect hold on the merits.

Mr. Justice Stewart Vacate & Remand all three.

At first, agreed with SG that Judge Bolty's decision should not be disturbed. But the Q is technically open & also it is proper for us to decide what Art III means. After further consideration, I think J Bolty misconstrued Art III of Treaty.

(~~Winans~~?) → Potter cited a case I did not recognize.
Winans
148 US. 371

The phrase "right in common" does not mean 50%. It is a right to take fish. Thus, Washington cannot so regulate fish as to deprive Indians of this right. The Wash. A.G. Gorton's idea of "equal opportunity" is appealing

Under Walker v Birmingham, there are problems of remedy. Send case back to courts below.

Vacate +

Mr. Justice White Not at Rest but will vote to Remand (like P.S.)
Closer to P.S. than to W.J.B. ~~Wesim~~ is relevant.
Boldt was wrong in 50%, + also in not counting fish caught on Reservations + in Puget Sound.
Not sure fed. cts. should order state how to implement the treaty. No fed judge should order a ~~fed~~ state official to enforce a Fed Treaty.
Vacate all remedial orders

Mr. Justice Marshall Reverse on 77-483
Affirm on 78-119 + 78-139

Agree with W.J.B.
Regardless of Boldt,
CA9 is right.

Mr. Justice Blackmun Generally with WJB
On state case could DIG, Reverse or Vacate. On fed case, agree with WJB - i.e. would affirm. But would reach merits. Boldt's division seems fair - 50-50 is good as any division. Treaty did not contemplate any shortage of fish.
Puyallup III is persuasive (?)
Would modify 50-50 to allow offset of fish taken on reservations & in Puget Sound - to end up with a true 50-50

There are notes on JPS's views - not Harry

Mr. Justice Powell Vacate & Remand all three

I would reach merits, & on merits I am inclined to agree with P.S. and BRW.

Mr. Justice Rehnquist Vacate & Remand

56s quasi finality arguments are unsound. (Brie cited a case from CA7 in 1970 or 71 that supports our reaching merits).

On merits, agree with P.S., BRW & LFP

Mr. Justice Stevens ~~Vacate~~ Affirm & Reverse & Modify

Merits are here. Have changed his mind several times.

But now think Bolt was right as to 50-50, but would modify by off-setting fish taken as Reservations & ~~Tribes~~ Puget Sound.

decided C/ 7/2/79 78-119 Washington v US
78-139 Puget Sound Gillnetters v. US

CJ leans
to Balt formula
- telephone talk
3/3/79

PS
Byron
LFP
WHR

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 9, 1979

Re: No. 77-983 Puget Sound/Washington State Fishing Case

Dear John:

My position with respect to your recently circulated memorandum in this case is very much that stated by Lewis in his note to you of May 9th.

Sincerely,

Mr. Justice Stevens

Copies to the Conference

May 9, 1979

77-983 Puget Sound/Washington State Fishing Case

Dear John:

I have read with interest and admiration your memorandum. It is well written and persuasive.

My vote at Conference was, however, the "other way" - particularly with respect to the meaning of "right in common". I have not thought that this meant a 50/50 division between Indians and non-Indians.

I am not disposed to write, but will await other circulations before coming to rest. The really important thing is to settle this controversy.

Sincerely,

Mr. Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 11, 1979

Re: Nos. 77-983, 78-119, 78-139 - Washington Fish cases

Dear John:

This indeed was a large task. I am prepared to join your memorandum if and when it is converted into an opinion, with the following reservations:

1. I think I would prefer to affirm flatly the judgment in No. 78-119. This is the International Fisheries case, and the memorandum agrees with the CA9 that the case is moot.

2. On page 35, there is an indication that the Court will not grant certiorari in the enforcement cases. I believe those cases are being held for this one and prefer not to prejudge them even though I agree that it is unlikely that certiorari in those cases will be granted.

Sincerely,

Harry

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 14, 1979

RE: Nos. 77-983, 78-119, 139 State of Washington v. Washington State Commercial Passenger Fishing, etc.

Dear John:

Your memorandum is a splendid job and I'd be happy to join it as a Court opinion.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 14, 1979

Re: 78-983, 78-119, 78-139 - Washington Fish Cases

Dear Harry:

Many thanks for your note. Both of your suggestions are good ones and will be adopted in our next draft--which will include quite a number of minor changes.

Respectfully,

John

Mr. Justice Blackmun

Copies to the Conference

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

F.1c

May 31, 1979

Memorandum

To: Mr. Justice White

From: Michael E. Gehringer, Assistant Librarian for Research Services

Subject: Effect of Revised Statutes §5596 (1874) on the Act of June 30, 1834, c. 161, §1, 4 Stat. 729 (1834)

This memorandum is in response to your inquiry regarding the effect of Revised Statutes §5596 (1874) on the Act of June 30, 1834, c.161, §1, 4 Stat. 729 (1834). Strict application of §5596, the consistent practice of this Court in regard to §1, and scholarly commentary on the definition of "Indian country," all concur that §1 was repealed by §5596. In practice, however, this Court relied on the provisions of the repealed §1 to determine the geographical limits to the application of the criminal sanctions of Revised Statutes §§2127-2157 (1874). This practice continued until 1948, when, with the revision of title 18 of the U.S. Code, a new statutory definition of "Indian country," (based on this Court's decisions construing §1) was adopted (18 U.S.C. §1151[1976]).

A brief but thorough analysis of the history of the use of the §1 definition of "Indian country" can be found in Federal Indian Law 12-17 (1958). We have sent a copy for your use with this memorandum.

JUDICIAL HISTORY

This Court has consistently ruled that §1 was repealed by §5596 whenever it has been presented with that question. The principal cases in this area, many of which explicitly admit the repeal of §1 before going on to fashion judicial definitions and extensions for the term "Indian country" based on §1, are the following:

Bates v. Clark, 95 U.S. 204 (1877)
Ex parte Crow Dog, 109 U.S. 556 (1883)
U.S. v. LeBris, 121 U.S. 278 (1887)
U.S. v. Celestine, 215 U.S. 278 (1909)
Clairmont v. U.S. 225 U.S. 551 (1912)
Donnelly v. U.S. 228 U.S. 243 (1913)
U.S. v. Sandoval 231 U.S. 28 (1913)
U.S. v. Pelican 232 U.S. 442 (1914)
U.S. v. Ramsey 271 U.S. 467 (1926)
U.S. v. McGowan 302 U.S. 535 (1938)

LEGISLATIVE HISTORY
4 Stat. 729, §1 (1834)

While several sections from this Act were ultimately codified as part of the Revised Statutes, §1 was not included in the revision. The definition in §1 had not been repealed or amended in any way prior to 1874, but doubts as to its continuing validity were apparent in the Commissioner's Draft codification of this section, and the accompanying notes (photocopies are attached). This proposed section was not part of the final revision and was never enacted.

Revised Statutes §5596 (1874)

This section was first introduced on the floor of the House on the final day of House proceedings on the Revised Statutes, April 1, 1874. A limited amount of floor discussion took place in the House, and later in the Senate, regarding the operation of this section. The discussion tended to restate the plain meaning of the effect and purpose of the section. (We have sent the proper volumes for your use.)

An earlier version of a repealer section appeared as Title I, §3 of the Commissioner's Draft (photocopy attached).

This Court's treatment of the effect of §5596 on omitted sections of otherwise included Acts has, again, been mainly consistent. One of this Court's earliest and clearest explications of the effect of §5596 in such situations can be found in U.S. v. Claflin, 97 U.S. 546, 548 (1878). As noted above, this Court has consistently applied §5596 as repealing §1 of the 1834 Act. In an analogous situation, this Court in Maul v. United States, 274 U.S. 501, 522 n. 23 (Brandeis, J., dissenting) dealt with a section of a 1793 navigation act

that was never expressly repealed prior to 1873, had been part of the Commissioner's Draft, but never appeared in the Revised Statutes. That section was "deemed to have been repealed, because of the omission" from the Revised Statutes. Id. The most recent comment by this Court on the effect of §5596 on omitted statutory sections appears in your dissenting opinion in Runyon v. McCrary, 427 U.S. 160, 207 (1976).

Attachments

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 1, 1979

Re: Nos. 77-983, 78-119, 78-139 - Washington Fish cases

Dear John:

I am with you. I shall join an opinion prepared along the lines of your memorandum as recirculated May 31.

Sincerely,

HAB

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 1, 1979

Re: 78-983, 78-119 and 78-139 - Washington
v. Fishing Vessel Assn.

Dear Potter:

Thank you for your letter and kind words about my memorandum in this case. Your reference to "a basic 50-50 allocation of the available fish between Indians and non-Indians" prompts me to add a few more words, however, to the already too many that I have written on the subject.

First, I'm afraid that the memorandum may not make as clear as it should that the Indians would not be allocated 50% of the "available fish" in Washington. Instead they could take no more than 50% of those fish that pass through their traditional fishing areas, which, as I understand it, amounts to about 50% of half of the anadromous fish in the area. Second, the "pie" that is being divided "between Indians and non-Indians" does not include those fish that would later have passed through traditional fishing sites but instead are taken by non-Indian fishermen who are not citizens of Washington. In short, even if the Indians' share were frozen at 50%, it would only amount to about 20% of the total number of fish in the area. Third, that number may drop still further when the District Court resolves the question of hatchery-bred fish which, if the Puyallup litigation is any guide, may be excluded from the "pie." In fact, that could result in the exclusion of up to half of the fish in some "runs," as it did in the Puyallup case. Fourth, the Indians' share is not

frozen at 50%. As footnote 26 indicates, that is a ceiling, but not a floor, and the District Court has already dropped the Indians' share below that point by 10% after its most recent assessment of the Indians' needs. Accordingly, even if the hatchery-bred fish are not excluded, the 20%-of-the-total estimate above is too high. Finally, I should point out that the modifications to the decree proposed in the memorandum significantly alter the manner in which the Indians' share is to be calculated, so that they will not receive the benefit of the District Court's exclusion of reservation-taken, subsistence, and ceremonial fish. All in all, therefore, the Indians will probably end up taking between 15 and 20% of the Washington anadromous fish, which seems to me to be quite consistent with the treaty language and the intent of the parties to the treaty.

I, of course, would be willing to emphasize these points more adequately than I have yet done if you think that would be helpful.

Respectfully,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 1, 1979

Re: 77-983, 78-119 and 78-139 - Washington v. Fishing Vessel Assn.

Dear John:

Please forgive my delay in responding to your admirably conscientious and thorough memorandum, for which we all owe you a debt of gratitude. As of now, I cannot bring myself to believe that the treaty language implies a basic 50-50 allocation of the available fish between Indians and non-Indians. I understand that Bill Rehnquist is preparing a short memorandum, and I shall wait to see what he says before finally coming to rest.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 1, 1979

Re: 78-983, 78-119 and 78-139 - Washington
v. Fishing Vessel Assn.

Dear Potter:

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I, of course, would be willing to emphasize these points more adequately than I have yet done if you think that would be helpful.

Respectfully,

Mr. Justice Stewart

Copies to the Conference

DW 6/4/79

Memorandum

To: Justice Powell

Re: Washington v. Washington State Ass'n, No. 77-983, et al.

You have asked me to examine these three curve-lined cases and evaluate the prospect of writing a dissent. I have studied Mr. Justice Stevens' memorandum suggesting an opinion for the Court, have read the four major relevant cases, and have reread the major briefs. I have not as yet done any checking of the record, however, and would of course have to do some more research before actually drafting a proposed opinion.

1. Justice Stevens' Opinion

As you know, the basic issue in this case is whether a series of Indian treaties negotiated in 1854 and 1855 give to several Indian tribes in what is now the State of Washington the right to take a set proportion of the anadromous fisheries in that state. By their terms, these treaties reserved to the Indians the "right of taking fish at usual and accustomed grounds and stations...in common with all citizens of the Territory." The question, therefore, is simply what "right of taking fish...in common" meant as used in the treaties.

As we have discussed, much of Justice Stevens' memorandum is thoroughly satisfactory. Thus, his description of

the facts and prior proceedings (pp. 1-14) is excellent, and I have no quarrel with the treatment of remedies in Section VII (pp. 31-36). It is with Sections IV and V that we may disagree.*/ Section IV argues that "in common with" as used in the treaties must be read as guaranteeing more than a mere "right of access." Instead, Justice Stevens argues that the right of access was a means for securing the more important right to take fish. He concludes that because the shortage of fish has made access an insufficient protection for the Indians' right to take fish, the fisheries must be divided up, with some set percentage set aside for the Indians. Justice Stevens argues that the purpose and language of the treaties, as well as prior decisions of this Court, support his view that more than a mere right of access was reserved by the Indians in their treaties.

Having concluded in Section IV that some percentage of Washington fisheries must be set aside for the Indians, Justice Stevens in Section V discusses what that percentage ought to be. He agrees with the lower courts' basic approach: because the Indians depended upon fish for their subsistence and were a

*/ Section VI deals with the effect of the 1930 treaty between the United States and Canada concerning the Fraser River Salmon. I generally agree that this treaty should have little effect on the rights of the treaty Indians in this case, once the Court has determined how the treaty is to be interpreted.

substantial portion of the population in the 1850's when the treaties were signed, he begins with a 50-50 split and then makes adjustments to take various factors into account. Thus, he would deduct from the Indians' share those fish taken by them on their reservations, where they have exclusive fishing rights, and those fish taken for ceremonial purposes. On the other hand, Justice Stevens would count against the non-Indian share all fish taken from identifiable fisheries by non-Indian Washington State residents fishing outside of the State's jurisdiction. The Indians' resulting percentage amounts to about 45%.

In his memorandum to Justice Stewart of June 1, Justice Stevens has clarified his position somewhat concerning the allocation he proposes. First, he contends that the basic 50% allocation should pertain only to those fish which pass through the Indians' traditional fishing grounds, and therefore that the initial percentage probably is no more than 25% of all the available fish in Washington. Furthermore, he speculates that non-Washington fisheries and rulings concerning hatchery-bred fish will diminish the Indians' portion to between 15% and 20%. Finally, he notes that the allocation percentage is only a maximum, and therefore that insofar as the Indians do not need all of the fish they could take, they will not be entitled to the unneeded portion.

