The Burger Court Opinion Writing Database

Washington v. Washington State Commercial Passenger Fishing Vessel Association

443 U.S. 658 (1979)

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

June 18, 1979

Re: (77-983 - Washington v. Washington State Commercial
(Passenger Fishing Vessel Ass'n.
(
(78-119 - Washington v. U.S.
(
(78-139 - Puget Sound Gillnetters Ass'n. v.
(USDC for the Western District of Wash.

MEMORANDUM TO THE CONFERENCE:

John has done a "noble" job but I suspect he would agree that his approach is really an "arbitration" holding. Developing a principled basis for decision here is extremely difficult.

I do not know whether time will help, but I join Byron in opting for a re-argument.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

June 22, 1979

RE: (77-983 - Washington v. Washington
(State Commercial Passenger
(Fishing vessel Assn.
(
(78-119 - Washington v. U.S.
(
(78-139 - Puget Sound Gillnetters
(Assn. v. USDC for the
(Western Dist. of Wash.

MEMORANDUM TO THE CONFERENCE:

I have decided to vote against reargument. I now join John's modified draft.

Regards,

WEB

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 14, 1979

RE: Nos. 77-983, 78-119, 139 State of Washington v. Washington State Commercial Passenger Fishing, etc.

Dear John:

Your memorandum is a splendid job and I'd be happy to join it as a Court opinion.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 1, 1979

Re: 77-983, 78-119 and 78-139 - Washington v. Fishing Vessel Assn.

Dear John:

Please forgive my delay in responding to your admirably conscientious and thorough memorandum, for which we all owe you a debt of gratitude. As of now, I cannot bring myself to believe that the treaty language implies a basic 50-50 allocation of the available fish between Indians and non-Indians. I understand that Bill Rehnquist is preparing a short memorandum, and I shall wait to see what he says before finally coming to rest.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 7, 1979

Re: No. 77-983 - Washington v. Washington State Ass'n

Dear Lewis,

I have read David Westin's memorandum with interest, and I think he has done a fine job in the limited time available. Perhaps it would expedite matters if the four of us could meet to talk this over after each of us has had a chance to read the memorandum and collect his thoughts.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to Mr. Justice White
Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 14, 1979

Re: No. 77-983, Washington v. United States

Dear Lewis,

I congratulate you and your law clerks on a very good job done in a very short time. If what you have written remains a dissenting opinion, I shall gladly join it. If, on the other hand, it commands the support of a majority, I see no practical alternative except to set these cases for reargument.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to Mr. Justice White
Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 15, 1979

77-983
Re: 78-119 - Washington v. United States, etc.

Dear Lewis:

Please add my name to your dissenting opinion in these cases.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 15, 1979

Re: Nos. 77-983, 78-119 & 78-139 - Washington fish cases

Dear John,

I agree with you that, whether sound or not, our prior cases construing the relevant Indian treaties conclude that the Indians not only were guaranteed a right of access and a right to fish in their accustomed places, but also were assured that the white man would not prevent fish from arriving in those places and that some portion of those fish would be reserved for them. To some lesser or greater extent, I understand that Lewis is to the contrary and hence, to me, he would at least partially overrule some of our prior cases. I am unprepared to do that, at least without reargument.

At Conference I was uncertain that a 50-50, or a mere 50-50 allocation was mandated by the treaties; and although Puyallup III at least tacitly held that the steelhead allocation was not inconsistent with the treaties, you clearly recognize that none of our cases has predetermined a precise allocation of the salmon runs, except, of course, for the fish that must escape for conservation purposes. After all, the words "in common" cannot possibly have meant a 50-50 division between the contracting parties in each of the various treaties negotiated and executed with particular Indian tribes.

