




10-1976

Puyallup Tribe, Inc. v. Department of Game of Washington

Lewis F. Powell Jr.

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Probably a
Grant

Then the "Third round"
of litigation over Puyallup
Indians' fishing rights.

PRELIMINARY MEMORANDUM

November 24, 1976 Conference
List 3, Sheet 2

No. 76-423

PUYALLUP TRIBE, INC.

Cert to Washington SC

v.

WASHINGTON DEPT. OF GAME

State/Civil

Timely

1. SUMMARY: This case presents the latest installment in a continuing litigation between the State of Washington and the Puyallup Indians, over the extent to which the state Game Department may restrict Puyallup ^(NET) fishing for steelhead. That fishing is protected, to some degree, by the Treaty of Medicine Creek, but the precise nature and degree of the protection is at issue in this

GRANT
There is
a need to
clear up
continuing
confusion
over the
fishing
rights of
the Puyallups.
If the

Court grants,
I think it
will have to
review all aspects
of the Wash. Court's
decision, as
responsible
etc.

litigation. Earlier phases of this same dispute have reached this Court on two occasions, and the circumstances of the present case indicate that it is likely to be heard a third time.

2. BACKGROUND: The Treaty of Medicine Creek, entered into in 1854, stated in pertinent part, 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. . .: Provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens"

In 1963, the Washington State Game Department, the present plaintiff/resp, sought a declaratory judgment as to the effect of the treaty on the application to the Puyallup Indians of the state's laws regulating steelhead fishing in the Puyallup River. The Superior Court concluded in 1965 that neither the Puyallup Tribe nor the Puyallup Reservation any longer existed, and that there were therefore no treaty rights remaining in members of the present defendant/petr, Puyallup Tribe, Inc. The State Supreme Court reversed, holding that the tribe still existed and had fishing rights arising from the treaty. It held that those rights could only be limited through statute or regulations reasonably necessary for the conservation of the fishery, and remanded for determination whether existing regulations prohibiting the use of nets could thus be justified. This Court affirmed in an opinion by Justice Douglas which did not reach the issue whether the prohibition of net fishing, as traditionally done

#I

by the Indians, could possibly be consistent with the treaty.

Puyallup I, 391 U.S. 392, 401-03.

In the remanded proceeding, the Washing^[-TON] Supreme Court ultimately upheld regulations promulgated by the Department of Game which prohibited all net fishing for steelhead during 1970. That conclusion rested on biological data for that year which showed that "the catch of the steelhead sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river." It noted, however, that the regulations must be made anew each year, suggesting that Indian net fishing must be allowed to the extent consistent with conservation.

On review, this Court reversed, again speaking through Justice Douglas. Puyallup II, 414 U.S. 44. It held that the total ban on net fishing was discriminatory against the Indians, since the steelhead fishery was totally preempted by the hook and line, non-Indian sport fishermen. While holding that in this instance the Indian net fishing could not be entirely forbidden, the Court also stated that:

"We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival . . . [T]he Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." Id. at 49.

CT
BW
PS

The Court declined to suggest how the problem of apportionment might reasonably be resolved, and did not deal with the question of whether the Indian rights inhered only in the "natural" fishery or extended to the approximately equal "hatchery" run as well. Justice White, joined by the Chief Justice and Justice Stewart, concurred on the basis that the Indian treaty rights only extended to the natural and not to the hatchery run of steelhead. } 9 agree

(

On the second remand, from which the present review is sought, the Superior Court undertook the task of attempting to allocate the steelhead fishery in a manner consistent with both conservation and the requirements of the Treaty of Medicine Creek. After hearing evidence, that court concluded that the treaty interest did not extend to the "hatchery run," that half the natural run had to be allowed to escape in order to perpetuate the species, and that the equities of the situation dictated that the Indians be allowed to take 45% of the remaining one-half of the natural run. This limitation was to be enforced by means of an actual numerical figure to be arrived at by sophisticated biological estimates of the total natural run. (Since the Indians have no way of actually preventing hatchery fish from ending up in their nets, the order effectively allowed them to catch either type of steelhead, in a number equal to 45% of half the natural run.)