2. Discussion

a. History and Language

The fundamental dispute in this case is whether the 1854-1855 treaties secure to the Indians a right of access only, or go farther to guarantee them the option to take a certain proportion of the yearly catch. As all parties apparently concede, this was not a burning question at the time the treaties were negotiated, for neither the Indians nor the whites at that time anticipated that the population of the territory would one day outstrip the supply of fish. And if there were plenty of fish to go around, mere access to them would be enough.

Nonetheless, I think there are at least two good arguments based upon the language of the treaty and the history surrounding it that generally support limiting the treaty rights concerning off-reservation fishing to rights of access. First, viewed in historical perspective it makes the most sense to understand the "common" right to be one of access. The main purpose of the treaties was to separate the Indians from the ever-increasing number of settlers by placing the former onto reservations. On these reservations, Indians were given exclusive rights to take fish. But the negotiators apparently recognized that the fish obtainable within the confines of the reservations would be insufficient for the Indians' needs. Under common law principles in force at the time, settlers who

took title to land along the river banks would hold the exclusive right to take fish from the river. Accordingly, to preserve the Indians' rights to take any fish from off-reservation locations (indeed, to preserve the right to get to such locations), the treaty secured the right "to take fish...in common with" residents of the Territory. Thus viewed, this right was a right of access--a right to take some fish from off of the reservation--rather than a right to take a particular percentage of all the fish.

Second, the language of the treaties, viewed as a whole, does not support Justice Stevens' interpretation. There were two different fishing rights given to the Indians: exclusive rights for fishing on the reservations, and "common" rights for fishing at usual and accustomed Indian fishing spots off of the reservations. Justice Stevens must concede, however, that the exclusive rights for reservation fishing were rights of access only, for otherwise the Indians would have the right to take all of the fish passing through their reservation. But no explanation is given for why the common rights should not be read like the exclusive rights as rights of access only.

Indeed, Justice Stevens' reading of this language makes little sense. If the Indians reserved the absolute right to take half of the fish from locations off of the reservation, then why was there a special, exclusive right to take fish on the reservation? Under the Court's rationale, the Indians can

take only up to 50% of any given fishery, and fish caught on the reservation apply toward this quota. But if one has a right to certain fish--irrespective of their location--it hardly makes any difference that only that person can fish in a certain area. Rather, the "exclusive" right makes sense only if the fisheries were not meant to be apportioned, for then access is crucial. In order to avoid making the exclusive reservation right a nullity, therefore, it makes the most sense to interpret the in "common" right to be, like the exclusive right, one of access alone.

b. Prior Decisions

Nor do the cases require the reading Justice Stevens has given the treaties. Perhaps the case most directly on point is United States v. Winans, 198 U.S. 371 (1905). In that case, a settler constructed several fish wheels in the Columbia River at a place where reservation Indians usually fished. These fish wheels apparently took from the river virtually every salmon swimming upstream, thereby giving the settler a monopoly on the fishery in that river. The Indians brought an action challenging the use of the fish wheels, claiming that it violated their treaty rights to "tak[e] fish at all usual and accustomed places, in common with citizens of the Territory." This Court upheld the Indians, stating that "in the actual taking of fish white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a

device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does." Id., at 382 (emphasis added). Thus, it appears that the primary basis for the Court's decision was the fact that the use of the fish wheels interfered with the Indians' right of access. This interpretation is confirmed by the opinion of the District Court, quoted at length in this Court's opinion, which noted that the operation of the fishing wheels "necessitates the exclusive possession of the space occupied by the wheels." Id., at 380. And indeed the Solicitor General's brief in Winans, referred to approvingly by the Court, advocated only "a way of access, free ingress and egress to and from the fishing grounds." The Court in Winans, therefore, apparently understood the treaties to secure nothing more than a right of access to the usual Indian fishing places.

Justice Stevens also finds support for his views in the Puyallup cases, which involved Indian fishing rights under the 1854-1855 treaties. In Puyallup Tribe v. Dept. of Game of Washington, 391 U.S. 392 (Puyallup I), the Court ruled that fishing regulations could be imposed upon Indians fishing at their "usual and accustomed" spots only to the extent necessary for conservation. As Justice Stevens suggests, the Court's decision in Puyallup I indicates that the treaties guaranteed something more than just "equal access" for the Indians, inasmuch as non-Indians plainly were subject to regulations not

connected with conservation. Puyallup I does not, however, undermine an interpretation of the treaties that would give Indians only a right of access (albeit access greater than that allowed non-Indians). As I have suggested, a plausible reading of the treaties is that Indians were given the right to go to their usual fishing spots and take some fish from those spots. This was not because everyone else in the Territory had this right. Quite the contrary, the danger the Indians sought to avoid apparently was that they, like other residents of the Territory, would be prevented from reaching their usual fishing spots by those who acquired land along the waterfront. Thus understood, Puyallup I stands only for the proposition that the only restrictions that may be placed upon Indians fishing at one of their usual and accustomed spots are those restrictions necessary for conservation purposes. It certainly does not suggest that Indians must be guaranteed a certain percentage of each fishery.

Washington Game Department v. Puyallup Tribe, 414 U.S. 44 (1973)(Puyallup II), is somewhat more difficult to explain. In that case, the Court considered the question whether a ban on all net fishing for steelhead trout in the Puyallup River violated the Indian treaties insofar as it kept Indians from fishing at their usual and accumstomed places by use of nets. The rule did not run afoul of the Court's decision in Puyallup I, inasmuch as it was uncontradicted that, if the Indians were

allowed to use nets and non-Indians were allowed to maintain their sport fishing rate, the Puyallup River fishery would be destroyed. Nonetheless, the Court struck down the state ban on the Indians' net fishing, finding that, although the rule on its face did not treat Indians differently from non-Indians, in effect it discriminated against the Indians "because all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians, is allowed." 414 U.S., at 48 (emphasis added). Thus, it appears that, for whatever reason, limiting the Indians to line fishing in the Puyallup River would have meant that the Indians would have obtained no fish whatsoever. See ibid., at 46-47 s("The ban on all net fishing in the Puyallup River for steelhead [trout] grants, in effect the entire run to the sports fishermen"). Indeed, the Solicitor General in Puyallup II objected to the ban on net fishing because "[i]t subordinates the Tribe's rights to those of sports fishermen and gives the Tribe only what might be left after the sports fishermen of unlimited number have had their take." Brief of Respondent in Puyallup II, O.T. 1972, No. 481, p. 18.

The remedy prescribed by the Court in Puyallup II was an allocation of the Puyallup River salmon among the Indians and the non-Indians. The Court declined to make any specific allocation, however, preferring to leave it up to the District Court. On remand, the District Court made a roughly 45-55% allocation between Indians and non-Indians, repectively.

Despite the Court's approval of allocation in Puyallup II, it does not necessarily follow that Indians' common fishing rights under the treaties generally must take the form of a right to take a specified percentage of the fisheries passing their lands. Rather, under Puyallup II two factors must converge before an apportionment is necessary: (1) conservation must require that limitations be placed upon the amount of fish to be taken or upon the means by which they are to be taken; and (2) application of regulations which are neutral on their face must in fact place upon the Indians an undue portion */ of the burden of the required conservation.

In the present case, I suspect that there is little doubt but that conservation requires the State of Washington to place some limitations upon the methods by which fish may be caught and upon the amount that may be caught. It is far from clear, however, that application of neutral regulations (such as a catch limitation per boat or per fisherman) would impose the burden of conservation upon the Indians alone. Indeed, the

*/ In Puyallup II the burden placed upon the Indians was undue because, as the Solicitor General pointed out, the State regulation totally subordinated Indian fishing rights to those of non-Indians. The present cases may require the Court to decide what short of total subordination amounts to "undue" burdening of Indian fishing rights. As I understand it, Justice Stevens would argue that any regulations required by conservation that do not guarantee to the Indians roughly 50% of the fish passing their land will necessarily impose the burden of conservation upon the Indians to too great a degree.

State argues that the fisheries at issue in these cases are quite different from that at issue in Puyallup II because the Indians are entitled to fish at the very mouths of the bodies of water. Thus, there is no danger that, if the Indians are subjected to restrictions similar to those imposed upon non-Indians, there will be too few fish to be caught by the time they reach the Indians. Absent this peculiar configuration, application of even-handed regulations will not discriminate against the Indians, and therefore apportionment should not be required under Puyallup II.

Finally, Puyallup Tribe v. Washington Game Dept., 433 U.S. 165 (1977)(Puyallup III), is of little assistance in deciding the issue in the present cases. The Court in that case decided only that the regulations permitted in Puyallup I could be applied against Indian fishing on the reservations, as well as off of them.

c. Recommendation

As you see from this memorandum, this case is fairly complex and the arguments seem to me difficult. There are two different ways in which a dissent might be written to Justice Stevens' proposed opinion. First, we could challenge his initial determination that a specific apportionment is required. Thus, it seems to me that he jumps too quickly to his conclusion that the treaties--as written and as interpreted by this Court--require an apportionment of fish in every case. I have

suggested some arguments based on the language and history of the treaties and this Court's prior decisions why a different approach may be appropriate. In my view, Puyallup II is the only real sticking point. Nonetheless, on the basis of the reading I have done heretofore, it seems to me that even that case may be distinguished. At the very least it seems that the appropriate course would be to remand to the District Court for findings whether the unique conditions present with respect to the Puyallup River Salmon are present here as well. Indeed, it appears that this may be what the State of Washington is asking for. See Petitioner's Reply Brief at 30-31.

Alternatively, we could concede that an apportionment is required and challenge Justice Stevens' 50-50 presumption. There are at least two reasons for doing so. First, he assumes that the right to take fish is one held by the Indians as a group, rather than a right held by each individual Indian. But if the right were for each Indian to take fish in common with others (Indian and non-Indian), then apportionment should be made among all those who take fish--not just between the Indians as a group and the non-Indians as a group. And this Court in Winans explicitly indicated that treaty fishing rights "are reserved...to every individual Indian, as though named therein." 198 U.S., at 381. If the apportionment were done on such a per capita basis, of course, the portion given to the Indians would be far less than 50%. Indeed, if the State of Washington's

brief is to be believed, such an apportionment would place the Indians in a worse position than they were before this action was brought, for it appears that the Indians long have taken more fish from Washington waters per person than have non-Indians.

Assuming that allocation by group is proper, however, there still are difficulties with Justice Stevens' position. The treaties were negotiated with individual tribes--not with the Indians en masse. Thus, I can see no good reason for saying that although "common" means "half," each tribe understood that the half for which it bargained would be diminished by the shares of all of the other tribes that entered into treaties with the non-Indians.

David

June 6, 1979

Dear Potter, Byron and Bill,

Following our accidental discussion on Thursday, I volunteered to relieve Bill Rehnquist of the task of trying to get something on paper for us to consider.

I send to each of you here with a memorandum prepared by my clerk, David Westin. In the limited time available, I think David has done a fine piece of work with - I am afraid -little help from me.

The question now is where do we go from here. The view several of us expressed at Conference that a 50-50 division of the fish was not acceptable, remains my view - despite the excellence of John's opinion. Nor do I think any mathematical division of the fish is either required by the treaty or makes any sense. The more difficult question (as we all recognize) is what does make sense, consistently with the treaty?

Subject to further discussion, I am inclined to agree with the view advanced in the enclosed memorandum that the language and history of the treaty (including its interpretation in Winan's, 198 U.S. 371), properly requires that it be construed as guaranteeing only a "right of access" in common. It really makes no sense to say that some specified percentage is in effect guaranteed. There is the problem of Puyallup II, although I believe this can be distinguished as suggested by David's memo.

If we were to agree that the right is limited to access in common, the question remains as to exactly how we describe the result of that interpretation. I suppose we could, as David Westin suggests as one possibility, remand to the District Court which is better situated than we are to work out the details. I have not thought this through yet.

Indeed, I am placing the memo in your hands, without having come finally to rest myself. I simply have not had sufficient time to devote to the case. But I am willing, if you wish me to, to try my hand at a draft of a dissent.

If there is support for undertaking this, I would welcome ideas as to whether we should simply remand or endeavor to give guidance beyond construing the treaty as above indicated.

It is late in the day, and in fairness to John and the Brothers (including all of us), if anything is to be done, it should progress forthwith.

Sincerely,

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Rehnquist

LFP/lab

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 7, 1979

Re: No. 77-983 - Washington v. Washington State Ass'n

Dear Potter, Byron and Lewis:

I am in general agreement with Lewis' proposal of June 6th, and with the memorandum of David Westin which he enclosed with it. I would be willing to see it written out along those lines, and think any inconsistencies between the views expressed in the memo and Puyallup II would be no greater than those between the latter and the treaty itself.

Sincerely,

WHR

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 7, 1979

Re: No. 77-983 - Washington v. Washington State Ass'n

Dear Lewis,

I have read David Westin's memorandum with interest, and I think he has done a fine job in the limited time available. Perhaps it would expedite matters if the four of us could meet to talk this over after each of us has had a chance to read the memorandum and collect his thoughts.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to Mr. Justice White
Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 8, 1979

Re: No. 77-983 - Washington v. Washington State Ass'n

Dear Lewis:

I would be more than happy to meet with you, Potter, and Byron, in accordance with the suggestion contained in Potter's letter of June 7th, at any mutually convenient time.

Sincerely,

Mr. Justice Powell

Copies to Mr. Justice Stewart
and Mr. Justice White

L.F.P.
Edited, with
Riders, 6/11 & 12

DW 6/11/79

Washington v. United States, No. 78-119

First Draft of Dissenting Opinion

MR. JUSTICE POWELL, dissenting.

I join parts I-III of the Court's opinion. I cannot agree, however, with the Court's conclusion that the treaties negotiated in 1854 and 1855 with the Indians of the Washington Territory require that half of all fish passing land upon which the Indians traditionally have fished be reserved for their exclusive use. On the contrary, the language, ~~structure,~~ and history of the treaties, as subsequently interpreted by this Court, plainly indicate that the fishing rights reserved by the Indians were rights of access only. Accordingly, I dissent.