Although I have difficulty accepting the notion that the treatie guaranteed to the Indians, or to a single Indian if he was the only Indian fisherman, 50% of the commercial salmon harvest in perpetu I also have difficulty in arriving at a principal basis for reserving t the Indians any lesser share of the harvest, over and above the fish

needed for ceremonial and subsistence purposes. The latter portion. I take it, small as it likely is, no one would quibble about. If the tribe, or any Indian fisherman, claimed enough fish to feed the tribe, free or for pay, such a claim would have priority, I suppose. But this would seem to be a drop in the bucket and would very likely be satisfied by merely a right of access and a right to fish commercially in the accustomed places. Indeed, the argument against you seems to be that whatever share the Indians are entitled to, given access, license-free fishing, and an ability to fish, which many of them obviously have, that share is no more than they are capable of taking when they fish in the customary places but "in common" with non-Indians who are also fishing there.

It should also be recalled that the tribal members may fish in the customary spots in unlimited numbers, as long as there is the required escapement. They also may fish, if licensed, in areas other than the treaty areas, including the ocean fisheries controlled by the United States; and in these other areas they may not only take fish that are destined for treaty fishing areas but also those fish (over half of the case area salmon, you suggest) that will not enter any of the customary Indian fishing locations.

As you can see, I am somewhat up in the air. However, if the case is not to be reargued and I must choose between your draft and Lewis' dissent, I would join in making your opinion an opinion for the Court. Of course, if reargued I might still come out that way. My first choice is to set the case for reargument, although I could understand that a majority might well believe that we shall learn little more than we do not already know. Even so, the issues might mature in our own minds, given a little more time and thought.

Sincerely yours,

Byron

Mr. Justice Stevens

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 25, 1979

Re: 77-983, 78-119 and 78-139 - Washington fish cases

Dear John,

If, as it seems, the vote is not to reargue these cases, please show me in the line-up as joining the Court's opinion.

Sincerely yours,

Byron

Mr. Justice Stevens

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 20, 1979

Re: Nos. 77-983, 78-119, and 78-139 - Washington v. United States

Dear John:

Please join me.

Sincerely,

T.M.

T.M.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 11, 1979

Re: Nos. 77-983, 78-119, 78-139 - Washington Fish cases

Dear John:

This indeed was a large task. I am prepared to join your memorandum if and when it is converted into an opinion, with the following reservations:

1. I think I would prefer to affirm flatly the judgment in No. 78-119. This is the International Fisheries case, and the memorandum agrees with the CA9 that the case is moot.

2. On page 35, there is an indication that the Court will not grant certiorari in the enforcement cases. I believe those cases are being held for this one and prefer not to prejudge them even though I agree that it is unlikely that certiorari in those cases will be granted.

Sincerely,

Harry

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 1, 1979

Re: Nos. 77-983, 78-119, 78-139 - Washington Fish cases

Dear John:

I am with you. I shall join an opinion prepared along the lines of your memorandum as recirculated May 31.

Sincerely,

HAB

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1979

MEMORANDUM TO THE CONFERENCE:

Re: Nos. 77-983, 78-119, and 78-119 - Washington Fish cases

I would like to weigh in with my comment about these cases. I sincerely hope they do not go over for reargument. It seems to me that the cases have been thoroughly briefed and fully argued and that the likelihood of any new enlightenment is meager. Also, we already have a number of other cases on the calendar for reargument.

It seems to me that John has done an admirable job of accommodating the views of those members of the Court who think some apportionment is required and who reject the "equal access" approach. Indeed, his most recent amendments to his memorandum take into account many of the objections the State itself has made to the orders of the District Court.

One factor that disturbs me is that a postponement for reargument would exacerbate the civil disobedience aspect of the cases. Despite the previous denial of certiorari on some of the issues litigated again here, the District Court has had difficulty in attaining compliance with its orders. If we go to reargument, enforcement during the summer and fall will continue to be difficult. Almost all the recreational fishing takes place during the summer, and the State's Department of Game is the branch of state government that has been least willing to concede fishing rights to the Indians. The prospect of still more strife, caused by our uncertainty over the details of an order already being amended by the District Court, is not a happy one.