i.e.
22% of
total

On appeal, the Supreme Court of Washington affirmed the Superior Court, but only after articulating at some length its view that the

Treaty, properly read, does not create any special status or exclusion for the Indians regarding reasonable state regulations against net fishing. In this first section of its opinion, the court rejected various challenges to the state's jurisdiction to regulate the Indian fishing at all, and then undertook a construction of the treaty. It noted that the treaty only gave a right "in common with all citizens" to fish "at all usual and accustomed places," and argued that this language gave ^[the Indians] no superior right nor a right to fish in any manner whatsoever. The court stated its view that this reading was not inconsistent with the meaning of Puyallup I and II read together, especially in light of the Puyallup II language arguably implying that the right to net fish may be prohibited entirely given an adequate conservation-related reason. (bottom of p. 3, supra)

After expressing its hope that this Court would see fit to adopt that view, condone a complete ban on net fishing, and therefore render the allocation scheme superfluous, the Washington Supreme Court went on to recognize an obligation to respect the literal language of Puyallup II invalidating the complete ban on net fishing. Therefore it considered the merits of the apportionment scheme adopted by the Superior Court. First ^(S/Lt Wash) ~~it~~ concluded that the treaty rights could not extend to the hatchery run, since those fish were produced by state programs sponsored by sport fishermen's license fees. It also analogized to the clause of the treaty excluding Indian fishing rights to private shell fish beds, on the theory that hatchery run steelhead,

like such shellfish, were propagated artificially and at someone's expense. Second it affirmed as reasonable the calculations as to how much of the natural run was necessary to sustain the species and what proportion of the remainder should be allowed to the Indians. Several concurring opinions were filed, whose details are less than critical at this stage of consideration.

An important sidelight of this litigation concerns closely-related activities taking place in federal court both before and after the decision here on review. One might say, in fact, that a sort of adversary relationship has developed between the state and federal courts with regard to the state's attempted application of its fishing regulations to the Indians. The CA 9 has ruled that the Puyallup Reservation in question continues to exist, United States v. Washington, 496 F.2d 620 (1974), and that harvests taken within the reservation may not be counted against any apportionment allowed to the Indians by the state. United States v. Washington, 520 F.2d 676 (1976). This position, if upheld, would greatly impair any efforts to manage the steelhead which rest on calculations of the total fishery.

State v. Fed. Ct.
CA 9 says reservation exists
No

More directly related to the decision here on review, the DC for the W.D. Washington (Judge Boldt) on August 13, 1976 ordered that any allocation which the state makes must be based upon the total steelhead run, that is both the natural and the hatchery run. This amounts to an injunction against the state of Washington following the opinion of its Supreme Court insofar as it limits the treaty interest to the

note
No

natural run. See App. to Intervenor Trout Unlimited Br.

3. CONTENTIONS: Petr Puyallup Tribe, Inc. contends that 1) the decision of the Washington Supreme Court conflicts with the dictates of the previous decisions of this Court which allow restriction of Puyallup fishing only for reasons of strict conservation necessity, which has not been shown in this case; and that 2) the state has no power to regulate Indian rights to take fish within their reservation territories. The petr expressly declines to seek cert on the aspect of the opinion below which limits the allocable resource to the natural run.

Resp state of Washington asserts that cert should be taken in light of the conflict between state and federal courts, and contends that all issues raised in the decision below should be considered (including the issue whether the hatchery run must be included in the allocation). Specifically it contends that the Court should reconsider the apportionment apparently ordered in Puyallup II.

Intervenor Trout Unlimited, an organization representing the sport fishing interests in the court below, adopts essentially the same position as the state, and likewise urges that the entire decision below be considered.

4. DISCUSSION: This case is clearly certworthy. There is a federal-state conflict on the disposition of two important aspects of this very controversy -- whether the state regulatory program may in any way affect (or even take into account) the fish caught within the

boundaries of the reservation, and also ⁽²⁾whether the state regulatory scheme as upheld by the state Supreme Court must base its calculations upon the entire run of natural and hatchery fish, as Judge Boldt of (This latter is the issue on which petr's do not seek cert.) the W.D. Washington has ordered. / This case involves a dispute of longstanding which apparently has gotten rather heated in recent months.