Rider A

I

At issue in these cases is the meaning of ~~a single~~ language ~~phrase~~ found in each of the six Indian treaties negotiated and signed in 1854 and 1855.1/ Each of the treaties provided substantially that "[t]he 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, and of erecting temporary houses for the purpose of curing." 2/ The

question before us is whether this "common" fishing right is a right only ~~to go~~ of access to usual and accustomed fishing sites and ~~take~~ (in order to) fish. There, or includes the greater right to exclude others from taking a particular portion of the fish that pass through the sites. As the Court observes, at the time the treaties were signed there was no need directly to address this question, for the surfeit of fish made lack of access to fishing areas the only constraint upon supply. Nonetheless, I believe that the fairest inference to be drawn from the language, ~~structure,~~ and history of the treaties is that the Indians sought and retained only the right to go to their accustomed fishing places and there fish along with non-Indians.

Rider A

(would be guaranteed a) or that the Indians (percentage of the catch.

Nothing in the language of the treaties indicates that any party understood that constraints would be placed on the amount of fish that anyone could take. ~~Quite~~ On the contrary, the plain meaning of the language is that non-Indians would be allowed ~~substantial~~ freedom to take fish ~~along~~ in common with Indians even in areas where the Indians traditionally had fished. United States v. Winans, 198 U.S. 371 (1905). This interpretation is confirmed by the language used in the treaty negotiated with the Yakima Tribe, which explicitly includes what apparently is implicit in each of the treaties: the Indians' right to take fish on their reservations is exclusive. Thus, the Yakima

Rider B

treaty provides that "[t]he exclusive right of taking fish in all the streams where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory...." 12 Stat. 951. The Court apparently concedes that this exclusive right to take fish does not mean that the Indians are entitled to all of the fish that would pass their reservation if left unmolested. Indeed, the Court would ~~go so far as to~~ reduce the Indians' 50 percent portion by those fish caught on the reservation. See ante, at __. But there is no reason apparent from the language used in the treaties why the "right of taking fish" means one thing for purposes of the exclusive right of reservation fishing and quite another for purposes of the "common" right of fishing at usual and accustomed places. The most reasonable conclusion, therefore, is that when the Indians and Governor Stevens agreed upon a "right of taking fish," they understood this right to be one of access to fish--exclusive access with respect to fishing places on the reservation, and common access with respect to fishing places off of the reservation.3/

In addition to the language ~~and structure~~ of the treaties, the historical setting in which they were negotiated

supports the inference that the fishing rights secured for the Indians were rights of access alone. The primary purpose of the six treaties negotiated by Governor Stevens was to resolve growing disputes between the settlers claiming title to land in the Washington Territory under the Land Donation Act of 1850, 9 Stat. 437, and the Indians who had occupied the land for generations. Under the bargain struck in the treaties, the Indians ceded their claims to vast tracts of land, retaining only certain specified areas as reservations, where they would have exclusive rights of possession and use. In exchange, the Indian tribes were given substantial sums of money and were promised various forms of aid. See, e.g., Treaty of Medicine Creek, 10 Stat. 1132. By thus separating the Indians from the settlers it was hoped that friction could be minimized.

The negotiators apparently realized, however, that restricting the Indians to relatively small tracts of land might interfere with their securing food. See Letter of George Gibbs to Captain McClellan, App. 326 ("[the Indians] require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish"). This necessary "liberty of motion" was jeopardized by the title claims of the settlers whose land abutted--or would abut--the waterways from which fish traditionally had been caught. Thus, in Governor Stevens'

report to the Commissioner of Indian Affairs, he noted the tension between the land rights afforded settlers under the 1850 Land Donation Act and the Indians' need to have some access to the fisheries. Although he expressed the view that "[i]t never could have been the intention of Congress that Indians should be excluded from their ancient fisheries," he noted that "no condition to this effect was inserted in the donation act," and therefore recommended the question "should be set at rest by law." Report of Governor Stevens to the Commissioner of Indian Affairs, App. 327. Viewed within this historical context, the common fishing right reserved to the Indians by the treaties of 1854 and 1855 could only have been the right to ~~roam off of the reservations in order to reach~~ fish at ~~the~~ locations traditionally used by the Indians for this purpose. On the other hand, there is no historical indication that either side to the treaties understood that the Indians would be specifically guaranteed some set portion of the fisheries to which they traditionally had ~~had~~ access.

II

Insofar as prior decisions of this Court speak to the question of the extent of Indian rights under the treaties of 1854 and 1855, those decisions ~~confirm that the fishing rights reserved to the Indians by the treaties were rights of access~~

only. Perhaps the case most directly on point is United States v. Winans, 198 U.S. 371 (1905). In that case a settler had constructed several fish wheels in the Columbia River. These fish wheels were built at locations where the Indians traditionally had fished, and "'necessitate[d] the exclusive possession of the space occupied by the wheels,'" Ibid., at 380, thereby interfering with the Indians' treaty right of access to fish. This Court reviewed in some detail the precise nature of the Indians' fishing rights under the Yakima Treaty, and concluded that the treaties,

> "...reserved rights...to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved wtihin certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the Territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places,' and the right 'of erecting temporary buildings for curing them.' The contingency of the future ownership of the lands, therefore, was foreseen and provided for--in other words, the Indians were given a right in the land--the right of crossing it to the river--the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty." (Emphasis added.)

In Winans the Court concluded that this right of access had been abridged, stating that "in the actual taking of fish white men may not be confined to a spear or crude net, but it does not

follow that they may construct and use a device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does." Id., at 382 (emphasis added). Thus, Winans was decided upon the basis of a treaty-secured right of access alone. Moreover, the Court's analysis of the treaty right at issue in Winans strongly indicates that nothing more than a right of access could fairly be inferred from the treaty.4/

Nor do the Puyallup cases interpret the common fishing right of the treaty to require an apportionment of Washington State fisheries ~~in every case~~. In Puyallup Tribe v. Dept. of Game of Washington, 391 U.S. 392 (1968)(Puyallup I), the Court ruled that ~~fishing~~ regulations imposed by the State could interfere with the Indians' rights ~~of access~~ to "to fish" at their "usual and accustomed" fishing spots only to the extent necessary for conservation. The Court observes that this connotes something more than mere "equal access" for the Indians, inasmuch as non-Indians plainly were subject to regulations not connected with conservation. See ante, at __. Puyallup I does not, however, indicate that the treaties should be interpreted as securing anything other than some form of a right of access. As noted above, the history and the language of the accords suggest that the right of taking fish in common with residents of the Territory was included within the treaties in order to assure that Indians would be

able to leave their reservations and travel over privately owned lands to their traditional fishing spots in order to seek fish. Under the Land Donation Act and the common law of property, this right was not one shared by every resident in the Territory. Quite the contrary, the danger the Indians sought to avoid was in part that they, like others, would be excluded from private land--in effect that those settlers who came to own land along the banks of the various waterways would come to have an effective monopoly upon the taking of fish. See supra, at ___. Thus understood, Puyallup I confirms that the treaties secured only rights of access for access greater than that generally available to residents of the Territory was precisely what the Indians bargained for and received.

In permitting the State to place limitations on the Indians' access rights when conservation so requires, the Court went farther in Puyallup I and suggested that even regulations thus justified would have to satisfy the requirements of "equal protection implicit in the phrase 'in common with.'" 391 U.S., at 403. In Washington Game Department v. Puyallup Tribe, 414 U.S. 44 (1973)(Puyallup II), we took up this suggestion and considered whether the conservation measures taken by the State of Washington had been even-handed in their treatment of the Indians. At issue was a Washington State ban on all net

fishing--by both Indians and non-Indians--for steelhead trout in the Puyallup River. According to testimony before the trial court, the annual run of steelhead trout in the Puyallup River was between 16,000 and 18,000, while unlimited sport fishing would result in the taking of between 12,000 and 14,000 steelhead annually. Because at least 25% of the entire run was required for escapement for hatcheries and spawning, the sport fishing totally preempted ~~any~~ all commercial fishing ~~whatsoever~~ by ~~the~~ Indians. ~~hence the~~ The State therefore imposed a ban on all net fishing. The Indians claimed that this ban amounted to an improper subordination of their treaty rights to ~~non-Indians'~~ the privilege of recreational fishing enjoyed by non-Indians.

We ~~ruled~~ held in Puyallup II that the ban on net fishing, ~~insofar~~, as it applied to Indians covered by treaty, was an ~~improper. In effect,~~ infringement of their rights. The State in the name of conservation was discriminating against the Indians "because all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians, is allowed." 414 U.S., at 48 (~~emphasis added~~). Because "[o]nly 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," Ibid., at 48, we remanded to the Washington courts for a fair apportionment of the steelhead run between Indian net

fishing and non-Indian sport fishing. Despite the Court's statements to the contrary, see ante, at __, we did not rule in Puyallup II that all fisheries ~~passing by Indian~~ at Indian "accustomed" fishing sites in the State ~~of Washington~~ must be apportioned between Indian and non-Indian fishermen. Rather, the question before the Court ~~in that case~~ was the narrow one whether the State was free to exhalt methods of fishing used exclusively by non-Indians over Indian ~~methods of fishing~~ used by, once it was determined that some regulation of fishing was required for purposes of conservation. Having decided that some regulation was required, but that the treaty forbad the State to choose to regulate only Indian fishing for conservation purposes, we remanded for an apportionment between net fishing and sport fishing.5/

Rider A →

David – this final sentence does not fit into my Rider but it is good & could well go into a note.

Emerging from our decisions in Puyallup I, Winans, and Puyallup II, therefore, is the proper approach to interpretation of the Indians' common fishing rights at the present time, when demand outstrips supply. The Indians have the right to go to their traditional fishing grounds to fish. Once there, they cannot be restricted in their methods or in the size of their take, save insofar as restrictions are required for ~~the sake of~~ conserving the fisheries from which they draw. Even in situations where such regulations are required, however, the State must be even-handed in limiting Indian and non-Indian fishing activity. It

David - I have tried a substitute draft for III

is not free to make the determination--apparently made by Washington with respect to the ban on net fishing in the Puyallup River--that Indian fishing rights will be ~~totally~~ subordinated to the interests of non-Indians.

III

In the present case, the District Court did not find any particular State fishing regulation to be invalid because it restricted impermissibly the Indians' right to take fish at their usual and accustomed fishing places. Rather, after concluding that Indian fishing off of the reservation properly was subject to some State regulation in the interests of conservation, the court immediately considered an apportionment between Indians and non-Indians, noting that "[b]y dictionary definition...'in common with' means sharing equally." 384 F.Supp., at 343. The court interpreted this equal sharing to require that "non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish...." Ibid.

Rider A

cannot be squared with the language or history of the treaties, or indeed with prior decisions

In my view this approach ~~was a substantial departure from our prior cases. Indeed,~~ In effect the District Court reforms the bargain

dissenting opinion of this Court.

struck with the Indians in 1854-1855 to conform with what ~~we now might~~ apparently perceive as a just result. Under Puyallup I it is plain that the State of Washington properly can impose regulations on Indians as well as non-Indians when it is necessary ~~to do so in order~~ to preserve and protect the fisheries of the State. But the regulations promulgated for this purpose need not take the form of a specific apportionment of the harvestable fish between Indians and non-Indians. Under our decision in Puyallup II the Indians' right under the treaties is only to be free even from conservation-based fishing regulation where it is shown that the State in structuring its conservation program has chosen to subordinate the rights of Indian fishermen to those of non-Indians. Here there was no such showing. On the contrary, from ~~aught~~ all that appears in the record, the regulations in force at the time of the District Court's decision were entirely even-handed. Nothing more is required by the treaties, save insofar as access to the fishing places is concerned.

To be sure, the unforeseen circumstances developing in the last 115 years ~~may~~ have affected seriously the Indians' ability to catch fish in the Pacific Northwest. This is not the result, however, of State regulation, but rather of changes in the population of the area and in the technology that makes commercial fishing an attractive business. To some extent the

disadvantages visited upon the Indians from these ~~unavoidable~~ changes may be ameliorated by special federal programs to modernize the Indians' fishing equipment in order to make them truly competitive with their non-Indian counterparts. But this Court should not undertake to rewrite the treaties of 1854-1855 in order to achieve what it may perceive to have been a just bargain in retrospect. I therefore would reverse the judgment of the Ninth Circuit and remand for consideration whether the regulations in force before the District Court acted in this case were based upon the State's decision to subordinate the Indians' fishing rights to those of the non-Indians.

Footnotes

1. Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point Elliott, 12 Stat. 927; Treaty of Point No Point, 12 Stat. 933; Treaty with the Makahs, 12 Stat. 939; Treaty with the Yakimas, 12 Stat. 951; Treaty of Olympia, 12 Stat. 971.

2. Treaty of Medicine Creek, supra, at 1133. There were some slight, immaterial variations in the language used. See, e.g., Treaty with the Yakimas, quoted infra, at ___.

3. Indeed, if the Court's interpretation of the treaties were correct, then the exclusive right with respect to reservation fishing would be largely superfluous. If the Indians had the right to 50%, and no more, of the fish irrespective of where they are caught, then it hardly would be of any great value to them that they could keep others from taking fish from locations on the reservation. The most reasonable way to interpret the exclusive right of reservation fishing so that it was of value, therefore, is as a special right of access.

4. The Government's brief in Winans, cited approvingly by the Court in that case, indicates that the Government also understood the treaty to guarantee nothing more than access rights to traditional fishing locations. In that brief, the

Government advocated only "a way of access, free ingress and egress to and from the fishing grounds." Brief for Appellant, No. 180, O.T. 1904, p. 56.

This interpretation of Winans was unequivocally affirmed by the Court a short time later in Seufert Bros. Co. v. United States, 249 U.S. 194 (1919). At issue in that case was whether Indians from the Yakima nation had the right under their treaty to cross the Columbia River and fish from the south bank, which admittedly had belonged to other tribes at the time of the treaty. The Court viewed Seufert, a case unquestionably involving only the right of access, to be squarely controlled by its earlier decision in Winans. 249 U.S., at 198. Moreover, the Court reaffirmed its view that the effect of the reservation of common fishing rights to the Indians amounted to a servitude. Ibid., at 199.]

5. Puyallup Tribe v. Washington Game Dept., 433 U.S. 165 (1977)(Puyallup III), is of little assistance in deciding the issue in the present cases. The Court in that case decided only that the regulations permitted in Puyallup I could be applied against Indian fishing on the reservations, as well as off of them.

