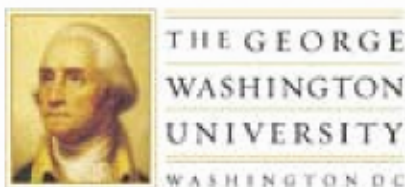


The Burger Court Opinion Writing Database

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

433 U.S. 165 (1977)

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



10. THE CHIEF JUSTICES
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 6/16/77

Recirculated: _____

W/B
Please join me
[Signature]

No. 76-423 - Puyallup Tribe and Ramo a Bennett v.
Dept. of Game of the State of Washington

MR. JUSTICE BRENNAN, dissenting:

While I agree with the Court's resolution of the rather tangled sovereign immunity question in Part I of the opinion, I cannot agree with the Court's interpretation of the substantive rights of the Puyallup Indians under the Treaty of Medicine Creek.

When white settlers first began arriving in the western part of what is now Washington State, the Puyallup Indians, along with other tribes surrounding Puget Sound, were heavily dependant for their livelihoods on runs of salmon and steel-head that came up the rivers in great numbers to spawn. In the 1850's the first Territorial Governor, Isaac I. Stevens, entered into a number of virtually identical treaties with representatives of these western Washington tribes to confine the Indians to reservation lands, and to open up the rest of the region to white settlers. One of these treaties was the Treaty of Medicine Creek, negotiated in 1854 by Governor Stevens with the Puyallups, the neighboring Nisqually tribe, and other

Only minor stylistic
changes from typed
version.

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

From: Mr. Justice Brennan

1st DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Recirculated: 6/22/77

No. 76-423

Puyallup Tribe, Inc. and Ramona Bennett, Petitioners, v. Department of Game of the State of Washington et al.	}	On Writ of Certiorari to the Supreme Court of Wash- ington.
---	---	---

[June 23, 1977]

MR. JUSTICE BRENNAN, *with whom Mr. Justice Marshall joins,* dissenting.

While I agree with the Court's resolution of the rather tangled sovereign immunity question in Part I of the opinion, I cannot agree with the Court's interpretation of the substantive rights of the Puyallup Indians under the Treaty of Medicine Creek.

When white settlers first began arriving in the western part of what is now Washington State, the Puyallup Indians, along with other tribes surrounding Puget Sound, were heavily dependant for their livelihoods on runs of salmon and steelhead that came up the rivers in great numbers to spawn. In the 1850's the first Territorial Governor, Isaac I. Stevens, entered into a number of virtually identical treaties with representatives of these western Washington tribes to confine the Indians to reservation lands, and to open up the rest of the region to white settlers. One of these treaties was the Treaty of Medicine Creek, negotiated in 1854 by Governor Stevens with the Puyallups, the neighboring Nisqually tribe, and other bands. That treaty gave the Puyallups a reservation at the southern end of Commencement Bay at the mouth of the Puyallup River.

The provisions for the Indians' all-important fishing rights provided:

"Article II: 'There is . . . reserved for the present use

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

✓
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 THURGOOD MARSHALL

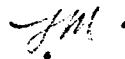
June 17, 1977

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

Dear Bill:

Please join me.

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

June 13, 1977

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

Dear John:

Please join me.

Sincerely,

H.A. S.

Mr. Justice Stevens

cc: The Conference

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

From: Mr. Justice Blackmun

Circulated: JUN 18 1976

Recirculated: _____

No. 76-423 - Day Hop Tribe v. Department of Game

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion. I entertain doubts, however,

about the continuing vitality in this day of the doctrine of tribal

immunity as it was enunciated in United States v. United States

Fidelity & Guaranty Co., 309 U.S. 506 (1940). I am of the view

that that doctrine may well merit reexamination in an appropriate

case.

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 17 1977

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-423

Puyallup Tribe, Inc. and Ramona Bennett, Petitioners, v. Department of Game of the State of Washington et al.	}	On Writ of Certiorari to the Supreme Court of Wash- ington.
---	---	---

[June —, 1977]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion. I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506 (1940). I am of the view that that doctrine may well merit re-examination in an appropriate case.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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 decided all
that needed to be decided here.