There is a response, and an Intervenor's brief.

11/12/76
CMS

Ayer

Wash SC, Superior Ct
ops in petn, appx.
Order of W.D. Wash
in Intervenor's Br.

Court Wash. Sup. Ct.
Argued 19...
Submitted 19...

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

No. 76-423

PUYALLUP TRIBE, INC. AND RAMONA BENNETT, Petitioners

vs.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

9/22/76 - Cert.

Stewart & Brennan think we have "fouled-up" by our prior cases. We have created a major problem.

Grant and invite SG to file brief.

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

Ask SG

Ask

Join 3

Altho our decision in I & II are not models of clarity, I'm afraid we held in II that the Treaty forbids a complete ban on net fishing.

This case presents conflicts between the state & fed. sts. as to what reg. if any is valid on the Reservation.

Wash S/Ct: But for II would hold Indians have no more right to net fish than any others. Accepting ruling in II to contrary, it held:

1. No rights to take "hatchery fish" rather than "natural run" steelheads.

(Not contested here by Indians)

2. State may regulate take of "natural run" fish within the Reservation, & approved State's conservation allocation:

Half the run (50%) to be free.
Of remaining half, Indians may take 45% (22% of total).

CA 9: Puyallup Res. continues to exist, and that State has no authority to regulate or restrict taking of steelhead - whether natural or "hatchery" - within Res.

DC (Boldt) on 9/13/76: Ordered State to include both "run" in determining any allocation it makes to Indians. (Is this not inconsistent with CA 9?)

SG supports Indians 100%. Juris. on Res. is "exclusive".

Rodgers (for Indians)

Art. ^{II} of Treaty reserves for Tribe ~~the~~ exclusive rights within the Reservation. This preempts any State authority to regulate w/in Reservation.

~~Re~~ J. Stewart pressed Rodgers as to whether & where the existence of Reservation has been established. Rodgers says S.Ct Wash. agreed to this (but did not identify where it so agreed).

Arguer not judicial requires acceptance of CAG's holding as to Reservation. # State of Wash. is constitutionally bound by CAG's decision (but cited no authority). (Agree that Full Faith & Credit statute doesn't address this situation).

This Court may have power to consider status of Reservation but we should not because State didn't make this issue.

Rogers (cont.)

Part of Res. is ^{on} ~~in~~ Trust Land

Farr (56 Amicus)

Existence of Res. is not properly before us. State didn't argue this in cts. below.

Cited p. B-6 of Pet. for Cert. as indicating Wash. S/Ct assumed existence of Reservation. (But this is ambiguous).

Agree this Q has never been decided in this litigation but argue it is not before us.

No map of Reservation in this record. But Record shows that 7 miles of River are within boundary.

Confusing case procedurally (yes!) — but judgment of DC (Boalt) in binding on state courts by virtue of res judicata or collateral estoppel.

City of Tacoma is not being run by Tribe!

Willner (for ~~State~~) Sports fishermen)

U. S. not a party to this case.

Hatchery fish - sportsmen have eq. interest. All progeny (after first generation) are treated as "natural run".

Regardless of whether there is a Reservation, the hatchery run are not covered by Treaty.

Yr { State Courts of Washington have jurisc. because - if for no other reason - this Court remanded case to state courts.

Gorton (AG of Wash.)

Hatchery fish are not subject to Treaty. ~~The~~ Treaty excludes artificially ~~or~~ bred shell fish.

The State's regulation operates on individuals fishermen - not with

Tribe (see names of parties in each of these cases) - ~~other~~ Tribe also is party

State wants declaratory judg. authorizing state to enforce its conservation laws vs individual Indians - not the Tribe.

Gordon (cont.)

Existence or non-existence of Tribe is irrelevant to this case (J Stewart noted that Puyallup I & II involved off-reservation rights)

Puyallup Treaty has no express reservation of rights on Reservation - as was included in other Treaties

Indians enjoy right to sports fishing - don't even have to buy license.