I am not in agreement, however, with the Court's conclusion that the treaties negotiated in 1854 and 1855 with the Indians of the Washington Territory require, as a starting point for determining the fishing rights of Indians and non-Indians, a "50-50" division of all fish passing land upon which the Indians traditionally have fished. Ante, at 25 et seq. The Court's opinion, as I read it, ~~accepts the District Court's~~ this Solomonic "~~50-50~~" division between the contending parties, subject to some downward adjustment on the Indians' side. construes The treaty language to "take fish . . . in common" ~~is construed~~ to require ~~this.~~ The Court apparently views the effectively treaties as guaranteeing ~~in effect~~ to the Indians a specified percentage of the runs of the anadromous fish in question. As I do not believe the language and history of the treaties can be construed to support the Court's interpretation, I dissent.

In short, they won a right of access to fish. In addition, the Indians retained the exclusive right to take fish on their reservations, a right not involved in this litigation.

Quite to the contrary, ~~as~~ the language confers upon non-Indians the same right ~~as is~~ it conferred upon Indians, even in areas where the Indians traditionally had fished. United States v. Winans, 198 U.S. 371 (1905). It hardly ~~even~~ could be argued that Congress intended to guarantee non-Indians any specified percentage of the available fish, ~~taken,~~ and Indians were given no different right.

All that the Indians had before non-Indians arrived in the Territory was the natural right to fish, a right exercised at identifiable locations. All that the treaties sensibly could have provided was the preservation of a right of access to these locations for the purpose of fishing there in common with non-Indians who had such access.

II

Prior decisions of this Court have prevented the dilution of these treaty rights, but none ~~have~~ (has) addressed the issue ~~presently~~ (now) before us. I read these decisionsas supporting the view expressed above. This is particularly true of U. S. v. Winans, 198 U.S. 371 (1905), the case most directly relevant.

The Court thus ~~read~~ revised these treaties as intending to "give[] a right in the land" - - a "servitude" upon all non-Indian land - to enable Indians to fish "in common with citizens of the Territory". The focus was on access to the traditional fishing areas for the purpose of enjoying the "right of fishing". Id., at 380. The Court in Winans concluded, on the facts before it, ~~in Winans~~, that the right of access to fish in these areas had been abridged. It stated that

Nor do the Puyallup cases interpret the treaties to require that any specified proportion of the catch be reserved for Indians. Indeed, Puyallup Tribe v. Dept. of Game of Washington, 391 U. S. 392 (1968) (Puyallup I), consistently with Winans, described the right of Indians under the treaties as "the right to fish 'at all usual and accustomed placed'." Id., at 398.* The issue before the Court in Puyallup I was the extent to which the state could regulate fishing. It held:

> ". . . the 'right' to fish outside the reservation was a treaty 'right' that could not be qualified or conditioned by the State. But 'the time and manner not being defined or established by the treaty, were within the reach of state power." Id. at 399.

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*The treaty right was repeatedly referred to in Puyallup I as a "right to fish". This term was used no less than seven times in the course of the opinion, with no distinction being made between the right "to fish" and "to take fish". Id., at 398-99.

The Court today finds support for its views in Puyallup I because the Court there recognized that apart from conservation measures, the State could not impose restrictive regulations on the treaty rights of Indians. It does not follow from this that an affirmative right to a specified percentage of the catch is guaranteed by the treaties. The Court misappreciates the nature of the basic right sought to be preserved by Congress. This, as noted above, was a right of access by Indians to their usual and accustomed fishing areas - a right to reach these areas - described in Winans as a servitude or right over land not owned by Indians. Putting it differently, this is a right to trespass on any land when necessary to reach the traditional fishing areas, and is a right not enjoyed by non-Indian residents of the Territory or such residents following statehood.

Relying upon the reference in Puyallup II to "apportionment", the Court expansively reads the decision in that case as strongly implying, if not holding, that ~~all~~ the catch ~~fisheries~~ at Indians' "accustomed" fishing sites in the ~~S~~state must be apportioned between Indian and non-Indian fishermen. This view certainly is not a necessary reading of Puyallup II. Indeed, I view it as a quite unjustified extension of that case. Puyallup II addressed an extremely narrow question: whether there had been "discrimination" by state regulations under which "all Indian net fishing [was] barred and only hook and line fishing entirely pre-empted by non-Indians, [was] allowed." Id., at 48. The entire opinion of the Court is confined to less than five pages of the U. S. Reports, and Mr. Justice Douglas stated at the outset that the issue of "allocating the catch" was mentioned "only to reserve decision on it". Id., at 48. In any event, to the extent language in Puyallup II may be read as supporting some general apportionment of the catch, it is dictum that is plainly incompatible with the language and historical understanding of these treaties.

In my view, the district court below - and now this Court - has formulated an apportionment doctrine that cannot be squared with the language or history of the treaties, or indeed with the prior decision of this Court. It has been argued to us that the application of this doctrine, and specificially the construction of the term "in common" as requiring a basic 50-50 apportionment, will result in an extraordinary economic windfall to Indian fisherman in the commercial fish market. This is said to give them a substantial position in the market wholly protected from competition from non-Indian fishermen. Apparently, non-Indian fishermen would be required from time to time to stay off fishery areas completely while Indians catch their Court-decreed allotment. In sum, it is urged that the district court's decision, if affirmed in substance by this Court, will discriminate quite unfairly against non-Indians. I find it difficult to reject these arguments as being unfounded.

To be sure, if the treaties must be construed to produce such a result, it would be our duty so to construe them. For the reasons stated above, I think the Court's construction virtually ignores the historical setting and purpose of the treaties, considerations that bear compellingly upon a proper reading of their language. Nor do

the prior decisions of this Court support or justify what seems to me to be a substantial reformation of the bargain struck with the Indians in 1854-1855.

I would hold that the treaties gave to the Indians two significant rights that should be respected: as made clear in Winans, the clear intention of the treaties was to assure to Indians the right of access over private lands so that they could continue to fish at their usual and accustomed fishing grounds. See also Seufert Bros. Co. v. United States, 249 U.S. 194 ( ). As subsequently construed, the treaties exempt Indians from state regulation (including the payment of license fees) except that necessary for conservation in the interest of all fishermen. Moreover, Indians have the exclusive right to fish on their reservations, and are guaranteed enough fish to satisfy their ceremonial and subsistence needs. Finally, under Puyallup II, it is settled that even a facially neutral conservation regulation is invalid if its effect is to discriminate against Indian fishermen.

The foregoing package of rights, privileges and exemptions - possessed only by ~~non-~~Indians - is quite substantial. I find no basis for according additional advantages to Indian fishermen.

78-983 ← file

I am not in agreement, however, with the Court's conclusion that the treaties negotiated in 1854 and 1855 with the Indians of the Washington Territory require, as a starting point for determining the fishing rights of Indians and non-Indians, a 50-50 division of all fish passing land upon which the Indians traditionally have fished. Ante, at 25 et seq. The Court's opinion, as I read it, accepts the District Court's "50-50" division between the contending parties, subject to some downward adjustment on the Indians' side. The treaty language to "take fish . . . in common" is construed to require this. The Court apparently views the treaties as guaranteeing - in effect - to the Indians a specified percentage of the runs of the anadromous fish in question. As I do not believe the language and history can be construed to support the Court's interpretation, I dissent.

In short, they won a right of access to fish. In addition, the Indians retained the exclusive right to take fish on their reservations, a right not involved in this litigation.

Quite to the contrary, as the language confers upon non-Indians the same right as is conferred upon Indians even in areas where the Indians traditionally had fished. U. S. v. Winans, 198 U.S. 371 (1905). It hardly even could be argued that Congress intended to guarantee non-Indians any specified percentage of the fish taken, and Indians were given no different right.

All that the Indians had before non-Indians arrived in the Territory was the natural right to fish, a right exercised at identifiable locations. All that the treaties sensibly could have provided was the preservation of a right of access to these locations for the purpose of fishing there in common with non-Indians who had such access.

II

Prior decisions of this Court have prevented the dilution of these treaty rights, but none have addressed the issue presently before us. I read these decisionsas supporting the view expressed above. THis is particularly true of U. S. v. Winans, 198 U.S. 371 (1905), the case most directly relevant.

The Court thus read these treaties as intending to "give[] a right in the land" - - a "servitude" upon all non-Indian land - to enable Indians to fish "in common with citizens of the Territory". The focus was on access to the traditional fishing areas for the purpose of enjoying the "right of fishing". Id., at 380. The Court concluded, on the facts before it in Winans, that the right of access to fish in these areas had been abridged. It stated that

Nor do the Puyallup cases interpret the treaties to require that any specified proportion of the catch be reserved for Indians. Indeed, Puyallup Tribe v. Dept. of Game of Washington, 391 U. S. 392 (1968) (Puyallup I), consistently with Winans, described the right of Indians under the treaties as "the right to fish 'at all usual and accustomed placed'." Id., at 398.* The issue before the Court in Puyallup I was the extent to which the state could regulate fishing. It held:

> ". . . the 'right' to fish outside the reservation was a treaty 'right' that could not be qualified or conditioned by the State. But 'the time and manner not being defined or established by the treaty, were within the reach of state power." Id. at 399.

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*The treaty right was repetitively referred to in Puyallup I as a "right to fish". This term was used no less than five times in the course of the opinion, with no distinction being made between the right "to fish" and to "take fish". Id., at 398-99.

The Court today finds support for its views in Puyallup I because the Court there recognized that apart from conservation measures, the State could not impose restrictive regulations on the treaty rights of Indians. It does not follow from this that an affirmative right to a specified percentage of the catch is guaranteed by the treaties. The Court misappreciates the nature of the basic right sought to be preserved by Congress. This, as noted above, was a right of access by Indians to their usual and accustomed fishing areas - a right to reach these areas - described in Winans as a servitude or right over land not owned by Indians. Putting it differently, this is a right to trespass on any land when necessary to reach the traditional fishing areas, and is a right not enjoyed by non-Indian residents of the Territory or such residents following statehood.

Relying upon the reference in Puyallup II to "apportionment", the Court expansively reads the decision in that case as strongly implying, if not holding, that all fisheries at Indians' "accustomed" fishing sites in the state must be apportioned between Indian and non-Indian fishermen. This view certainly is not a necessary reading of Puyallup II. Indeed, I view it as a quite unjustified extension of that case. Puyallup II addressed an extremely narrow question: whether there had been "discrimination" by state regulations under which "all Indian net fishing [was] barred and only hook and line fishing entirely pre-empted by non-Indians, is allowed." Id., at 48. The entire opinion of the Court is confined to less than five pages of the U. S. Reports, and Mr. Justice Douglas stated at the outset that the issue of "allocating the catch" was mentioned "only to reserve decision on it". Id., at 48. In any event, to the extent language in Puyallup II may be read as supporting some general apportionment of the catch, it is dictum that is plainly incompatible with the language and historical understanding of these treaties.

In my view, the district court below - and now this Court - has formulated an apportionment doctrine that cannot be squared with the language or history of the treaties, or indeed with the prior decision of this Court. It has been argued to us that the application of this doctrine, and specificially the construction of the term "in common" as requiring a basic 50-50 apportionment, will result in an extraordinary economic windfall to Indian fisherman in the commercial fish market. This is said to give them a substantial position in the market wholly protected from competition from non-Indian fishermen. Apparently, non-Indian fishermen would be required from time to time to stay off fishery areas completely while Indians catch their Court-decreed allotment. In sum, it is urged that the district court's decision, if affirmed in substance by this Court, will discriminate quite unfairly against non-Indians. I find it difficult to reject these arguments as being unfounded.

To be sure, if the treaties must be construed to produce such a result, it would be our duty so to construe them. For the reasons stated above, I think the Court's construction virtually ignores the historical setting and purpose of the treaties, considerations that bear compellingly upon a proper reading of their language. Nor do

the prior decisions of this Court support or justify what seems to me to be a substantial reformation of the bargain struck with the Indians in 1854-1855.

I would hold that the treaties gave to the Indians two significant rights that should be respected: as made clear in Winans, the clear intention of the treaties was to assure to Indians the right of access over private lands so that they could continue to fish at their usual and accustomed fishing grounds. See also Seufert Bros. Co. v. United States, 249 U.S. 194 ( ). As subsequently construed, the treaties exempt Indians from state regulation (including the payment of license fees) except that necessary for conservation in the interest of all fishermen. Moreover, Indians have the exclusive right to fish on their reservations, and are guaranteed enough fish to satisfy their ceremonial and subsistence needs. Finally, under Puyallup II, it is settled that even a facially neutral conservation regulation is invalid if its effect is to discriminate against Indian fishermen.

The foregoing package of rights, privileges and exemptions - possessed only by non-Indians - is quite substantial. I find no basis for according additional advantages to Indian fishermen.

June 13, 1979

77-983 Washington v. United States

Dear Potter, Byron and Bill:

After a further rather careful examination of the central issue in this case, I have concluded that the treaties gave the Indians a right of access over the lands of non-Indians to fish (to take fish if they could catch them) at their accustomed places.

The enclosed draft of a dissent incorporates my present views. As the draft is written as a dissent (which I am prepared to circulate), it would require substantial additional writing to convert it into a Court opinion - even in the unlikely event that four others agreed with my view of the treaties. Indeed, as one of you said on Monday, it may well be too late for any proper Court opinion other than John's.

I would not oppose reargument, and a good deal can be said for this. I rather doubt, however, whether we could settle any issues of consequence now and thereby limit the scope of reargument.

I would, of course, welcome any comments on the enclosed draft.

Sincerely,

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Rehnquist

lfp/ss

LFP/ss 6/13/79

Washington v. United States, No. 78-119

MR. JUSTICE POWELL, dissenting.

I join parts I-III of the Court's opinion. I am not in agreement, however, with the Court's interpretation of the treaties negotiated in 1854 and 1855 with the Indians of the Washington Territory. The Court's opinion, as I read it, construes the treaties' provision "to take fish...in common" as guaranteeing the Indians a specified percentage of the runs of the anadromous fish passing land upon which the Indians traditionally have fished. Indeed, it takes as a starting point for determining fishing rights an equal division of these fish between Indians and non-Indians. Ante, at 25, et seq. As I do not believe that the language and history of the treaties can be construed to support the Court's interpretation, I dissent.