One alternative, of course, in order to meet Byron's concern that "the issues might mature in our own minds, given a little more time and thought," is to let the opinion come down during the summer, or on the first day of the 1979 Term, when we are less harried. I know that this suggestion will be shot down immediately, for it encounters the quorum problem and "has never been done." I believe, however, that it was not too long ago that cases came down in a subsequent Term without reargument. This is the only Court I know of that insists on clearing its calendar before the recess. There is a lot to be said for that, but, as with most rules, there ought to be room for an exception now and then.

HAB.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 9, 1979

77-983 Puget Sound/Washington State Fishing Case

Dear John:

I have read with interest and admiration your memorandum. It is well written and persuasive.

My vote at Conference was, however, the "other way" - particularly with respect to the meaning of "right in common". I have not thought that this meant a 50/50 division between Indians and non-Indians.

I am not disposed to write, but will await other circulations before coming to rest. The really important thing is to settle this controversy.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

June 6, 1979

Dear Potter, Byron and Bill,

Following our accidental discussion on Thursday, I volunteered to relieve Bill Rehnquist of the task of trying to get something on paper for us to consider.

I send to each of you here with a memorandum prepared by my clerk, David Westin. In the limited time available, I think David has done a fine piece of work with - I am afraid -little help from me.

The question now is where do we go from here. The view several of us expressed at Conference that a 50-50 division of the fish was not acceptable, remains my view - despite the excellence of John's opinion. Nor do I think any mathematical division of the fish is either required by the treaty or makes any sense. The more difficult question (as we all recognize) is what does make sense, consistently with the treaty?

Subject to further discussion, I am inclined to agree with the view advanced in the enclosed memorandum that the language and history of the treaty (including its interpretation in Winan's, 198 U.S. 371), properly requires that it be construed as guaranteeing only a "right of access" in common. It really makes no sense to say that some specified percentage is in effect guaranteed. There is the problem of Puyallup II, although I believe this can be distinguished as suggested by David's memo.

If we were to agree that the right is limited to access in common, the question remains as to exactly how we describe the result of that interpretation. I suppose we could, as David Westin suggests as one possibility, remand to the District Court which is better situated than we are to work out the details. I have not thought this through yet.

Indeed, I am placing the memo in your hands, without having come finally to rest myself. I simply have not had sufficient time to devote to the case. But I am willing, if you wish me to, to try my hand at a draft of a dissent.

If there is support for undertaking this, I would welcome ideas as to whether we should simply remand or endeavor to give guidance beyond construing the treaty as above indicated.

It is late in the day, and in fairness to John and the Brothers (including all of us), if anything is to be done, it should progress forthwith.

Sincerely,

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Rehnquist

LFP/lab

June 13, 1979

77-983 Washington v. United States

Dear Potter, Byron and Bill:

After a further rather careful examination of the central issue in this case, I have concluded that the treaties gave the Indians a right of access over the lands of non-Indians to fish (to take fish if they could catch them) at their accustomed places.

The enclosed draft of a dissent incorporates my present views. As the draft is written as a dissent (which I am prepared to circulate), it would require substantial additional writing to convert it into a Court opinion - even in the unlikely event that four others agreed with my view of the treaties. Indeed, as one of you said on Monday, it may well be too late for any proper Court opinion other than John's.

I would not oppose reargument, and a good deal can be said for this. I rather doubt, however, whether we could settle any issues of consequence now and thereby limit the scope of reargument.

I would, of course, welcome any comments on the enclosed draft.

Sincerely,

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Rehnquist

lfp/ss

6/14/79

LFP/ss 6/13/79

77-983

Washington v. United States, No. 78-119

MR. JUSTICE POWELL, dissenting.

I join parts I-III of the Court's opinion. I am not in agreement, however, with the Court's interpretation of the treaties negotiated in 1854 and 1855 with the Indians of the Washington Territory. The Court's opinion, as I read it, construes the treaties' provision "to take fish...in common" as guaranteeing the Indians a specified percentage of the runs of the anadromous fish passing land upon which the Indians traditionally have fished. Indeed, it takes as a starting point for determining fishing rights an equal division of these fish between Indians and non-Indians. Ante, at 25, et seq. As I do not believe that the language and history of the treaties can be construed to support the Court's interpretation, I dissent.

