

# The Burger Court Opinion Writing Database

*Department of Game of Washington v.  
Puyallup Tribe*  
414 U.S. 44 (1973)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University  
Forrest Maltzman, George Washington University



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

CHAMBERS OF  
THE CHIEF JUSTICE

October 25, 1973

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

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MEMORANDUM TO THE CONFERENCE:

I have read Bill Douglas' proposed opinion and Byron's concurrence in the above. I do not intend to write an "opinion" but I will have a few observations addressed to both -- I hope by tomorrow.

Regards,



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

CHAMBERS OF  
THE CHIEF JUSTICE

October 25, 1973

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

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MEMORANDUM TO THE CONFERENCE:

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

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

not help to be more explicit?

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

(1) The Treaty does not oblige the State to subsidize the Indian fishery with planted fish paid for by sports fishermen. The Indians' Treaty rights extend only to the natural run.

(2) Even in regard to the natural run, the Indian fishery cannot take so many fish as to deplete the natural run.

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

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

Regards,

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

CHAMBERS OF  
THE CHIEF JUSTICE

November 14, 1973

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

Dear Bill:

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

Regards,



Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

November 14, 1973

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

Dear Byron:

Please join me in your concurring opinion.

Regards,

WJB

Mr. Justice White

Copies to the Conference

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

2nd DRAFT

From: Douglas, J.

File No.: 10-23

Recirculated:

Nos. 72-481 AND 72-746

Department of Game of the  
 State of Washington,  
 Petitioner.

72-481 *v.*

The Puyallup Tribe, Inc.,  
 et al.

On Writ of Certiorari to  
 the Supreme Court of  
 Washington.

Puyallup Tribe, Petitioner.

72-746 *v.*

Department of Game of the  
 State of Washington.

[November —, 1973]

Mr. JUSTICE DOUGLAS delivered the opinion of the Court.

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

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

October 26, 1973

MEMORANDUM TO THE CONFERENCE

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

I want to reserve the questions of the Indian's share whether restricted to native run or total run. First the Department of Game in oral argument says it's not in the case at present. Second it is not raised as a question in either petition. Third the facts are not fully developed-- ~~most~~ how much federal money goes into the hatchery.

I'd reserve the question awaiting a record.

W.W.  
William O. Douglas

October 26, 1973

72-481

Dear Harry:

I appreciate your suggestions in the  
Puyallup Indian cases and I have incorporated  
them.

Yours faithfully,

W.C.D.

Mr. Justice Blackmun

Supreme Court of the United States

Memorandum

1/12

, 19

1/12, 4:50 P.M.

Concerto, 1963, 242 U.S. 261, 422 P. 2d 754, 764.

notes

Replies

from  
WJD

would the addition  
to our Indian case  
meet your problem?

STATES

Bill - I don't think it, for  
I am more than for copies  
Treaty rights give. This is  
just crack by way of a  
commercial fishing at

Certiorari to  
the Court of

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 72-481 AND 72-746

Department of Game of the  
State of Washington.  
Petitioner,

72-481 v.

The Puyallup Tribe, Inc.,  
et al.

Puyallup Tribe, Petitioner.

72-746 *v.*

Department of Game of the  
State of Washington.

On Writ of Certiorari to  
the Supreme Court of  
Washington.

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

November 12, 1973

MEMO TO THE CONFERENCE:

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

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

W.W.  
William O. Douglas

The Conference

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

*Cir*  
11/29/13

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

MEMORANDUM TO THE CONFERENCE

Nov. 30 conf., list 5, p

Re: No. 72-5437 Bennett v. Dept. of Game of Wash.

This case was held for our decision in No. 72-481,  
Dept. of Game of Wash. v. Puyallup Tribe and No. 72-746,  
Puyallup Tribe v. Dept. of Game of Wash.

The conditional cross-petitioner in this case is a member of the Puyallup Tribe who was named as an individual defendant, along with the Puyallup Tribe, in the action below. She asked that this conditional cross-petition be granted only in the event we granted the petition of the Washington Dept. of Game.

As an individual member of the Puyallup Tribe, she poses in this conditional cross-petition exactly the same questions we faced in No. 72-481 and No. 72-746.

I would grant the petition, vacate the judgment insofar as it applies to cross-petitioner, and remand for further proceedings consistent with our opinion in Nos. 72-481 and 72-746

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, Jr.

October 24, 1973

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

Dear Bill:

I agree.

Sincerely,

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

October 24, 1973

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

Dear Byron,

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

Sincerely yours,

? S,

Mr. Justice White

Copies to the Conference

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

## 1st DRAFT

From: White, J.

## SUPREME COURT OF THE UNITED STATES

Recirculated: 10-24-7

Nos. 72-481 AND 72-746

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

Department of Game of the  
 State of Washington,  
 Petitioner,

72-481 *v.*

The Puyallup Tribe, Inc.,  
 et al.

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

On Writ of Certiorari to  
 the Supreme Court of  
 Washington.

[November —, 1973]

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

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

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

October 25, 1973

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

Dear Bill:

Please join me.

Sincerely,



T.M.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 24, 1973

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

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Dear Bill:

Please join me in your circulation of October 23.

Sincerely,

*H. A. B.*

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 24, 1973

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

Dear Bill:

This will supplement my joinder letter of today. The following items are not at all important, but I raise them for your consideration.

1. In the very first sentence of the opinion is a reference to the "Department of Game and Fisheries of the State of Washington." I thought that these were and are separate Departments. I checked the record for the 1963 case and find that the complaint names both Departments as plaintiffs. I wonder, therefore, whether that first line should not refer to the "Departments of Game and of Fisheries" or something similar thereto.

2. On page 5, in two places, the distinction is drawn between net fishing by Indians and sports fishing by whites. I have not checked the record carefully, but I wonder whether sports fishing is confined to whites or, rather, non-Indians. You know the State of Washington far better than I, and perhaps it is so confined. I think, however, that I would feel a little better if the 7th line on page 5 were made to read "entirely pre-empted by sport fishermen, is allowed," and if the last word of the 7th line of the first full paragraph were omitted.

Sincerely,



Mr. Justice Douglas

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

October 25, 1973

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

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Douglas

lfp/ss

cc: The Conference

circulated?

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

October 25, 1973

Re: Nos. 72-481 & 72-746 - Dept. of Game v. Puyallup

Dear Byron:

While riding home with you last night, I told you I thought I would join your concurring opinion in Puyallup. On second thought, I think that the concurrence is about as strong with you and Potter joining it as if I weighed in, too, so I have elected to join Bill's opinion outright.

Sincerely,

*W.H.W.*

Mr. Justice White

PEACE IN SIGHT  
ON WAR, REVOLUTION AND PEACE  
Sanford, California 94335-6000



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Supreme Court of the United States  
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CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

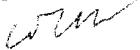
October 25, 1973

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

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 12, 1973

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

Dear Bill:

Please join me.

Sincerely,

*WRW*

Mr. Justice Douglas

Copies to the Conference