I

At issue in these cases is the meaning of language found in six similar Indian treaties negotiated and signed in 1854 and 1855.1/ Each of the treaties provides substantially that "[t]he 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, and of erecting temporary houses for the purpose of curing."2/ The question before us is whether this "common" fishing right is a right only

of access to usual and accustomed fishing sites for the purpose of fishing there, or includes the greater right to exclude others from taking a particular portion of the fish that pass through the sites. As the Court observes, at the time the treaties were signed there was no need directly to address this question, for the surfeit of fish made lack of access to fishing areas the only constraint upon supply. Nonetheless, I believe that the compelling inference to be drawn from the language and history of the treaties is that the Indians sought and retained only the right to go to their accustomed fishing places and there to fish along with non-Indians. In addition, the Indians retained the exclusive right to take fish on their reservations, a right not involved in this litigation. In short, they have a right of access to fish.

Nothing in the language of the treaties indicates that any party understood that constraints would be placed on the amount of fish that anyone could take, or that the Indians would be guaranteed a percentage of the catch. Quite to the contrary, the language confers upon non-Indians precisely the same right to fish that it confers upon Indians, even in those areas where the Indians traditionally had fished. United States v. Winans, 198 U.S. 371 (1905). As it cannot be argued that Congress intended to guarantee non-Indians any specified percentage of the available fish, there is neither force nor logic to the argument that the same language--the "right to take fish"--does guarantee such a percentage to Indians.

This conclusion is confirmed by the language used in the treaty negotiated with the Yakima Tribe, which explicitly includes what apparently is implicit in each of the treaties: the Indians' right to take fish on their reservations is exclusive. Thus, the Yakima treaty provides that "[t]he exclusive right of taking fish in all the streams where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory...." 12 Stat. 951. See ante, at __. There is no reason apparent from the language used in the treaties why the "right of taking fish" should mean one thing for purposes of the exclusive right of reservation fishing and quite another for purposes of the "common" right of fishing at usual and accustomed places. Since the Court interprets the right of taking fish in common to be an entitlement to half of the entire catch taken from fisheries passing the Indians' traditional fishing grounds, it therefore should follow that the Court would interpret the exclusive right of taking fish to be an entitlement to all of the fish taken from fisheries passing the Indians' reservations. But the Court apparently concedes that this exclusive right is not of such draconian proportions. Indeed, the Court would reduce the Indians' 50 percent portion by those fish caught on the reservation. The more reasonable conclusion, therefore, is that when the Indians and Governor

Stevens agreed upon a "right of taking fish," they understood this right to be one of access to fish--exclusive access with respect to fishing places on the reservation, and common access with respect to fishing places off of the reservation.3/

In addition to the language of the treaties, the historical setting in which they were negotiated supports the inference that the fishing rights secured for the Indians were rights of access alone. The primary purpose of the six treaties negotiated by Governor Stevens was to resolve growing disputes between the settlers claiming title to land in the Washington Territory under the Land Donation Act of 1850, 9 Stat. 437, and the Indians who had occupied the land for generations. Under the bargain struck in the treaties, the Indians ceded their claims to vast tracts of land, retaining only certain specified areas as reservations, where they would have exclusive rights of possession and use. In exchange, the Indian tribes were given substantial sums of money and were promised various forms of aid. See, e.g., Treaty of Medicine Creek, 10 Stat. 1132. By thus separating the Indians from the settlers it was hoped that friction could be minimized.

The negotiators apparently realized, however, that restricting the Indians to relatively small tracts of land might interfere with their securing food. See Letter of George Gibbs to Captain McClellan, App. 326 ("[the Indians] require the liberty of motion for the purpose of seeking, in their proper

season, roots, berries, and fish"). This necessary "liberty of motion" was jeopardized by the title claims of the settlers whose land abutted--or would abut--the waterways from which fish traditionally had been caught. Thus, in Governor Stevens' report to the Commissioner of Indian Affairs, he noted the tension between the land rights afforded settlers under the 1850 Land Donation Act and the Indians' need to have some access to the fisheries. Although he expressed the view that "[i]t never could have been the intention of Congress that Indians should be excluded from their ancient fisheries," he noted that "no condition to this effect was inserted in the donation act," and therefore recommended the question "should be set at rest by law." Report of Governor Stevens to the Commissioner of Indian Affairs, App. 327. Viewed within this historical context, the common fishing right reserved to the Indians by the treaties of 1854 and 1855 could only have been the right, over and above their exclusive fishing right on their reservations, to roam off of the reservations in order to reach fish at the locations traditionally used by the Indians for this purpose. On the other hand, there is no historical indication that any of the parties to the treaties understood that the Indians would be specifically guaranteed some set portion of the fisheries to which they traditionally had had access.

II

Prior decisions of this Court have prevented the dilution of these treaty rights, but none has addressed the issue now before us. I read these decisions as supporting the interpretation set forth above. This is particularly true of United States v. Winans, 198 U.S. 371 (1905), the case most directly relevant. In that case a settler had constructed several fish wheels in the Columbia River. These fish wheels were built at locations where the Indians traditionally had fished, and "'necessitate[d] the exclusive possession of the space occupied by the wheels,'" id., at 380, thereby interfering with the Indians' treaty right of access to fish. This Court reviewed in some detail the precise nature of the Indians' fishing rights under the Yakima Treaty, and concluded that the treaties,

> "...reserved rights...to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved wtihin certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the Territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places,' and the right 'of erecting temporary buildings for curing them.' The contingency of the future ownership of the lands, therefore, was foreseen and provided for--in other words, the Indians were given a right in the land--the right of crossing it to the river--the right to

> occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty." Id., at 381 (Emphasis added).

The Court thus viewed these treaties as intended to "giv[e] a right in the land"--a "servitude" upon all non-Indian land--to enable Indians to fish "in common with citizens of the Territory." The focus was on access to the traditional fishing areas for the purpose of enjoying the "right of fishing." Id., at 380. The Winans Court concluded, on the facts before it, that the right of access to fish in these areas had been abridged. It stated that "in the actual taking of fish white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does." Id., at 382 (emphasis added). Thus, Winans was decided solely upon the basis of a treaty-secured right of access to fish. Moreover, the Court's analysis of the treaty right at issue in Winans strongly indicates that nothing more than a right of access fairly could be inferred from the treaty.4/

Nor do the Puyallup cases interpret the treaties to require that any specified proportion of the catch be reserved for Indians. Indeed, Puyallup Tribe v. Dept. of Game of Washington, 391 U.S. 392 (1968)(Puyallup I), consistently with Winans, described the right of Indians under the treaties as "the right to fish 'at all usual and accustomed places.'" Id.,

at 398.5/ The issue before the Court in Puyallup I was the extent to which the state could regulate fishing. It held that,

> "...the 'right' to fish outside the reservation was a treaty 'right' that could not be qualified or conditioned by the State. But 'the time and manner of fishing...necessary for the conservation of fish,' not being defined or established by the treaty, were within the reach of state power."

The Court today finds support for its views in Puyallup I because the Court there recognized that, apart from conservation measures, the State could not impose restrictive regulations on the treaty rights of Indians. But it does not follow from this that an affirmative right to a specified percentage of the catch is guaranteed by the treaties to Indians or to non-Indians, for the Court misapprehends the nature of the basic right sought to be preserved by Congress. This, as noted above, was a right of the Indians to reach their usual and accustomed fishing areas. Put differently, this right, described in Winans as a servitude or right over land not owned by the Indians, entitles the Indians to trespass on any land when necessary to reach their traditional fishing areas, and is a right not enjoyed by non-Indian residents of the area.

In permitting the State to place limitations on the Indians' access rights when conservation so requires, the Court went farther in Puyallup I and suggested that even regulations

thus justified would have to satisfy the requirements of "equal protection implicit in the phrase 'in common with.'" 391 U.S., at 403. Accordingly, in Washington Game Department v. Puyallup Tribe, 414 U.S. 44 (1973)(Puyallup II), we considered whether the conservation measures taken by the State had been even-handed in the treatment of the Indians. At issue was a Washington State ban on all net fishing--by both Indians and non-Indians--for steelhead trout in the Puyallup River. According to testimony before the trial court, the annual run of steelhead trout in the Puyallup River was between 16,000 and 18,000, while unlimited sport fishing would result in the taking of between 12,000 and 14,000 steelhead annually. Because the escape of at least 25% of the entire run was required for hatcheries and spawning, the sport fishing totally preempted all commercial fishing by Indians. The State therefore imposed a ban on all net fishing. The Indians claimed that this ban amounted to an improper subordination of their treaty rights to the privilege of recreational fishing enjoyed by non-Indians.

We held in Puyallup II that the ban on net fishing, as it applied to Indians covered by treaty, was an infringement of their rights. The State in the name of conservation was discriminating against the Indians "because all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians, is allowed." 414 U.S., at 48. Because "[o]nly 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," Id., at 48, we remanded to the Washington courts for a fair apportionment of the steelhead run between Indian net fishing and non-Indian sport fishing.

Relying upon the reference in Puyallup II to "apportionment," the Court expansively reads the decision in that case as strongly implying, if not holding, that the catch at Indians' "accustomed" fishing sites must be apportioned between Indian and non-Indian fishermen. This view certainly is not a necessary reading of Puyallup II. Indeed, I view it as a quite unjustified extension of that case. Puyallup II addressed an extremely narrow question: whether there had been "discrimination" by state regulations under which "all Indian net fishing [was] barred and only hook and line fishing entirely pre-empted by non-Indians, [was] allowed." Id., at 48. In any event, to the extent language in Puyallup II may be read as supporting some general apportionment of the catch, it is dictum that is plainly incompatible with the language and historical understanding of these treaties.6/

Emerging from our decisions in Winans, Puyallup I and Puyallup II, therefore, is the proper approach to interpretation of the Indians' common fishing rights at the present time, when demand outstrips supply. The Indians have the right to go to their traditional fishing grounds to fish. Once there, they

cannot be restricted in their methods or in the size of their take, save insofar as restrictions are required for conserving the fisheries from which they draw. Even in situations where such regulations are required, however, the State must be even-handed in limiting Indian and non-Indian fishing activity. It is not free to make the determination--apparently made by Washington with respect to the ban on net fishing in the Puyallup River--that Indian fishing rights will be totally subordinated to the interests of non-Indians.

III

In my view, the District Court below--and now this Court--has formulated an apportionment doctrine that cannot be squared with the language or history of the treaties, or indeed with the prior decisions of this Court. The application of this doctrine, and particularly the construction of the term "in common" as requiring a basic 50-50 apportionment, is likely to result in an extraordinary economic windfall to Indian fishermen in the commercial fish market by giving them a substantial position in the market wholly protected from competition from non-Indian fishermen. Indeed, non-Indian fishermen apparently will be required from time to time to stay out of fishing areas completely while Indians catch their Court-decreed allotment. In sum, the District Court's decision will discriminate quite unfairly against non-Indians.

To be sure, if it were necessary to construe the treaties to produce these results, it would be our duty so to construe them. But for the reasons stated above, I think the Court's construction virtually ignores the historical setting and purpose of the treaties, considerations that bear compellingly upon a proper reading of their language. Nor do the prior decisions of this Court support or justify what seems to me to be a substantial reformation of the bargain struck with the Indians in 1854-1855.

I would hold that the treaties give to the Indians two significant rights that should be respected. As made clear in Winans, the purpose of the treaties was to assure to Indians the right of access over private lands so that they could continue to fish at their usual and accustomed fishing grounds. Indians also have the exclusive right to fish on their reservations, and are guaranteed enough fish to satisfy their ceremonial and subsistence needs. Moreover, as subsequently construed, the treaties exempt Indians from state regulation (including the payment of license fees) except that necessary for conservation in the interest of all fishermen. Finally, under Puyallup II, it is settled that even a facially neutral conservation regulation is invalid if its effect is to discriminate against Indian fishermen. This package of rights, privileges, and exemptions--possessed only by Indians--is quite substantial. I find no basis for according them additional advantages.

Footnotes

1. Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point Elliott, 12 Stat. 927; Treaty of Point No Point, 12 Stat. 933; Treaty with the Makahs, 12 Stat. 939; Treaty with the Yakimas, 12 Stat. 951; Treaty of Olympia, 12 Stat. 971.

2. Treaty of Medicine Creek, supra, at 1133. There were some slight, immaterial variations in the language used. See, e.g., Treaty with the Yakimas, quoted infra, at ___.

3. Indeed, if the Court's interpretation of the treaties were correct, then the exclusive right with respect to reservation fishing would be largely superfluous. If the Indians had the right to 50%, and no more, of the fish irrespective of where they are caught, then it hardly would be of any great value to them that they could keep others from taking fish from locations on the reservation. The most reasonable way to interpret the exclusive right of reservation fishing so that it was of value, therefore, is as a special right of access.

4. The Government's brief in Winans, cited approvingly by the Court in that case, indicates that the Government also understood the treaty to guarantee nothing more than access rights to traditional fishing locations. In that brief, the Government advocated only "a way of access, free ingress and egress to and from the fishing grounds." Brief for Appellant, No. 180, O.T. 1904, p. 56.

This interpretation of Winans was unequivocally affirmed by the Court a short time later in Seufert Bros. Co. v. United States, 249 U.S. 194 (1919). At issue in that case was whether Indians from the Yakima nation had the right under their treaty to cross the Columbia River and fish from the south bank, which admittedly had belonged to other tribes at the time of the treaty. The Court viewed Seufert, a case unquestionably involving only the right of access, to be squarely controlled by its earlier decision in Winans. 249 U.S., at 198. Moreover, the Court reaffirmed its view that the effect of the reservation of common fishing rights to the Indians amounted to a servitude. Ibid., at 199.

5. The treaty right was repeatedly referred to in Puyallup I as a "right to fish." This phrase was used no less than seven times in the course of the opinion, with no distinction being made between the right "to fish" and the right "to take fish." Id., at 397-99.

6. Having decided that some regulation was required, but that the treaty forbad the State to choose to regulate only Indian fishing for conservation purposes, we remanded for an apportionment between net fishing and sport fishing. Puyallup Tribe v. Washington Game Dept., 433 U.S. 165 (1977)(Puyallup III), is of little assistance in deciding the issue in the present cases. The Court in that case decided only that the regulations permitted in Puyallup I could be applied against Indian fishing on the reservations, as well as off of them.