I

At issue in these cases is the meaning of language found in six similar Indian treaties negotiated and signed in 1854 and 1855.1/ Each of the treaties provides substantially 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, and of erecting temporary houses for the purpose of curing."2/ The question before us is whether this "common" fishing right is a right only

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 15, 1979

Re: 77-983, 78-119, and 78-139 Washington v. Fishing Vessel Association

Dear John:

Thank you for your letter concerning my dissenting opinion in these cases. I agree that Puyallup II is a point of difference between us, although I think that the language and history of the treaties are controlling.

The opinion for the Court in Puyallup II is a scant four pages in length and is so cryptic that it is difficult to tell exactly what was being decided or why. Nonetheless, I think that the most sensible interpretation of Justice Douglas' opinion does not in any way require that the federal courts allocate all of the fish subject to the 1854-1855 treaties between the Indians and the non-Indians. Puyallup II involved the State's ban on net fishing for steelhead trout in one river (the Puyallup), a regulation unquestionably justified by conservation requirements described in Puyallup I. The only question presented and considered was whether this ban was invalid because it violated the "equal protection [requirement] implicit in th phrase 'in common with.'" Puyallup I, 391 U.S., at 403. Although the ban was neutral on its face, as applied it discriminated against the Indians, because members of the Puyallup Tribe engaged in fishing only by means of nets. Thus, when the Washington Supreme Court ruled that net fishing would be allowed only if hook-and-line fishing did not take all of the permissibly harvestable fish, the Solicitor General concluded that this would "subordinat[e] the Tribe's rights to those of sports fishermen and giv[e] the Tribe only what might be left after the sports fisherme of unlimited number have had their take." Brief of Respondent in Puyallup II, O.T. 1972, No. 481, p.18. In sum, it appears that under the special circumstances of the Puyallup River, preferring hook-and-line fishing to net

fishing in effect preferred non-Indian fishing to Indian fishing.

It is plain from the opinion that the Court understood the issue in Puyallup II to be whether the treaties would permit the State to meet conservation goals by means of regulations that would burden only Indian fishermen, and therefore operate discriminatorily. Writing for the Court, Justice Douglas stated that "[w]hether [the ban on all net fishing in the Puyallup River] amounts to discrimination under the Treaty is the central issue in these cases." Id., at 47. In its brief analysis, the Court observed that "[t]he ban on all net fishing in the Puyallup River for steelhead [trout] grants, in effect the entire run to the sports fishermen," id., at 46-47, and that the ban discriminated against the Indians "because all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians, is allowed." Id., at 48 (emphasis added).

I believe the correct interpretation of Puyallup II, therefore, is that it forbad the State of Washington to adopt otherwise valid conservation restrictions upon Indian fishing if those restrictions would have the effect of placing the entire cost of conservation on the Indians. To be sure, as you suggest, the Indians in Puyallup II could have begun hook-and-line fishing in order to continue to take fish in the Puyallup River. But the Court in effect ruled that the "equal protection" aspect of the treaties would be violated if the Indians alone were made to alter their methods of taking fish. It was in this quite limited and unusual context that the Court suggested apportionment as the method by which Indian fishing rights could best be secured in the Puyallup River. The opinion does not suggest that apportionment is the Indians' right with respect to all of the fish covered by the treaties in the State of Washington.

In sum, I understand Puyallup II to require even-handed treatment of the Indians whenever some limitation on their catch is required by conservation concerns. Whether this "equal protection" interpretation of the treaties is appropriate, and if so whether it applies to all fisheries covered by the treaties--or indeed whether it applies anywhere in the absence of discriminatory effect, are questions we may have to address at some point in the future.

But these questions are not before us in this case, at least in the focused sense in which the single issue of discrimination was presented in Puyallup II.