Argues that II was wrong in holding an allocation bet. Indians & non-Indians was required as to off-Res. fishing. We were under misapprehension - Indians do have same rights as others.

CA9 ~~didn't~~ held Res. had not been terminated but did not identify boundaries.

→ The 45% is a limit only
| on net commercial fishing - as
| Indians also may fish for sport.

River was realigned in 1920's
& there remains no part of it in original Res (Trust Land?)

97 1/2 % people in what is claimed as Res. are non-Ind.

Puyallup

[2, 1977 APRIL 19]

Supreme Court of the United States

Memorandum

1. Wash. State Courts
did have Juris
(we remanded case to
them).
2. Hatchery ~~to~~ run are
not subject to Treaty.
Thus, at least - & even
if Reservation exists -
these fish are subject
to State regulation.
3. As to natural run,
I'm inclined to agree
that State may regulate
for Conservation purposes
even within Reservation
Treaty not explicitly to contrain

April 19, 1977

BENCH MEMO

To: Mr. Justice Powell

From: Dave Martin

No. 76-423 Puyallup Tribe, Inc. v. Department of Game

I will try to summarize here the various issues in the case, about which we talked earlier today.

*I - Treated as
suit vs.
individuals,
altho Tribe
was party*

Sovereign immunity. Although the Tribe has apparently been a defendant party/since the beginning of the lawsuit, this Court has never focused on the sovereign immunity issue. But the Court did make clear in a footnote in Puyallup I that it was treating the case as a suit against individual Indians for their activities off-reservation. Puyallup II seems to have proceeded on a similar assumption, although the Court was not as explicit. At the beginning of Puyallup III the plaintiff Dept of Game filed an amended complaint.. The SG and the Tribe seem to argue that that complaint is directed only to the Tribe and its chairperson. See SG brief at 12-13. But at oral argument AG Gorton other stated that the individuals were still named and served, but that they never appeared. In any event ~~the two courts below~~ the two courts below paid attention only to the Tribe and the ~~chairperson~~ chairperson as defendants, ^{trial court,} see App to petn at B-2 (Wash. S Ct opinion), and the order of the ~~DC~~ App to Petn at E-2 - E-5, commands action only on the part of the Tribe, not of any individuals. The Tribe was ordered to supply a roll of tribal fishermen and to send weekly catch reports to the Dept of Game. Also the ^{trial court} ~~SG~~ retained continuing jurisdiction. The State's brief

II - the same

*III - individuals
named &
served;
but ap.
& order of
Wash S/Ct
focused on
Tribe*

indicates that the trial court has apparently ordered the tribe to implement closures. ~~On~~ On Feb. 27, 1976, the court found the tribe and tribal officers in contempt for failure to comply with these court orders, ^{but no} ~~sanctions~~ sanctions were imposed. See state's brief at 17-18.

~~_____~~

These orders have such ~~a~~ a significant impact on the Tribe as a tribe that they are surely barred if sovereign immunity attaches. This Court's most recent pronouncement on ~~sovereign immunity~~ Indian tribes' immunity from suit contains very strong language seeming to make that immunity almost impregnable, save as Congress expressly waives it. Speaking of proceedings in a federal district court in Missouri, the Court held:

In the Missouri proceedings in corporate reorganization, the United States, by the Superintendent of the Five Civilized Tribes for the Choctaw and Chickasaw Nations, filed a claim on behalf of the Indian Nations. This it is authorized to do.⁸ No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against the United States.⁹ The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent¹⁰ continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization.¹¹ It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did. Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits. This seems necessarily to follow if the public policy which protects a quasi-sovereignty from judicial attack is to be made effective. . . .

But, it is said that there was a waiver of immunity by a failure to object to the jurisdiction of the Missouri District Court over the cross-claim. It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible.¹⁴

US Fidelity
& Guaranty Co
309 US 506

← Exempt
from
suit

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-513. See also Turner v. United States, 248 U.S. 354, 358.