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 14, 1979

Re: No. 77-983, Washington v. United States

Dear Lewis,

I congratulate you and your law clerks on a very good job done in a very short time. If what you have written remains a dissenting opinion, I shall gladly join it. If, on the other hand, it commands the support of a majority, I see no practical alternative except to set these cases for reargument.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to Mr. Justice White
Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 14, 1979

Re: No. 77-983 - Washington v. United States

Dear Lewis:

My sentiments with respect to your most recent draft in this case are the same as those conveyed to you by Potter in his letter of June 14th. I am firmly of the view that John's memorandum misconstrues the treaty; the question of reargument would depend upon the amount of work which would inevitably fall on you and your chambers in converting what is now a dissent into a majority opinion if it attracts four votes other than yours. It will certainly have mine.

Sincerely,

Mr. Justice Powell

Copies to Mr. Justice Stewart
and Mr. Justice White

June 15, 1979

Re: 77-983, 78-119, and 78-139 Washington v. Fishing Vessel Association

Dear John:

Thank you for your letter concerning my dissenting opinion in these cases. I agree that Puyallup II is a point of difference between us, although I think that the language and history of the treaties are controlling.

The opinion for the Court in Puyallup II is a scant four pages in length and is so cryptic that it is difficult to tell exactly what was being decided or why. Nonetheless, I think that the most sensible interpretation of Justice Douglas' opinion does not in any way require that the federal courts allocate all of the fish subject to the 1854-1855 treaties between the Indians and the non-Indians. Puyallup II involved the State's ban on net fishing for steelhead trout in one river (the Puyallup), a regulation unquestionably justified by conservation requirements described in Puyallup I. The only question presented and considered was whether this ban was invalid because it violated the "equal protection [requirement] implicit in the phrase 'in common with.'" Puyallup I, 391 U.S., at 403. Although the ban was neutral on its face, as applied it discriminated against the Indians, because members of the Puyallup Tribe engaged in fishing only by means of nets. Thus, when the Washington Supreme Court ruled that net fishing would be allowed only if hook-and-line fishing did not take all of the permissibly harvestable fish, the Solicitor General concluded that this would "subordinat[e] the Tribe's rights to those of sports fishermen and giv[e] the Tribe only what might be left after the sports fishermen of unlimited number have had their take." Brief of Respondent in Puyallup II, O.T. 1972, No. 481, p.18. In sum, it appears that under the special circumstances of the Puyallup River, preferring hook-and-line fishing to net

fishing in effect preferred non-Indian fishing to Indian fishing.

It is plain from the opinion that the Court understood the issue in Puyallup II to be whether the treaties would permit the State to meet conservation goals by means of regulations that would burden only Indian fishermen, and therefore operate discriminatorily. Writing for the Court, Justice Douglas stated that "[w]hether [the ban on all net fishing in the Puyallup River] amounts to discrimination under the Treaty is the central issue in these cases." Id., at 47. In its brief analysis, the Court observed that "[t]he ban on all net fishing in the Puyallup River for steelhead [trout] grants, in effect the entire run to the sports fishermen," id., at 46-47, and that the ban discriminated against the Indians "because all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians, is allowed." Id., at 48 (emphasis added).

I believe the correct interpretation of Puyallup II, therefore, is that it forbad the State of Washington to adopt otherwise valid conservation restrictions upon Indian fishing if those restrictions would have the effect of placing the entire cost of conservation on the Indians. To be sure, as you suggest, the Indians in Puyallup II could have begun hook-and-line fishing in order to continue to take fish in the Puyallup River. But the Court in effect ruled that the "equal protection" aspect of the treaties would be violated if the Indians alone were made to alter their methods of taking fish. It was in this quite limited and unusual context that the Court suggested apportionment as the method by which Indian fishing rights could best be secured in the Puyallup River. The opinion does not suggest that apportionment is the Indians' right with respect to all of the fish covered by the treaties in the State of Washington.

In sum, I understand Puyallup II to require even-handed treatment of the Indians whenever some limitation on their catch is required by conservation concerns. Whether this "equal protection" interpretation of the treaties is appropriate, and if so whether it applies to all fisheries covered by the treaties--or indeed whether it applies anywhere in the absence of discriminatory effect, are questions we may have to address at some point in the future.

But these questions are not before us in this case, at least in the focused sense in which the single issue of discrimination was presented in Puyallup II.

Sincerely,

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 15, 1979

RE: 77-983, 78-119 and 78-139 - Washington v. Fishing Vessel Association

Dear Lewis:

Because your "dissenting" opinion probably has as good a chance of becoming a Court opinion as my memorandum, it may be appropriate for me to respond by letter rather than by circulating revisions in my earlier draft.

I think it is imperative that we focus on the proper interpretation of Puyallup II.

In that case, there was nothing about the state regulation that entirely preempted the supply of steelhead for non-Indians; as the State vigorously argued in that case, Indians and non-Indians were afforded equal "access" to the hook-and-line fishery authorized by the regulation. Instead, the preemption found by the Court was the consequence of the fact that non-Indians so thoroughly outnumbered Indians that "equal access" effectively prevented the latter from taking any appreciable number of fish. By finding that preemption inconsistent with the treaties, the Court rather clearly held that the Indians not only have a right of "access" to fishing areas but also have a "right of taking" a substantial number of fish.

Accordingly, if the treaties merely gave the Indians the two rights you describe in the last paragraph of your opinion, Puyallup II should have been decided the other way. For the state regulation was not merely "facially

neutral," but it was also substantively neutral because it banned commercial, and allowed hook-and-line, fishing by both non-Indians and Indians. As I read your opinion, the only way you can find that the regulation in Puyallup II discriminated against the Indians is to assume that the Indians have some kind of inherent right to engage in a commercial fishing enterprise that non-Indians do not have and to conclude that requiring Indians to observe the same rules as non-Indians is therefore somehow "discriminatory." Apart from the fact that this theory is inconsistent with your earlier interpretation of the treaties at p. 2 as affording Indians and non-Indians "precisely the same right to fish," I know of no evidence that supports it. As I see it, the "discrimination" disapproved of in Puyallup II was precisely the same as is involved in this case--under preexisting policies, non-Indians could, but Indians could not, take substantial numbers of fish.

I sympathize with your concern about this case, but it seems to me we must either overrule Puyallup II or give the Indians a share of the fish.

Respectfully,

Mr. Justice Powell

Copies to the Conference

David - add WHR to P.S. ✓

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

call Printer

CHAMBERS OF
JUSTICE POTTER STEWART

June 15, 1979

Re: 78-119 - Washington v. United States, etc.

Dear Lewis:

Please add my name to your dissenting opinion in these cases.

Sincerely yours,

P.S.
1.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 15, 1979

Re: Nos. 77-983, 78-119 & 78-139 - Washington fish cases

Dear John,

I agree with you that, whether sound or not, our prior cases construing the relevant Indian treaties conclude that the Indians not only were guaranteed a right of access and a right to fish in their accustomed places, but also were assured that the white man would not prevent fish from arriving in those places and that some portion of those fish would be reserved for them. To some lesser or greater extent, I understand that Lewis is to the contrary and hence, to me, he would at least partially overrule some of our prior cases. I am unprepared to do that, at least without reargument.

At Conference I was uncertain that a 50-50, or a mere 50-50 allocation was mandated by the treaties; and although Puyallup III at least tacitly held that the steelhead allocation was not inconsistent with the treaties, you clearly recognize that none of our cases has predetermined a precise allocation of the salmon runs, except, of course, for the fish that must escape for conservation purposes. After all, the words "in common" cannot possibly have meant a 50-50 division between the contracting parties in each of the various treaties negotiated and executed with particular Indian tribes.

Although I have difficulty accepting the notion that the treaties guaranteed to the Indians, or to a single Indian if he was the only Indian fisherman, 50% of the commercial salmon harvest in perpetuity, I also have difficulty in arriving at a principal basis for reserving to the Indians any lesser share of the harvest, over and above the fish

needed for ceremonial and subsistence purposes. The latter portion, I take it, small as it likely is, no one would quibble about. If the tribe, or any Indian fisherman, claimed enough fish to feed the tribe, free or for pay, such a claim would have priority, I suppose. But this would seem to be a drop in the bucket and would very likely be satisfied by merely a right of access and a right to fish commercially in the accustomed places. Indeed, the argument against you seems to be that whatever share the Indians are entitled to, given access, license-free fishing, and an ability to fish, which many of them obviously have, that share is no more than they are capable of taking when they fish in the customary places but "in common" with non-Indians who are also fishing there.

It should also be recalled that the tribal members may fish in the customary spots in unlimited numbers, as long as there is the required escapement. They also may fish, if licensed, in areas other than the treaty areas, including the ocean fisheries controlled by the United States; and in these other areas they may not only take fish that are destined for treaty fishing areas but also those fish (over half of the case area salmon, you suggest) that will not enter any of the customary Indian fishing locations.

As you can see, I am somewhat up in the air. However, if the case is not to be reargued and I must choose between your draft and Lewis' dissent, I would join in making your opinion an opinion for the Court. Of course, if reargued I might still come out that way. My first choice is to set the case for reargument, although I could understand that a majority might well believe that we shall learn little more than we do not already know. Even so, the issues might mature in our own minds, given a little more time and thought.

Sincerely yours,

Byron

Mr. Justice Stevens

Copies to the Conference

cmc

[c. 6/18/1979]

Supreme Court of the United States

Memorandum

----------, 19.....

Dand – John is keeping the "pot boiling". Maybe Byron has agreed to join if these changes are made.

I hope we can circulate soon.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 18, 1979

MEMORANDUM TO THE CONFERENCE

Re: 77-983, 78-119, and 78-139 - Washington v. Fishing Vessel Association

In order to emphasize the point that I propose that "reasonable livelihood needs"--rather than the 50% ceiling--should provide the primary standard for measuring the Indians' share of the fish, I would like to substitute the attached pages 11, 26, 27, and 28 of my original memorandum.

It seems to me the point is of sufficient importance to merit study before we decide whether or not reargument is necessary.

Respectfully,

JPS

Attachments

or to their needs, whichever was less. The Department of Fisheries agreed that the Indians were entitled to "a fair and equitable share" stated in terms of a percentage of the harvestable salmon in the area; ultimately it proposed a share of "one-third."

Only the Game Department thought the treaties provided no assurance to the Indians that they could take some portion of each run of fish. That agency instead argued that the treaties gave the Indians no fishing rights not enjoyed by nontreaty fishermen except the two rights previously recognized by decisions of this Court—the right of access over private lands to their usual and accustomed fishing grounds, see *Seufert Bros. Co.* v. *United States*, 249 U. S. 194, *United States* v. *Winans*, 198 U. S. 371, and an exemption from the payment of license fees. See *Tulee* v. *Washington*, 315 U. S. 681.

The District Court agreed with the parties who advocated an allocation to the Indians, and it essentially agreed with the United States as to what that allocation should be. It held that the Indians are entitled to a 45% to 50% share of the harvestable fish that will at some point pass through recognized tribal fishing grounds in the case area. ~~(Significantly, over half of the anadromous fish in the case area do not pass through such grounds and are exempt from the order.)~~ The share was to be calculated on a river-by-river, run-by-run basis, subject to certain adjustments. Fish caught by Indians for ceremonial and subsistence purposes as well as fish caught within a reservation were excluded from the calculation of the tribes' share.[16] In addition, in order to compensate for fish caught outside of the case area, *i. e.*, beyond the State's

15A

See attached insert

portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas." 384 F. Supp., at 328.

[16] Moreover, fish caught by individual Indians at off-reservation locations that are not "usual and accustomed" sites, was treated as if it had been caught by nontreaty fishermen. 384 F. Supp., at 410.

Insert

15A/The Solicitor General estimates that over half of the anadromous fish in the case area do not pass through such grounds and are exempt from the order. Brief for the United States, at 72-73. This estimate is consistent with the State's figures on the number of salmon caught in 1977, see JA 635-639, which indicate that the Indians caught only about 18% of the fish taken in the case area that year. Of course, the Indians claim that they were prevented from catching as many fish that year as they were entitled to under the District Court's order because of interference by non-Indian fishermen, but even if the 18% figure were increased by the amount of fish the Indians claim they should have caught, see Brief of Respondent Indian Tribes, at 72, n. 273, the Indians' take would only amount to about 20% of the total number of fish taken in the case area. The State and the commercial fishing associations do not directly dispute either the Solicitor General's estimate or the Indians' representations concerning the number of fish they should have caught under the District Court's order. Nonetheless, they do repeatedly refer to the District Court's order as awarding half or more of the fish taken in the case area to the Indians. Accordingly, a factual dispute exists on the question of what percentage of the fish in the case area actually pass through Indian fishing areas and are therefore subject to the District Court's allocations and, in the absence of any relevant findings by the courts below, we are unable to express any view on the matter.

reasonable

> Indians' livelihood needs would be met. *Arizona* v. *California, supra,* 373 U. S., at 600; *Winters, supra.* See *Winans, supra,* 198 U. S., at 384. This is precisely what the District Court did here, except that it realized that some ceiling should be placed on the Indians' apportionment to prevent their needs from exhausting the entire resource and thereby frustrating the treaty right of "all other citizens of the territory."
>
> Thus, it first concluded that at the time the treaties were signed, the Indians, who comprised three-fourths of the territorial population, depended heavily on anadromous fish as a source of food, commerce, and cultural cohesion. Indeed, it found that the non-Indian population depended on Indians to catch the fish that the former consumed. See pp. 4–9, and n. 8, *supra.* Only then did it determine that the Indian's present-day subsistence and commercial needs should be met, subject, of course, to the 50% ceiling.[26] 384 F. Supp., at 342–343.

ff

It must be remembered, however, that the 50% figure imposes a maximum but not a minimum allocation. As in Arizona v. California and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood--that is to say, a moderate living. Accordingly, while the maximum possible allocation to the Indians is fixed at 50%,26/ the minimum is not; the latter will, upon proper submissions to the District Court, be modified in response to changing circumstances. If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45 or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of large numbers of fish.