Sincerely,

L. Lewis

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 18, 1979

77-983,78-119 78-139 - Washington Fish Case

Dear John:

As a sideline observer, though not entirely a disinterested one, I have read with interest the exchange between you and Byron.

Having had my "say", I do not intend to get into the middle of this friendly debate, but I will address one point. In your letter of June 18, you identify as perhaps the only question open for reargument is "whether or not Puyallup II should be overruled". You also say that "it would be quite awkward for the Court to be expressing doubt about such an important case so shortly after it was decided".

While I cheerfully recognize that you and I read Puyallup II differently, I do suggest - for reasons stated prior correspondence and in my dissent - that reasonable lawyers and judges may conclude that Puyallup II is not nearly so broad a decision as you view it. Normally, a case may be construed to hold only what was necessary for the judgment on the issue presented. No general question of apportionment was before the Court in Puyallup II. While the language could be construed more broadly, the fact is that the case turned on the discriminatory effect of a state regulation as applied only to the facts before the Court.

A reargument could address, as one question, the scope of the holding in Puyallup II. But if we have a reargument, as suggested by the Chief Justice and Byron, I would prefer - in addition - to keep all issues open for reconsideration.

Sincerely,

Lewis

Mr. Justice Stevens
lfp/ss
cc: The Conference

1, 2, 6-7, 10-11

Mr. J...

From: Mr. Justice Po...

Circulated: _____

Recirculated: 19 JUN 19...

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-983, 78-119, AND 78-139

State of Washington et al., Petitioners, 77-983 *v.* Washington State Commercial Passenger Fishing Vessel Association et al.	On Writ of Certiorari to the Supreme Court of Washington.
State of Washington et al., Petitioners, 78-119 *v.* United States et al.	On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.
Puget Sound Gillnetters Association et al., Petitioners, 78-139 *v.* United States District Court for the Western District of Washington (United States et al., Real Parties in Interest).	

[June —, 1979]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

I join Parts I–III of the Court's opinion. I am not in agreement, however, with the Court's interpretation of the treaties negotiated in 1854 and 1855 with the Indians of the Washington Territory. The Court's opinion, as I read it, construes the treaties' provision "to take fish . . . in common" as guaranteeing the Indians a specified percentage of the runs of the anadromous fish passing land upon which the Indians tradi-

3,10,11

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

2nd DRAFT

From: Mr. Justice Powell

Circulated: _____

Recirculated: 26 JUN 1979

SUPREME COURT OF THE UNITED STATES

Nos. 77-983, 78-119, AND 78-139

State of Washington et al., Petitioners, 77-983 *v.* Washington State Commercial Passenger Fishing Vessel Association et al.	On Writ of Certiorari to the Supreme Court of Washington.
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 9, 1979

Re: No. 77-983 Puget Sound/Washington State Fishing Case

Dear John:

My position with respect to your recently circulated memorandum in this case is very much that stated by Lewis in his note to you of May 9th.

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 7, 1979

Re: No. 77-983 - Washington v. Washington State Ass'n

Dear Potter, Byron and Lewis:

I am in general agreement with Lewis' proposal of June 6th, and with the memorandum of David Westin which he enclosed with it. I would be willing to see it written out along those lines, and think any inconsistencies between the views expressed in the memo and Puyallup II would be no greater than those between the latter and the treaty itself.

Sincerely,

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 8, 1979

Re: No. 77-983 - Washington v. Washington State Ass'n

Dear Lewis:

I would be more than happy to meet with you, Potter, and Byron, in accordance with the suggestion contained in Potter's letter of June 7th, at any mutually convenient time.

Sincerely,

Mr. Justice Powell

Copies to Mr. Justice Stewart
and Mr. Justice White

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 14, 1979

Re: No. 77-983 - Washington v. United States

Dear Lewis:

My sentiments with respect to your most recent draft in this case are the same as those conveyed to you by Potter in his letter of June 14th. I am firmly of the view that John's memorandum misconstrues the treaty; the question of reargument would depend upon the amount of work which would inevitably fall on you and your chambers in converting what is now a dissent into a majority opinion if it attracts four votes other than yours. It will certainly have mine.