More recent CA decisions (although I haven't found many) maintain this very strong position of tribal immunity. See Maryland Casualty Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517⁵²⁰ (CA5

1966), cert denied 385 U.S. 918; Colliflower v. Garland, 342

F.2d 369, 376 (CA9 1965); Dieke v. Cheyenne-Arapaho Tribes, Inc.,

304 F.2d 113 (CA10 1962). ~~There~~ There is also a cert petition pending, *cert pending*

- Fort Belknap Indian Community v. District Court, No. 76-919,

(Gene did the pool memo), presenting one aspect of the tribal immunity question. There the tribe was sued for damages resulting from an alleged tort committed by a tribal police officer. The Montana^{Supreme} Court held that ^{tribal} sovereign immunity did not apply, but Gene thought summary reversal was appropriate. The Court has called for the SG's views, and there has been no final disposition of the petition.

→ I see little escape from a holding that sovereign immunity protects the Tribe from a suit like the one here. The relief decreed ~~under the above-cited cases~~ ~~imposes~~ imposes duties not on individual Indians but on the Tribe, and so the assumptions on which this Court proceeded in Puyallup I and II have evaporated. ^(should be noted) It also ~~seems~~ ^(under the above-cited cases) that this immunity is sufficient to defeat any suit in which a tribe is a defendant, whether brought in state or federal court--unless the plaintiff can point to some act of Congress waiving the tribe's immunity.

But having said this, I must point out that the parties have not briefed the issue well, and the issue deserves more thorough treatment. This Court has not faced the issue since 1940, and a lot of changes in

federal Indian policy have taken place since then. (For example, ~~the~~
~~xxxxxxxxxxxxxxxxxxxx~~ in keeping with the trend toward reduc^{ing}
perhaps should
federal paternalism, it seems there/~~might be~~ be room for a tribe itself
to waive immunity--rather than leaving waiver as the exclusive province
of Congress, as the USF&G case seems to indicate.) Perhaps this is an
appropriate occasion to call for reargument, specifically directing the
parties ~~to~~ to focus their attention on the sovereign immunity issue. They
could tell us whether there are other^{federal} statutes that arguably waive
immunity and they could address the question of whether any tribal
immunity extends to the tribe's chairperson. (At this point I think it
should, since she seems to have been sued only in her official capacity;
I have found no suggestion that she is a fisherman.) Perhaps there is
some merit in scheduling it for reargument along with the Fort Belknap
case.

If this issue is to be decided now, I think immunity attaches.

The reservation.

1. Does it exist? As Justice Rehnquist's questions at oral argument
suggested, there ~~a~~ could be some difficult federalism questions involved
if the state courts chose, as a matter of state res judicata doctrine,
not to honor the CA9 decision declaring that the Puyallup reservation
exists. But it still seems to me that in the end, there would have
to be some requirement that the state honor the earlier CA9 decision.
Otherwise the situation might deteriorate into a war of contradictory
injunctions telling the state officials or the tribe to do ~~in~~ mutually
inconsistent things. This Court would have to arbitrate, and surely
the federal court's ^(injunction) ~~ultimately~~ would/prevail. *yes*

This is not to say that the Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law, has remained static during the 141 years since *Worcester* was decided. Not surprisingly, the doctrine has undergone considerable evolution in response to changed circumstances. As noted above, the doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See, e. g., *Oklahoma Tax Comm'n v. United States*, 319 U. S. 598 (1943). Similarly, notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians. See, e. g., *New York ex rel. Ray v. Martin*, 326 U. S. 496 (1946); *Draper v. United States*, 164 U. S. 240 (1896); *Utah & Northern R. Co. v. Fisher*, 116 U. S. 28 (1885). This line of cases was summarized in this Court's landmark decision in *Williams v. Lee*, 358 U. S. 217 (1959): "Over the years this Court has modified [the *Worcester* principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized Thus, suits by Indians against outsiders in state courts have been sanctioned. . . . And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. . . . But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive. . . . Essentially, absent governing

Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.*, at 219-221 (footnote omitted).

Id. at 168-172. See also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148.

