The Burger Court Opinion Writing Database

Antoine v. Washington

420 U.S. 194 (1975)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

February 14, 1975

Re: 73-717 - Antoine v. Washington

Dear Bill:

Please join me in your opinion.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 31, 1974

73-717?

MEMO TO THE CONFERENCE:

This xerox copy of a recent N.Y. Times story may be of interest on Indian fishing rights.

William O. Douglas

Wm Brennan
DC 74

RULING BOLSTER FISHING BY INDIA

Judge in Washington S Upholds Treaty of 18

GIG HARBOR, Wash., De (AP) — For the Quinault, Lummi, the Nisqualie, the Pu lup and other tribes, the ru by United States District Ju George Boldt has made a matic difference, for the be in the quality of their lives.

Because of it, Indians in state of Washington are bec ing commercial fishermen the first time in decades. the white fishermen who dominated the industry they are being put out of ness.

Suddenly 2,000 white mercial fishermen have limited to only 50 per cen the "harvestable catch" year—a figure determined state officials under court der. The Indians are gua teed the other 50 per cent.

The result has been a sl drop in income for men George Ancich, 50 years who operates a 58-foot fis boat out of this Puget So village. "I lost $15,000 $20,000 in good clear mo this fall; I earned only $6 he said. "I can't last ano year. Unless I can fish like always have, I'll have to sell boat, my gear. And what c do at my age."

Paul Anderson, of the P Sein Vessels Association, that fishing boat owners averaged $15,000 to $20,000 nually. But this year t earned $500 to $2,000 bec of the restrictions imposed Judge Boldt.

The ruling last spring in preted an 1854 treaty betw Indians in this area and United States Government, cause they were ceding lan settlers, the Indians wor they might lose their fis rights, too. So the treaty sta that "Indians shall have right to fish in common v white men."

20th Century Switch

It was hardly a concess for the settlers. Until nea 1900 they concentrated farming and the Indian tri did 98 per cent of the comm cial fishing. The Indians s their catch of Shinook salm Washington's most import commercial fish, to the whi

The 20th century was other matter, however. The dians charged that whites only dominated commer fishing but stopped Indi from fishing in Puget Sou Most of the salmon catch, also small harvests of herr

attached to WOD news of 12/31/74

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

From: Douglas; J.

Circulate: 2/13

Recirculate: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-717

Alexander J. Antoine et ux., Appellants, *v.* State of Washington. } On Appeal from the Supreme Court of Washington.

[January —, 1975]

MR. JUSTICE DOUGLAS, concurring.

I agree with the opinion of the Court that Congress ratified the cession Agreement together with all the rights secured by the Indians, thus putting the Agreement under the umbrella of the Supremacy Clause.

In 1872 President Grant, by Executive Order,[1] established a reservation for Indian tribes who came to be known as the Colville Confederated Tribes. By the Act of August 19, 1890,[2] a commission was appointed by the President to negotiate with the Tribes for "the cession of such portion of said reservation as said Indians may be willing to dispose of . . . ." On May 9, 1891, the commission entered into an Agreement with the Tribes by which the latter ceded to the United States "all their right, title, claim and interest in" a tract of land constituting approximately the northern half of the reservation. Article 6 of the Agreement, however, provided that "the *right to hunt* and fish *in common with* all other persons on lands not allotted to said Indians *shall not be taken away or in anywise abridged.*" (Italics added.)

In 1892 the Congress passed an Act restoring the northern tract to the public domain and opening it to

[1] Indian Reservations, Executive Orders 1855-1922, at 194-195.
[2] 26 Stat. 355.

1st Draft

SUPREME COURT OF THE UNITED STATES

No. 73-717

Alexander J. Antoine et ux., Appellants, *v.* State of Washington. } On Appeal from the Supreme Court of Washington.

[January —, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The appellants, husband and wife, are Indians.[1] They were convicted in the Superior Court of the State of Washington of the offenses of hunting and possession of deer during closed season in violation of RCW 77.16.020 and RCW 77.16.030.[2] The offenses occurred on unal-

[1] The appellant husband is an enrolled member of the Confederated Tribes of the Colville Indian Reservation. Appellant wife is a Canadian Indian and is not enrolled in the United States. The State of Washington did not however contest before the state courts that both appellants are entitled to the rights of members of the Colville Tribes on the property in question. The State Supreme Court stated, ". . . it is not questioned that [the husband] and his wife are beneficiaries of the agreement . . . ." 82 Wn. 2d 440, 511 P. 2d 1351 (1973). Appellee state conceded at oral argument in this Court that reversal of the husband's conviction requires reversal of the wife's conviction. Tr. p. 22.

Tribes that formed the Confederated Tribes include the Colville, Columbia, San Poil, Okanogan, Nez Perce, Lake, Spokane and Coeur d' Alene.