26/ "The logic of the District Court's 50% ceiling is also manifest. For an equal division—especially between parties who presumptively treated with each other as equals—is suggested, if not necessarily dictated, by the word "common" as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset, and Anglo-American common law has presumed that division when, as here, no other percentage is suggested by the language of the agreement or the surrounding circumstances. *E. g.*, 2 American Law of Property § 6.5, at 19 (A.

(Cont'd)

new n. 26 cont'd.

Casner ed. 1952); E. Hopkins, Handbook on the Law of Real Property § 209, at 336 (1896).

Although the District Court's exercise of its discretion, as slightly modified by the Court of Appeals, see n. 17, *supra*, is in most respects unobjectionable, I am not satisfied that all of the adjustments it made to its division are consistent with the preceding analysis.

The District Court determined that the fish taken by the Indians on their reservations should not be counted against their share. It based this determination on the fact that Indians have the exclusive right under the treaties to fish on their reservations. But this fact seems to me to have no greater significance than the fact that some nontreaty fishermen may have exclusive access to fishing sites that are not "usual and accustomed" places. Shares in the fish runs should not be affected by the place where the fish are taken. Cf. *Puyallup III*, 433 U. S., at 173–177.[27] I therefore disagree with the District Court's exclusion of the Indians' on-reservation catch from their portion of the runs.[28]

This same rationale, however, validates the Court-of-Appeals-modified equitable adjustment for fish caught outside the jurisdiction of the State by nontreaty fishermen from

[27] This Court's decision in *Puyallup III*, which approved state regulation of on-reservation fishing in the interest of conservation, was issued after the District Court excluded the Indians' on-reservation take and the Court of Appeals affirmed. See 520 F. 2d, at 690. There is substantial doubt in my mind that those courts would have decided the question as they did had *Puyallup III* been on the books.

[28] A like reasoning requires the fish taken by treaty fishermen off of the reservations and at locations other than "usual and accustomed" sites, see n. 16, *supra*, to be counted as part of the Indians share. Of course, the District Court, in its discretion, may determine that so few fish fit into this, or any other, category (*e. g.*, "take-home" fish caught by non-treaty commercial fishermen for personal use) that accounting for them individually is unnecessary, and that an estimated figure may be relied on in making the annual computation. Indeed, if the amount is truly de minimis, no accounting at all may be required.

the State of Washington. See n. 17, *supra*, and accompanying text. So long as they take fish from identifiable runs that are destined for traditional tribal fishing grounds, such persons may not rely on the location of their take to justify excluding it from their share. Although it is true that the fish involved are caught in waters subject to the jurisdiction of the United States, rather than of the State, see 16 U. S. C. § 1811–1812, the persons catching them are nonetheless "citizens of the territory" and as such the beneficiaries of the Indians' reciprocal grant of land in the treaties as well as the person's expressly named in the treaties as sharing fishing rights with the Indians. Accordingly, they may justifiably be treated differently from nontreaty fishermen who are not citizens of Washington. The statutory provisions just cited are therefore important in this context only because they clearly place a responsibility on the United States, rather than the State, to police the take of fish in the relevant waters by Washington citizens insofar as is necessary to assure compliance with the treaties.

On the other hand, as long as there are enough fish to satisfy the Indians' ceremonial and subsistence needs, I see no justification for the District Court's exclusion from the treaty share of fish caught for these purposes. We need not now decide whether priority for such uses would be required in a period of short supply in order to carry out the purposes of the treaty. See 384 F. Supp., at 343. For present purposes, I would merely hold that the total catch—rather than the commercial catch—is the measure of each party's right.[29]

[29] The Government suggests that the District Court's exclusion of the "take-home" catch of nontreaty fishermen from the nontreaty share makes up for any losses to those fishermen occasioned by the exclusion of the Indians' ceremonial and subsistence take. I see nothing in the District Court's findings to verify this allegation, see 384 F. Supp., at 343, athough the District Court may wish to address the issue in this light on remand.

Although there is some discussion in the briefs concerning whether the

Accordingly, any fish (1) taken in Washington waters or in United States waters off the coast of Washington and (2) taken from runs of fish that pass through the Indians' usual and accustomed fishing grounds and (3) taken by either members of the Indian tribes that are parties to this litigation, on the one hand, or by non-Indian citizens of Washington, on the other hand, shall count against that party's respective share of the fish.

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

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1979

Re: (77-983 - Washington v. Washington State Commercial
(Passenger Fishing Vessel Ass'n.
(
(78-119 - Washington v. U.S.
(
(78-139 - Puget Sound Gillnetters Ass'n. v.
(USDC for the Western District of Wash.

MEMORANDUM TO THE CONFERENCE:

John has done a "noble" job but I suspect he would agree that his approach is really an "arbitration" holding. Developing a principled basis for decision here is extremely difficult.

I do not know whether time will help, but I join Byron in opting for a re-argument.

Regards,

WEB

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 18, 1979

RE: 77-983, 78-119, 78-139 - Washington v. Fishing Vessel Association

Dear Chief:

Would it not be appropriate to have a Conference discussion of this case before voting on Byron's reargument suggestion?

I appreciate your compliment on my "noble" effort, but I am rather surprised by your comment that my memorandum proposes an "arbitration" holding.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 18, 1979

Re: 77-983, 78-119, and 78-139 - Washington v. Fishing Vessel Association

Dear Byron:

Thank you for your thoughtful letter of June 15th. As you suggest, there are no easy answers to the problems raised by this case and especially to the question of what share of fish the treaties, as interpreted by our prior cases, afford the Indians. Nonetheless, it may be useful to make a few comments on some of the points you have made in your letter.

First, I should emphasize that I did not intend in my memorandum to assure the Indians 50% of the fish in perpetuity; the 50% figure was merely intended to establish the maximum amount that the Indians could take if their "livelihood needs" reasonably justify that amount. If, as you hypothesize, a tribe should dwindle to just one member, or only a handful, a 50% allocation of an entire run would be manifestly inappropriate because the livelihood of a small group of persons could not reasonably require an allotment of millions of fish.

Second, I really think it is clear that the "access" approach that Lewis advocates--even if supplemented by the fish the Indians catch outside of the treaty areas--would not assure the Indians an amount of fish consistent with the intent of the treaties. As I understand the figures, the access approach would not even satisfy the Indians' subsistence and ceremonial needs. Before the District Court's decree went into effect, the Indians were catching only about 2 to 3 1/2% of the runs, 459 F. Supp., at 1032,

whereas the District Court found that their subsistence and ceremonial needs in later years required about 5% (see J.A. 593). More importantly, merely satisfying ceremonial and subsistence needs can hardly be the proper allocation because the findings make it clear that the Indians did have an established trade and commerce in fish in the 1850's.

The fact that the Indians had a virtual monopoly of the fisheries when the treaties were made makes the analogy to the water cases relevant. You will recall that Arizona v. California and other cases hold that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians should secure enough of that resource to provide the Indians with a livelihood--that is to say, a moderate living. I should think a similar approach is proper with respect to fish, modified only by the fact that we impose an absolute ceiling of 50% on the Indians' allocation of fish whereas I don't recall that any such ceiling was imposed in any of the water cases.

I have mixed feelings about your suggestion that the case should be reargued. Certainly I would agree that the case is much too important to let the investment we have made this Term be decisive. On the other hand, I am not sure we will get much more help on the allocation problem than is already available in the hundreds of pages of briefs that have already been filed. The new question that we might suggest for reargument is whether or not Puyallup II should be overruled. I have thought a good deal about that suggestion since we talked about the case the other day, but wonder if it would be wise for the Court to advance that suggestion when none of the parties and none of the amicus briefs shed any doubt on the validity of the case. It seems to me it would be quite awkward for the Court to be expressing doubt about such an important case so shortly after it was decided. Although I have had serious doubts about whether the case was correctly decided--particularly when I was working on Puyallup III--I really am persuaded now that the Court did reach the correct result there and almost certainly would reaffirm its holding if the point should be squarely addressed again.

As an alternative to your reargument suggestion, I wonder if it might be useful to try and schedule another conference devoted specifically to this case and nothing else to see if there is some modified position that could command a court. After all, my assignment was merely to prepare a memorandum for further consideration and discussion by the Court and we really have not had any such collegial review of the case since my memorandum was circulated.

In all events, I appreciate your careful study of the case.

Respectfully,

J L

Mr. Justice White

Copies to the Conference

June 18, 1979

77-983,78-119 78-139 - Washington Fish Case

Dear John:

As a sideline observer, though not entirely a disinterested one, I have read with interest the exchange between you and Byron.

Having had my "say", I do not intend to get into the middle of this friendly debate, but I will address one point. In your letter of June 18, you identify as perhaps the only question open for reargument is "whether or not Puyallup II should be overruled". You also say that "it would be quite awkward for the Court to be expressing doubt about such an important case so shortly after it was decided".

While I cheerfully recognize that you and I read Puyallup II differently, I do suggest - for reasons stated in prior correspondence and in my dissent - that reasonable lawyers and judges may conclude that Puyallup II is not nearly so broad a decision as you view it. Normally, a case may be construed to hold only what was necessary for the judgment on the issue presented. No general question of apportionment was before the Court in Puyallup II. While the language could be construed more broadly, the fact is that the case turned on the discriminatory effect of a state regulation as applied only to the facts before the Court.

A reargument could address, as one question, the scope of the holding in Puyallup II. But if we have a reargument, as suggested by the Chief Justice and Byron, I would prefer - in addition - to keep all issues open for reconsideration.

Sincerely,

Mr. Justice Stevens
lfp/ss
cc: The Conference

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

1,2,6,7,10-11

From: Mr. Justice Powell

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SUPREME COURT OF THE UNITED STATES

Nos. 77–983, 78–119, AND 78–139

State of Washington et al., Petitioners, 77–983 *v.* Washington State Commercial Passenger Fishing Vessel Association et al.	On Writ of Certiorari to the Supreme Court of Washington.
State of Washington et al., Petitioners, 78–119 *v.* United States et al.	On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.
Puget Sound Gillnetters Association et al., Petitioners, 78–139 *v.* United States District Court for the Western District of Washington (United States et al., Real Parties in Interest).	

[June —, 1979]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

I join Parts I–III of the Court's opinion. I am not in agreement, however, with the Court's interpretation of the treaties negotiated in 1854 and 1855 with the Indians of the Washington Territory. The Court's opinion, as I read it, construes the treaties' provision "to take fish . . . in common" as guaranteeing the Indians a specified percentage of the runs of the anadromous fish passing land upon which the Indians tradi-

tionally have fished. Indeed, it takes as a starting point for determining fishing rights an equal division of these fish between Indians and non-Indians. *Ante,* at 25 *et seq.* As I do not believe that the language and history of the treaties can be construed to support the Court's interpretation, I dissent.

I

At issue in these cases is the meaning of language found in six similar Indian treaties negotiated and signed in 1854 and 1855.[1] Each of the treaties provides substantially that "[*t*]*he 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,* and of erecting temporary houses for the purpose of curing."[2] The question before us is whether this "common" fishing right is a right only of access to usual and accustomed fishing sites for the purpose of fishing there, or includes the greater right to exclude others from taking a particular portion of the fish that pass through the sites. As the Court observes, at the time the treaties were signed there was no need to address this question, for the surfeit of fish made lack of access to fishing areas the only constraint upon supply. Nonetheless, I believe that the compelling inference to be drawn from the language and history of the treaties is that the Indians sought and retained only the right to go to their accustomed fishing places and there to fish along with non-Indians. In addition, the Indians retained the exclusive right to take fish on their reservations, a right not involved in this litigation. In short, they have a right of access to fish.

---

[1] Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point Elliott, 12 Stat. 927; Treaty of Point No Point, 12 Stat. 933; Treaty with the Makahs, 12 Stat. 939; Treaty with the Yakimas, 12 Stat. 951; Treaty of Olympia, 12 Stat. 971.

[2] Treaty of Medicine Creek, *supra,* at 1133. There were some slight, immaterial variations in the language used. See, *e. g.,* Treaty with the Yakimas, quoted *infra,* at 3.

Nothing in the language of the treaties indicates that any party understood that constraints would be placed on the amount of fish that anyone could take, or that the Indians would be guaranteed a percentage of the catch. Quite to the contrary, the language confers upon non-Indians precisely the same right to fish that it confers upon Indians, even in those areas where the Indians traditionally had fished. *United States* v. *Winans,* 198 U. S. 371 (1905). As it cannot be argued that Congress intended to guarantee non-Indians any specified percentage of the available fish, there is neither force nor logic to the argument that the same language—the "right to take fish"—does guarantee such a percentage to Indians.

This conclusion is confirmed by the lanaguage used in the treaty negotiated with the Yakima Tribe, which explicitly includes what apparently is implicit in each of the treaties: the Indians' right to take fish on their reservations is exclusive. Thus, the Yakima treaty provides that "[t]he exclusive right of taking fish in all the streams where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory. . . ." 12 Stat. 951. See *ante,* at ——. There is no reason apparent from the language used in the treaties why the "right of taking fish" should mean one thing for purposes of the exclusive right of reservation fishing and quite another for purposes of the "common" right of fishing at usual and accustomed places. Since the Court interprets the right of taking fish in common to be an entitlement to half of the entire catch taken from fisheries passing the Indians' traditional fishing grounds, it therefore should follow that the Court would interpret the exclusive right of taking fish to be an entitlement to *all* of the fish taken from fisheries passing the Indian's reservations. But the Court apparently concedes that this exclusive right is not of such draconian

proportions. Indeed, the Court would reduce the Indians' 50% portion by those fish caught on the reservation. The more reasonable conclusion, therefore, is that when the Indians and Governor Stevens agreed upon a "right of taking fish," they understood this right to be one of access to fish—exclusive access with respect to fishing places on the reservation, and common access with respect to fishing places off of the reservation.[3]

In addition to the language of the treaties, the historical setting in which they were negotiated supports the inference that the fishing rights secured for the Indians were rights of access alone. The primary purpose of the six treaties negotiated by Governor Stevens was to resolve growing disputes between the settlers claiming title to land in the Washington Territory under the Land Donation Act of 1850, 9 Stat. 437, and the Indians who had occupied the land for generations. Under the bargain struck in the treaties, the Indians ceded their claims to vast tracts of land, retaining only certain specified areas as reservations, where they would have exclusive rights of possession and use. In exchange, the Indian tribes were given substantial sums of money and were promised various forms of aid. See, *e. g.*, Treaty of Medicine Creek, 10 Stat. 1132. By thus separating the Indians from the settlers it was hoped that friction could be minimized.