Sincerely,

Mr. Justice Powell

Copies to Mr. Justice Stewart
and Mr. Justice White

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1979

Re: Nos. 77-983, 78-119, and 78-139 - Washington v. United States

Dear Lewis:

In your most recent circulation of a dissenting opinion in this case on June 19th, you correctly show me as joining you and Potter in that opinion. Although I orally advised you that I agreed with it, and on May 9th circulated a note to John indicating that my views were in accordance with yours communicated to him on the same date, in looking through my file now I cannot find any formal "join" letter from me to you which I also circulated at the Conference. This will constitute such a letter if I have not previously sent you one which qualifies as an "official" join.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

P. 8

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: MAY 7 '79

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–983, 78–119, AND 78–139

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Puget Sound Gillnetters Association et al., Petitioners, 78–139 *v.* United States District Court for the Western District of Washington (United States et al., Real Parties in Interest).	

[May —, 1979]

Memorandum of MR. JUSTICE STEVENS.

To extinguish the last group of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia River in what is now the State of Washington,[1] the

[1] By three earlier treaties the United States had extinguished the conflicting claims of Spain and Russia in 1824, 8 Stat. 252, 302, and Great Britain in 1846, 9 Stat. 969. In 1848 Congress established the Oregon

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 14, 1979

Re: 78-983, 78-119, 78-139 - Washington Fish Cases

Dear Harry:

Many thanks for your note. Both of your suggestions are good ones and will be adopted in our next draft--which will include quite a number of minor changes.

Respectfully,

Mr. Justice Blackmun

Copies to the Conference

Pp 14, 25, 26-28, 36
Footnotes Renumbered

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: MAY 31 '79

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–983, 78–119, AND 78–139

State of Washington et al., Petitioners, 77–983 *v.* Washington State Commercial Passenger Fishing Vessel Association et al.	On Writ of Certiorari to the Supreme Court of Washington.
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[June —, 1979]

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[1] By three earlier treaties the United States had extinguished the conflicting claims of Spain and Russia in 1824, 8 Stat. 252, 302, and Great Britain in 1846, 9 Stat. 969. In 1848 Congress established the Oregon

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 1, 1979

Re: ~~78~~77-983, 78-119 and 78-139 - Washington v. Fishing Vessel Assn.

Dear Potter:

Thank you for your letter and kind words about my memorandum in this case. Your reference to "a basic 50-50 allocation of the available fish between Indians and non-Indians" prompts me to add a few more words, however, to the already too many that I have written on the subject.

First, I'm afraid that the memorandum may not make as clear as it should that the Indians would not be allocated 50% of the "available fish" in Washington. Instead they could take no more than 50% of those fish that pass through their traditional fishing areas, which, as I understand it, amounts to about 50% of half of the anadromous fish in the area. Second, the "pie" that is being divided "between Indians and non-Indians" does not include those fish that would later have passed through traditional fishing sites but instead are taken by non-Indian fishermen who are not citizens of Washington. In short, even if the Indians' share were frozen at 50%, it would only amount to about 20% of the total number of fish in the area. Third, that number may drop still further when the District Court resolves the question of hatchery-bred fish which, if the Puyallup litigation is any guide, may be excluded from the "pie." In fact, that could result in the exclusion of up to half of the fish in some "runs," as it did in the Puyallup case. Fourth, the Indians' share is not

frozen at 50%. As footnote 26 indicates, that is a ceiling, but not a floor, and the District Court has already dropped the Indians' share below that point by 10% after its most recent assessment of the Indians' needs. Accordingly, even if the hatchery-bred fish are not excluded, the 20%-of-the-total estimate above is too high. Finally, I should point out that the modifications to the decree proposed in the memorandum significantly alter the manner in which the Indians' share is to be calculated, so that they will not receive the benefit of the District Court's exclusion of reservation-taken, subsistence, and ceremonial fish. All in all, therefore, the Indians will probably end up taking between 15 and 20% of the Washington anadromous fish, which seems to me to be quite consistent with the treaty language and the intent of the parties to the treaty.

