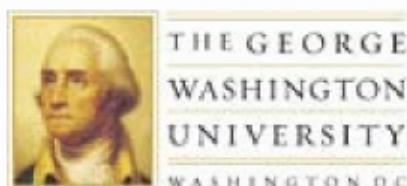


# The Burger Court Opinion Writing Database

*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



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: \_\_\_\_\_

*WJB*  
*Please return me*

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 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

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: \_\_\_\_\_

Recirculated: ~~6/22/71~~

## 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 23, 1977]

MR. JUSTICE BRENNAN, dissenting.

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

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

with whom Mr.  
Justice Marshall  
concurred,

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,

*JM*

T. M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

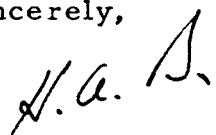
June 13, 1977

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

Dear John:

Please join me.

Sincerely,



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 O'Quigley  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JUN 13 1971

Recirculated: JUN 13 1971

No. 76-423 - Day v. Hup 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 Washington.

[June —, 1977]

MR. JUSTICE BLACKMUN, concurring.

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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:

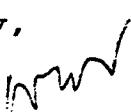
"The state courts must continue to accord full respect to the tribe's right to participate in the proceedings without treating such participation as qualifying its right to claim immunity as a sovereign."

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

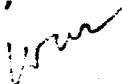
June 10, 1977

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

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

Copies to the Conference

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

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: 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,<sup>1/</sup> 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,

<sup>1/</sup> 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  
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[June —, 1977]

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<sup>1</sup> 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.