The negotiators apparently realized, however, that restricting the Indians to relatively small tracts of land might interfere with their securing food. See Letter of George Gibbs to Captain McClellan, App. 326 ("[the Indians] require the

[3] Indeed, if the Court's interpretation of the treaties were correct, then the exclusive right with respect to reservation fishing would be largely superfluous. If the Indians had the right to 50%, and no more, of the fish irrespective of where they are caught, then it hardly would be of any great value to them that they could keep others from taking fish from locations on the reservation. The most reasonable way to interpret the exclusive right of reservation fishing so that it was of value, therefore, is as a special right of access.

liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish"). This necessary "liberty of motion" was jeopardized by the title claims of the settlers whose land abutted—or would abut—the waterways from which fish traditionally had been caught. Thus, in Governor Stevens' report to the Commissioner of Indian Affairs, he noted the tension between the land rights afforded settlers under the 1850 Land Donation Act and the Indians' need to have some access to the fisheries. Although he expressed the view that "[i]t never could have been the intention of Congress that Indians should be excluded from their ancient fisheries," he noted that "no condition to this effect was inserted in the donation act," and therefore recommended the question "should be set at rest by law." Report of Governor Stevens to the Commissioner of Indian Affairs, App. 327. Viewed within this historical context, the common fishing right reserved to the Indians by the treaties of 1854 and 1855 could only have been the right, over and above their exclusive fishing right on their reservations, to roam off of the reservations in order to reach fish at the locations traditionally used by the Indians for this purpose. On the other hand, there is no historical indication that any of the parties to the treaties understood that the Indians would be specifically guaranteed some set portion of the fisheries to which they traditionally had had access.

II

Prior decisions of this Court have prevented the dilution of these treaty rights, but none has addressed the issue now before us. I read these decisions as supporting the interpretation set forth above. This is particularly true of *United States* v. *Winans,* 198 U. S. 371 (1905), the case most directly relevant. In that case a settler had constructed several fish wheels in the Columbia River. These fish wheels were built at locations where the Indians traditionally had fished, and " 'necessitate[d] the exclusive possession of the space occupied

by the wheels,'" *id.*, at 380, thereby interfering with the Indians' treaty right of access to fish. This Court reviewed in some detail the precise nature of the Indians' fishing rights under the Yakima Treaty, and concluded that the treaties,

> ". . . reserved rights . . . to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the Territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places,' and the right 'of erecting temporary buildings for curing them.' The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, *the Indians were given a right in the land—the right of crossing it to the river*—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty." *Id.*, at 381 (emphasis added).

The Court thus viewed these treaties as intended to "giv[e] a right in the land"—a "servitude" upon all non-Indian land—to enable Indians to fish "in common with citizens of the Territory." The focus was on access to the traditional fishing areas for the purpose of enjoying the "right of fishing." *Id.*, at 380. The *Winans* Court concluded, on the facts before it, that the right of access to fish in these areas had been abridged. It stated that "in the actual taking of fish white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a device which gives them *exclusive possession of the fishing places*, as it is admitted a fish wheel does." *Id.*, at 382 (emphasis added). Thus, *Winans* was decided solely upon

the basis of a treaty-secured right of access to fish. Moreover, the Court's analysis of the treaty right at issue in *Winans* strongly indicates that nothing more than a right of access fairly could be inferred from the treaty.[4]

Nor do the *Puyallup* cases interpret the treaties to require that any specified proportion of the catch be reserved for Indians. Indeed, *Puyallup Tribe* v. *Dept. of Game of Washington,* 391 U. S. 392 (1968) (*Puyallup I*), consistently with *Winans,* described the right of Indians under the treaties as "the right to fish 'at all usual and accustomed places.' " *Id.,* at 398.[5] The issue before the Court in *Puyallup I* was the extent to which the State could regulate fishing. It held that,

> ". . . the 'right' to fish outside the reservation was a treaty 'right' that could not be qualified or conditioned by the State. But 'the time and manner of fishing . . . necessary for the conservation of fish,' not being defined or established by the treaty, were within the reach of state power."

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[4] The Government's brief in *Winans,* cited approvingly by the Court in that case, indicates that the Government also understood the treaty to guarantee nothing more than access rights to traditional fishing locations. In that brief, the Government advocated only "a way of access, free ingress and egress to and from the fishing grounds." Brief for Appellant, No. 180, O. T. 1904, p. 56.

This interpretation of *Winans* was unequivocally affirmed by the Court a short time later in *Seufert Bros. Co.* v. *United States,* 249 U. S. 194 (1919). At issue in that case was whether Indians from the Yakima nation had the right under their treaty to cross the Columbia River and fish from the south bank, which admittedly had belonged to other tribes at the time of the treaty. The Court viewed *Seufert,* a case unquestionably involving only the right of access, to be squarely controlled by its earlier decision in *Winans.* 249 U. S., at 198. Moreover, the Court reaffirmed its view that the effect of the reservation of common fishing rights to the Indians amounted to a servitude. *Id.,* at 199.

[5] The treaty right was repeatedly referred to in *Puyallup I* as a "right to fish." This phrase was used no less than seven times in the course of the opinion, with no distinction being made between the right "to fish" and the right "to take fish." *Id.,* at 397–99.

The Court today finds support for its views in *Puyallup I* because the Court there recognized that, apart from conservation measures, the State could not impose restrictive regulations on the treaty rights of Indians. But it does not follow from this that an affirmative right to a specified percentage of the catch is guaranteed by the treaties to Indians or to non-Indians, for the Court misapprehends the nature of the basic right sought to be preserved by Congress. This, as noted above, was a right of the Indians to reach their usual and accustomed fishing areas. Put differently, this right, described in *Winans* as a servitude or right over land not owned by the Indians, entitles the Indians to trespass on any land when necessary to reach their traditional fishing areas, and is a right not enjoyed by non-Indian residents of the area.

In permitting the State to place limitations on the Indians' access rights when conservation so requires, the Court went farther in *Puyallup I* and suggested that even regulations thus justified would have to satisfy the requirements of "equal protection implicit in the phrase 'in common with.'" 391 U. S., at 403. Accordingly, in *Washington Game Department* v. *Puyallup Tribe,* 414 U. S. 44 (1973) (*Puyallup II*), we considered whether the conservation measures taken by the State had been evenhanded in the treatment of the Indians. At issue was a Washington State ban on all net fishing—by both Indians and non-Indians—for steelhead trout in the Puyallup River. According to testimony before the trial court, the annual run of steelhead trout in the Puyallup River was between 16,000 and 18,000, while unlimited sport fishing would result in the taking of between 12,000 and 14,000 steelhead annually. Because the escape of at least 25% of the entire run was required for hatcheries and spawning, the sport fishing totally pre-empted all commercial fishing by Indians. The State therefore imposed a ban on all net fishing. The Indians claimed that this ban amounted to an improper subordination of their treaty rights to the privilege of recreational fishing enjoyed by non-Indians.

We held in *Puyallup II* that the ban on net fishing, as it applied to Indians covered by treaty, was an infringement of their rights. The State in the name of conservation was discriminating against the Indians "because all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians, is allowed." 414 U. S., at 48. Because "[o]nly 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," *id.*, at 48, we remanded to the Washington courts for a fair apportionment of the steelhead run between Indian net fishing and non-Indian sport fishing.

Relying upon the reference in *Puyallup II* to "apportionment," the Court expansively reads the decision in that case as strongly implying, if not holding, that the catch at Indians' "accustomed" fishing sites must be apportioned between Indian and non-Indian fishermen. This view certainly is not a necessary reading of *Puyallup II*. Indeed, I view it as a quite unjustified extension of that case. *Puyallup II* addressed an extremely narrow question: where there had been "discrimination" by state regulations under which "all Indian net fishing [was] barred and only hook and line fishing entirely pre-empted by non-Indians, [was] allowed." *Id.*, at 48. In any event, to the extent language in *Puyallup II* may be read as supporting some general apportionment of the catch, it is dictum that is plainly incompatible with the language and historical understanding of these treaties.[6]

Emerging from our decisions in *Winans*, *Puyallup I*, and

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[6] Having decided that some regulation was required, but that the treaty forbad the State to choose to regulate only Indian fishing for conservation purposes, we remanded for an apportionment between net fishing and sport fishing. *Puyallup Tribe* v. *Washington Game Dept.*, 433 U. S. 165 (1977) (*Puyallup III*), is of little assistance in deciding the issue in the present cases. The Court in that case decided only that the regulations permitted in *Puyallup I* could be applied against Indian fishing on the reservations, as well as off of them.

Puyallup II, therefore, is the proper approach to interpretation of the Indians' common fishing rights at the present time, when demand outstrips supply. The Indians have the right to go to their traditional fishing grounds to fish. Once there, they cannot be restricted in their methods or in the size of their take, save insofar as restrictions are required for conserving the fisheries from which they draw. Even in situations where such regulations are required, however, the State must be evenhanded in limiting Indian and non-Indian fishing activity. It is not free to make the determination—apparently made by Washington with respect to the ban on net fishing in the Puyallup River—that Indian fishing rights will be totally subordinated to the interests of non-Indians.

III

In my view, the District Court below—and now this Court—has formulated an apportionment doctrine that cannot be squared with the language or history of the treaties, or indeed with the prior decisions of this Court. The application of this doctrine, and particularly the construction of the term "in common" as requiring a basic 50–50 apportionment, is likely to result in an extraordinary economic windfall to Indian fishermen in the commercial fish market by giving them a substantial position in the market wholly protected from competition from non-Indian fisherman.[7] Indeed, non-

[7] The Court apparently sees this windfall as being necessary alms for the Indians, for it concludes that "in light of the far superior numbers, capital resources, and technology of the non-Indians, the concept of the Indians' 'equal *opportunity*' to take advantage a scarce resource is likely in practice to mean that the Indians' 'right of taking fish' will net them virtually no catch at all." *Ante*, at 17 n. 21. But if the plight of the Indians in the Pacific Northwest requires that special provisions be made for their livelihood, this Court should not enact these provisions by reforming a bargain struck more than two hundred years ago. Nor should the cost of recompensing the Indians for their past losses fall only on the shoulders of the commercial fishermen of the State of Washington—a very small portion of the people who benefitted from the displacement of the

Indian fishermen apparently will be required from time to time to stay out of fishing areas completely while Indians catch their Court-decreed allotment. In sum, the District Court's decision will discriminate quite unfairly against non-Indians.[8]

Indians. This is a problem for resolution by Congress. It has the basic responsibility for making sure that Indians are not discriminated against, and that their rights are fully protected. In the exercise of this responsibility Congress could pursue various avenues for relief of any perceived discrimination or disadvantage. It could, for example, provide for Indian fishermen the modern technology and capital resources that they lack, thereby enabling them to compete on an equal basis with non-Indian fishermen. Moreover, a legislative resolution of this problem can protect the interests of Indians without imposing substantially the entire cost upon non-Indian fishermen of the State of Washington.

[8] In addition to the burdens placed upon non-Indian fishermen, the Court's decision is likely to prove difficult to enforce fairly and effectively. To date, the District Court has had to resort to the outer limits of its equitable powers in order to enforce its decree. This has included taking over supervision of all of the commercial fishing in the Puget Sound area, ordering the creation of a telephone "hot line" that fishermen can use to determine when and where they may legally fish, and ordering United States Marshals to board fishing craft and inspect for violations of the court's preliminary injunction. Indeed, in his response to the petition for certiorari in the present case, the Solicitor General set forth in some detail the extraordinary difficulty the Government has had in enforcing the District Court's decrees, saying:

". . . the default of the state government has required the United States to concentrate a disproportionate amount of its limited fisheries enforcement personnel on what is essentially a local enforcement problem. Agents of the National Marine Fisheries Service, the United States Fish and Wildlife Service, the United States Marshals Service, and the Coast Guard have been diverted from their regular duties to assist the district court in implementing the Indians' treaty rights. This has resulted in a reduction in the federal fisheries services available for the rest of the country and for the enforcement of the ocean fisheries programs governed by the Fishery Conservation Management Act of 1976." Brief of Respondent on Petition for Certiorari, at 20.

These problems, it seems to me, will be exacerbated by a formula apportionment such as that ordered by the Court.

To be sure, if it were necessary to construe the treaties to produce these results, it would be our duty so to construe them. But for the reasons stated above, I think the Court's construction virtually ignores the historical setting and purposes of the treaties, considerations that bear compellingly upon a proper reading of their language. Nor do the prior decisions of this Court support or justify what seems to me to be a substantial reformation of the bargain struck with the Indians in 1854–1855.

I would hold that the treaties give to the Indians two significant rights that should be respected. As made clear in *Winans,* the purpose of the treaties was to assure to Indians the right of access over private lands so that they could continue to fish at their usual and accustomed fishing grounds. Indians also have the exclusive right to fish on their reservations, and are guaranteed enough fish to satisfy their ceremonial and subsistence needs. Moreover, as subsequently construed, the treaties exempt Indians from state regulation (including the payment of license fees) except that necessary for conservation in the interest of all fishermen. Finally, under *Puyallup II,* it is settled that even a facially neutral conservation regulation is invalid if its effect is to discriminate against Indian fishermen. These rights, privileges, and exemptions—possessed only by Indians—are quite substantial. I find no basis for according them additional advantages.

Conference 6/21/79 Jlr

Fish Case 77-983

Voter on reargument:

C.J. - [redacted], Passed on 2nd Round

W.J.B. - No.

P.S. - Yes.

B.R.W. - Yes.

T.M. - No.

H.A.B. - No.

L.F.P. - Yes.

W.H.R. - Yes.

J.P.S. - No.

Should we propose a Question?

X X X

At Conference on 6/21, the CJ first voted for reargument; then he "passed"; & on 6/22 he sent out

P.S. - Yes.

B.R.W. - Yes.

T.M. - No.

H.A.B. - No.

L.F.P. - Yes.

W.H.R. - Yes.

J.P.S. - No.

Should we propose a Question?

X X X

At Conference on 6/21, the CJ first voted for reargument; then he "passed"; & on 6/22 he sent out a note joining John - hence no reargument.!!