I, of course, would be willing to emphasize these points more adequately than I have yet done if you think that would be helpful.

Respectfully,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 15, 1979

RE: 77-983, 78-119 and 78-139 - Washington v. Fishing Vessel Association

Dear Lewis:

Because your "dissenting" opinion probably has as good a chance of becoming a Court opinion as my memorandum, it may be appropriate for me to respond by letter rather than by circulating revisions in my earlier draft.

I think it is imperative that we focus on the proper interpretation of Puyallup II.

In that case, there was nothing about the state regulation that entirely preempted the supply of steelhead for non-Indians; as the State vigorously argued in that case, Indians and non-Indians were afforded equal "access" to the hook-and-line fishery authorized by the regulation. Instead, the preemption found by the Court was the consequence of the fact that non-Indians so thoroughly outnumbered Indians that "equal access" effectively prevented the latter from taking any appreciable number of fish. By finding that preemption inconsistent with the treaties, the Court rather clearly held that the Indians not only have a right of "access" to fishing areas but also have a "right of taking" a substantial number of fish.

Accordingly, if the treaties merely gave the Indians the two rights you describe in the last paragraph of your opinion, Puyallup II should have been decided the other way. For the state regulation was not merely "facially

neutral," but it was also substantively neutral because it banned commercial, and allowed hook-and-line, fishing by both non-Indians and Indians. As I read your opinion, the only way you can find that the regulation in Puyallup II discriminated against the Indians is to assume that the Indians have some kind of inherent right to engage in a commercial fishing enterprise that non-Indians do not have and to conclude that requiring Indians to observe the same rules as non-Indians is therefore somehow "discriminatory." Apart from the fact that this theory is inconsistent with your earlier interpretation of the treaties at p. 2 as affording Indians and non-Indians "precisely the same right to fish," I know of no evidence that supports it. As I see it, the "discrimination" disapproved of in Puyallup II was precisely the same as is involved in this case--under preexisting policies, non-Indians could, but Indians could not, take substantial numbers of fish.

I sympathize with your concern about this case, but it seems to me we must either overrule Puyallup II or give the Indians a share of the fish.

Respectfully,

Mr. Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 18, 1979

Re: 77-983, 78-119, and 78-139 - Washington v. Fishing Vessel Association

Dear Byron:

Thank you for your thoughtful letter of June 15th. As you suggest, there are no easy answers to the problems raised by this case and especially to the question of what share of fish the treaties, as interpreted by our prior cases, afford the Indians. Nonetheless, it may be useful to make a few comments on some of the points you have made in your letter.

First, I should emphasize that I did not intend in my memorandum to assure the Indians 50% of the fish in perpetuity; the 50% figure was merely intended to establish the maximum amount that the Indians could take if their "livelihood needs" reasonably justify that amount. If, as you hypothesize, a tribe should dwindle to just one member, or only a handful, a 50% allocation of an entire run would be manifestly inappropriate because the livelihood of a small group of persons could not reasonably require an allotment of millions of fish.

Second, I really think it is clear that the "access" approach that Lewis advocates--even if supplemented by the fish the Indians catch outside of the treaty areas--would not assure the Indians an amount of fish consistent with the intent of the treaties. As I understand the figures, the access approach would not even satisfy the Indians' subsistence and ceremonial needs. Before the District Court's decree went into effect, the Indians were catching only about 2 to 3 1/2% of the runs, 459 F. Supp., at 1032,

whereas the District Court found that their subsistence and ceremonial needs in later years required about 5% (see J.A. 593). More importantly, merely satisfying ceremonial and subsistence needs can hardly be the proper allocation because the findings make it clear that the Indians did have an established trade and commerce in fish in the 1850's.