~~It~~ It would be ~~hard~~ hard to say that the trial court's orders here, telling the tribe and its officers how to exercise some of their governmental powers, do not infringe on the right of reservation Indians to make their own laws and be ruled by them. Therefore these particular court orders cannot stand, insofar as they relate to matters

*State Courts did
accept view that
Res.
counts*

But the Court need not touch on any of those questions here, for in fact the state ~~courts~~ courts did accept the ~~state~~ CA9 decision. Both state courts proceeded on the assumption that the reservation exists. Moreover, at the start of the trial the Dept of Game itself conceded that the CA9 decision would have to ~~prevail~~ be honored unless ~~this~~ this Court reversed. App. at 20-21. We denied cert.

I think it clear that this Court should proceed on the same assumption, even though the state in its brief here--for the first time--attempts to ~~argue~~ argue the reservation question. I don't regard the question as open to the state. Moreover, the record here--for obvious reasons--is hopelessly inadequate for making the determination anew.

2. Does the state have jurisdiction over fishing by Indians on the reservation? If the reservation exists, then the lower court's order is in error, in my view. This Court's cases, for 150 years, have been very grudging in permitting state jurisdiction ~~with~~ with respect to reservation-related matters, beginning with Chief Justice Marshall's near-absolutist position in Worcester v. Georgia, 6 Pet. 515, 556-~~571~~ 571 (1832). In McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, a unanimous Court struck down the application of a state income tax to the income of a tribal Indian earned on the reservation. The Court wrote:

The principles governing the resolution of this question are not new. On the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U. S. 786, 789 (1945).

As a leading text on Indian problems summarizes the relevant law: "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply."

on the reservation.

Obviously such a holding has the potential for destroying the state's conservation program, if the Indians decided to wipe out the steelhead. But that is a fanciful prospect, ~~it does~~ since the Indians have ~~strong~~ strong incentives to make some arrangement for the continuation of the species. More importantly, Congress' authority over the Tribes is plenary--ample to safeguard against severe problems.

The merits. As we discussed, I do not think the allocation question is properly presented by the petition filed by the Tribe, and none of the other parties filed a valid cross-petition. If somehow the question is reached, however, I would have trouble sustaining the exclusion of hatchery fish--at least on this record. The trial court apparently ~~ex~~ excluded much of the evidence the Tribe sought to introduce to support its theory that hatchery fish do nothing more than replenish ~~a~~[#] portion of the fish stocks wiped out by advancing "civilization." This question of Indian entitlement to hatchery fish is of great importance to nearly all the fishing-based tribes of Washington, and it would be unfortunate for this Court to decide the question on an inadequate record in a dubious jurisdictional setting. The same question will be coming up in Phase II (due to start next January.) ~~of Judge Boldt's litigation.~~ [#] That case will probably give rise to a better record, showing the situation of many tribes, and this Court will almost surely receive a petition for cert from Judge Boldt's ultimate decision after it has worked its way through CA9. In other words, failing to reach the merits here will ~~not~~^(forever) foreclose an opportunity to pass on the most important substantive question--entitlement to hatchery fish.

In this light, it is not as ironic as it might otherwise seem for this Court to dispose of this 14-year-old case on a threshold

issue like sovereign immunity. In fact, this case is in such an unhelpful posture that I think the best course is to lay it to rest on the narrowest ground possible, letting future disputes proceed via Judge Boldt.

D.M.

The Chief Justice Affirm

Too late in day to say there is Sovereign Immunity
U.S. not a party here; hence no res judicata.
arising from Judge Boalt's DC op.
Doubt as to whether Reservation still exists.

Mr. Justice Brennan Vacate & Remand

Case has to go back again.

In I & II, only individual Indians were
involved. But Tribe is Δ here, & U.S. Fidelity
holds that Tribe has immunity & then can be
waived. We then must remand case
for consideration of other issue - that it did not
address.

Op of Wash S/Ct accepted op. of CA 9 that
~~the~~ Reservation exists. Then leaves Q whether
§ 2 of Treaty forecloses State regulation on Reservation
would vacate & remand on both issues.

Mr. Justice Stewart DIG

Case we should take in J. Boalt's case.