[2] The alleged offenses occurred on September 11, 1971, in Ferry County on unallotted non-Indian land within the ceded northern half of the original reservation.

RCW 77.16.020 provides in pertinent part:

page 14

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

Circulated:

Recirculated: 1/21/75

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-717

Alexander J. Antoine et ux., Appellants, *v.* State of Washington. | On Appeal from the Supreme Court of Washington.

[January —, 1975]

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RCW 77.16.020 provides in pertinent part:

J p. 10

Mr. The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

3rd DRAFT

Circulated: _____

Recirculated: 1-22-75

SUPREME COURT OF THE UNITED STATES

No. 73-717

Alexander J. Antoine et ux., Appellants, v. State of Washington. | On Appeal from the Supreme Court of Washington.

[January —, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

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RCW 77.16.020 provides in pertinent part:

pp. 5, 6, 12

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

From: Brennan, J.

4th DRAFT

Circulated:

Recirculated: 2/6

SUPREME COURT OF THE UNITED STATES

No. 73-717

Alexander J. Antoine et ux., Appellants, *v.* State of Washington. | On Appeal from the Supreme Court of Washington.

[January —, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

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RCW 77.16.020 provides in pertinent part:

STYLISTIC CHANGES

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

From:

Circulated:

Recirculated: 3/10/75

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-717

Alexander J. Antoine et ux., Appellants, *v.* State of Washington. | On Appeal from the Supreme Court of Washington.

[January —, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

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RCW 77.16.020 provides in pertinent part:

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 10, 1975

Re: No. 73-717, Antoine v. Washington

Dear Bill,

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

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 23, 1975

Re: No. 73-717 - Antoine v. Washington

Dear Bill:

I agree with your current circulation in this case.

Sincerely yours,

Mr. Justice Brennan

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 16, 1975

Re: No. 73-717 -- Alexander J. Antoine et ux. v.
State of Washington

Dear Bill:

Please join me in your opinion.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 10, 1975

Re: No. 73-717 - Antoine v. Washington

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 20, 1975

No. 73-~~718~~ 717 Antoine v. Washington

Dear Bill:

I read your fine opinion over the weekend, and will be happy to join you. The one concern which I have relates to hunting on private land. Your note 12 (p. 14) comes fairly close to the point. I would prefer, however, to put up a "smoke signal" that will make our message to the "Injuns" somewhat sharper. For example, perhaps an additional paragraph in the footnote along the following lines would be helpful:

> "A claim of entitlement to hunt on fenced or posted private land without prior permission of the owner would raise serious questions not presented in this case."

Indeed, I would prefer to say categorically that the reserved right to hunt cannot be construed as conferring the hunting privilege except on publicly owned land or private land with prior permission of the owner.

Without having checked the transcript of oral argument, my recollection is that the offense in this case occurred on private land, although no issue was made of this.

Sincerely,

Lewis

Mr. Justice Brennan

LFP/gg

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 20, 1975

No. 73-717 Antoine v. Washington

Dear Bill:

Please join me.

Sincerely,

L. Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 20, 1975

Re: No. 73-717 -- Antoine v. State of Washington

Dear Bill:

In due course I will circulate a dissent in the above case.

Sincerely,

WHR

Mr. Justice Brennan

cc: The Conference

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

From: Rehnquist, J.

Circulated: 2-5-75

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–717

Alexander J. Antoine et ux., Appellants, *v.* State of Washington. | On Appeal from the Supreme Court of Washington.

[February —, 1975]

MR. JUSTICE REHNQUIST, dissenting.

I do not agree with the Court's conclusion, *ante*, p. 4, that "[c]ongressional approval was given" to the provisions of Art. 6 of the agreement of May 19, 1891.

The Supremacy Clause of the Constitution specifies both "Laws" and "Treaties" as enactments which are the supreme law of the land, "anything in the Constitution or Laws of any State to the Contrary notwithstanding." If the game laws enacted by the State of Washington, containing customary provisions respecting seasons in which deer may be hunted, are invalid under the Supremacy Clause, they must be so by virtue of either a treaty or a law enacted by Congress. Concededly the agreement of 1891, between Commissioners appointed by the President and members of the Colville and Confederated Indian Bands, was not a treaty; it was not intended to be such, and Congress had explicitly provided 20 years earlier that Indian tribes were not to be considered as independent nations with which the United States could deal under the treaty power. Washington's game laws, therefore, can only be invalid by reason of some law enacted by Congress.

The Court's opinion refers us to the Act of Congress of June 21, 1906, which authorized monetary compensation to the Colvilles for the termination of the northern

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

Rehnquist

2nd DRAFT

2-14-75
2/11/75

SUPREME COURT OF THE UNITED STATES

No. 73-717

Alexander J. Antoine et ux., Appellants, *v.* State of Washington. | On Appeal from the Supreme Court of Washington.

[February —, 1975]

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Wm Douglas
Oct 74