Sincerely,

L. F. P.

Mr. Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 9, 1977

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

Dear John:

I think your opinion does a very lawyer-like job of carrying out what I recall to be the consensus of the Conference, and will be happy to join it if you can see your way clear to make one change. Your penultimate sentence presently reads as follows:

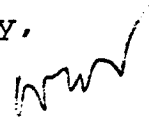
"The state courts must continue to accord full respect to the tribe's right to participate in the proceedings without treating such participation as qualifying its right to claim immunity as a sovereign."

Literally read, this could mean that the tribe as a tribe could continue to litigate and seek relief in the Washington courts without in any way giving up its claim to sovereign immunity. I have not researched the point, but have a vague recollection from law school days that one who is totally immune from suit in a particular court need not be accorded all of the rights of an ordinary litigant subject to suit in that court. From the context in which the sentence appears, I sense that it is not intended to be read in what I have previously described as a literal way, but rather to allow the tribe to continue to participate in

the proceedings on behalf of its members, in the manner described in your footnote 4. If I am right in my surmise, would you be willing to revise the penultimate sentence to read:

"The state courts must continue to accord full respect to the tribe's right to participate in the proceedings on behalf of its members as it has in the past without treating such participation as qualifying its right to claim immunity as a sovereign."

Sincerely,



Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

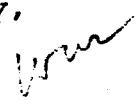
June 10, 1977

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

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

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

76-423 - Puyallup Tribe and Ramona Bennett
v. Dept. of Game of the State of
Washington

From: Mr. Justice Stevens

Circulated: 6/8/77

Recirculated: _____

MR. JUSTICE STEVENS delivered the opinion of the Court.

On April 8, 1975, after more than 13 years of litigation, including two decisions by this Court, ^{1/} the Superior Court of the State of Washington for Pierce County entered a judgment against the Puyallup Tribe of Indians. That judgment recited that the court possessed jurisdiction to regulate the fishing activities of the Tribe both off and on its reservation, and limited the number of steelhead trout that members of the Tribe might catch with nets in the Puyallup River each year. The Tribe was directed to file a list of members authorized to exercise treaty _____ fishing rights, and to report to the Washington State Department of Game, and to the court, the number of steelhead caught by its treaty fishermen each week. The judgment, with a slight modification, was affirmed by the Supreme Court of Washington, 86 Wash. 2d 664, 548 P.2d 1058 (1976).

The Tribe, supported by the United States as amicus curiae, contends in this Court that the doctrine of sovereign immunity requires that the judgment be vacated,

^{1/} In Puyallup Tribe v. Dept. of Game of Washington, et al., 391 U.S. 392 (Puyallup I), the Court held that Article III of the Treaty of Medicine Creek, 10 Stat. 1132, did not foreclose reasonable State regulation, in the interest of conservation, of fishing by the

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

Copies to the Conference

STYLISTIC CHANGES THROUGHOUT

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: Mr. Justice Stevens

Circulated: _____

Recirculated: 6/22/77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-423

Puyallup Tribe, Inc. and Ramona Bennett, Petitioners, v. Department of Game of the State of Washington et al.	}	On Writ of Certiorari to the Supreme Court of Wash- ington.
---	---	---

[June —, 1977]

MR. JUSTICE STEVENS delivered the opinion of the Court.

On April 8, 1975, after more than 13 years of litigation, including two decisions by this Court,¹ the Superior Court of the State of Washington for Pierce County entered a judgment against the Puyallup Tribe of Indians. That judgment recited that the court had jurisdiction to regulate the fishing activities of the Tribe both on and off its reservation, and limited the number of steelhead trout that members of the tribe may catch with nets in the Puyallup River each year. The Tribe was directed to file a list of members authorized to exercise treaty fishing rights, and to report to the Washington

¹ In *Puyallup Tribe v. Dept. of Game of Washington, et al.*, 391 U. S. 392 (*Puyallup I*), the Court held that Art. III of the Treaty of Medicine Creek, 10 Stat. 1132 (1854), did not foreclose reasonable state regulation, in the interest of conservation, of fishing by the Indians "in common with" fishing by others; the Court remanded the case to the state court to determine whether a total ban on net fishing was justified by the interest in conservation.

In *Washington Game Dept. v. Puyallup Tribe*, 414 U. S. 44 (*Puyallup II*), the Court held that a complete ban on net fishing for steelhead trout by the Indians was precluded by the treaty, and remanded for a determination of the number of catchable fish which should be apportioned to an Indian net fishery.