This case presents a limited issue. The
Wash S/Ct merely tried to carry out our mandate
in II. All that it decided as to Tribe & Reservation
was quite limited - ~~measure~~ measure the "take".

Not convinced there is a Reservation -
see map of Tacoma

This is a "pip-squeak" case. Boalt's case
is the main one

~~Boalt's case~~

Tribe was a co-Δ from
beginning. Pleadings
show this

Mr. Justice White Affirm

Wash S/Ct has declared the State has right to regulate "take" as to natural run by a decision that probably applies to all Indian Reservation. State has done what we told it to do. This is wholly consistent with II and is a major decision.

But hasn't considered Sovereign Immunity issue.

Apart from that issue, Byron would affirm. In her view, willing to assume Reservation is ^{still} extant.

Mr. Justice Marshall Vacate & Remand

Agree with Brennan

Mr. Justice Blackmun Affirm

Agree generally with Potter, but would not D16. As to S/Immunity, Tribe has been in all the way. Byron is right on merits.

That issue is minor one

Mr. Justice Powell Affirm (tentative)

Subject to resolution of S/Immunity issue, I'd affirm.

Agree generally with Byron
if it can be satisfied there is a
way to get around S/9 issue.

Mr. Justice Rehnquist

Would affirm if we can answer
S/Immunity issue. But there is reserve.
Edleman v Jordan said issue could be raised
at any time. This case has been here
twice & the S/9 issue never raised. We could
say it is now too late to raise issue.

Even if issue can be raised now, under
Ex Parte Young they would affirm as to
the Chaperson. Trabe has been party
since beginning. Trabe did not raise S/9
in its answer.

Mr. Justice Stevens

There is no Reservation. Would be
willing to Remand on Rosenbush

In Fidelity case (309 U.S.) the Immunity
was asserted in defense to money judgment.
Even if there can't be a money judgment,
the litigation is still here.

Agree with Rehnquist that we could
analogize to Ex Parte Young.

S/C + Wash. read I & II as assuming
no juris & no S/Immunity issue. We'd
look silly to raise issue now.

June 10, 1977

No. 76-423 Puyallup Tribe v. Department
of Game

Dear John:

I commend you on an artful opinion that "tiptoed" around some of the difficult issues, and yet deciding all that needed to be decided here.

Sincerely,

Mr. Justice Stevens

lfp/ss

cc: The Conference

John: I would prefer a change in footnote 10 to acknowledge the collateral estoppel effect of the CA9 decision so far as the present litigation is concerned. I attach a possible revision but I am with you whether or not you make this change.

L.F.P., Jr.

No. 76-423 - Puyallup TribePossible revision of footnote 10:

10. The continued existence of the Puyallup reservation has been a matter of dispute. In a decision that predates our consideration of DeCoteau v. District County Court, 420 U.S. 425, and Rosebud Sioux v. Kneip, ___ U.S. ___, No. 75-562 (April 4, 1977), the Ninth Circuit, relying on Mattz v. Arnett, 412 U.S. 481, held that the reservation did still exist, 496 F.2d 620 (1974), cert. denied, 419 U.S. 1032. That decision is not open to question here by the State of Washington or its agencies and for purposes of this case, we assume that the reservation still exists.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

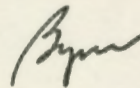
June 10, 1977

Re: No. 76-423 - Puyallup Tribe v. Dept of Game

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

Copies to Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

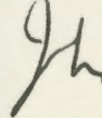
June 10, 1977

Re: 76-423 - Puyallup Tribe, et al. v. Dept.
of Game, et al.

Dear Bill:

Your suggested change is a definite improvement
and I will be more than happy to adopt it.

Respectfully,



Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

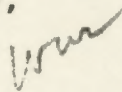
June 10, 1977

Re: No. 76-423 - Puyallup v. Department of Game

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 13, 1977

✓

Re: No. 76-423 - Puyallup Tribe v. Department of Game

Dear John:

Please join me.

Sincerely,

H.A. B.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 13, 1977

76-423 - Puyallup Tribe v.
Dept. of Game

Dear John,

I think you have done an admirable
job in this thankless case and am glad to
join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

[illegible]