The fact that the Indians had a virtual monopoly of the fisheries when the treaties were made makes the analogy to the water cases relevant. You will recall that Arizona v. California and other cases hold that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians should secure enough of that resource to provide the Indians with a livelihood--that is to say, a moderate living. I should think a similar approach is proper with respect to fish, modified only by the fact that we impose an absolute ceiling of 50% on the Indians' allocation of fish whereas I don't recall that any such ceiling was imposed in any of the water cases.

I have mixed feelings about your suggestion that the case should be reargued. Certainly I would agree that the case is much too important to let the investment we have made this Term be decisive. On the other hand, I am not sure we will get much more help on the allocation problem than is already available in the hundreds of pages of briefs that have already been filed. The new question that we might suggest for reargument is whether or not Puyallup II should be overruled. I have thought a good deal about that suggestion since we talked about the case the other day, but wonder if it would be wise for the Court to advance that suggestion when none of the parties and none of the amicus briefs shed any doubt on the validity of the case. It seems to me it would be quite awkward for the Court to be expressing doubt about such an important case so shortly after it was decided Although I have had serious doubts about whether the case was correctly decided--particularly when I was working on Puyallup III--I really am persuaded now that the Court did reach the correct result there and almost certainly would reaffirm its holding if the point should be squarely addressed again.

As an alternative to your reargument suggestion, I wonder if it might be useful to try and schedule another conference devoted specifically to this case and nothing else to see if there is some modified position that could command a court. After all, my assignment was merely to prepare a memorandum for further consideration and discussion by the Court and we really have not had any such collegial review of the case since my memorandum was circulated.

In all events, I appreciate your careful study of the case.

Respectfully,

J. L.

Mr. Justice White

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 18, 1979

RE: 77-983, 78-119, 78-139 - Washington v. Fishing Vessel Association

Dear Chief:

Would it not be appropriate to have a Conference discussion of this case before voting on Byron's reargument suggestion?

I appreciate your compliment on my "noble" effort, but I am rather surprised by your comment that my memorandum proposes an "arbitration" holding.

Respectfully,

The Chief Justice

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 18, 1979

MEMORANDUM TO THE CONFERENCE

Re: 77-983, 78-119, and 78-139 - Washington v. Fishing Vessel Association

In order to emphasize the point that I propose that "reasonable livelihood needs"--rather than the 50% ceiling--should provide the primary standard for measuring the Indians' share of the fish, I would like to substitute the attached pages 11, 26, 27, and 28 of my original memorandum.

It seems to me the point is of sufficient importance to merit study before we decide whether or not reargument is necessary.

Respectfully,

JPS

Attachments

or to their needs, whichever was less. The Department of Fisheries agreed that the Indians were entitled to "a fair and equitable share" stated in terms of a percentage of the harvestable salmon in the area; ultimately it proposed a share of "one-third."

Only the Game Department thought the treaties provided no assurance to the Indians that they could take some portion of each run of fish. That agency instead argued that the treaties gave the Indians no fishing rights not enjoyed by nontreaty fishermen except the two rights previously recognized by decisions of this Court—the right of access over private lands to their usual and accustomed fishing grounds, see *Seufert Bros. Co.* v. *United States*, 249 U. S. 194, *United States* v. *Winans*, 198 U. S. 371, and an exemption from the payment of license fees. See *Tulee* v. *Washington*, 315 U. S. 681.

The District Court agreed with the parties who advocated an allocation to the Indians, and it essentially agreed with the United States as to what that allocation should be. It held that the Indians are entitled to a 45% to 50% share of the harvestable fish that will at some point pass through recognized tribal fishing grounds in the case area. ~~(Significantly, over half of the anadromous fish in the case area do not pass through such grounds and are exempt from the order.)~~ The share was to be calculated on a river-by-river, run-by-run basis, subject to certain adjustments. Fish caught by Indians for ceremonial and subsistence purposes as well as fish caught within a reservation were excluded from the calculation of the tribes' share.[16] In addition, in order to compensate for fish caught outside of the case area, *i. e.*, beyond the State's

15A

See attached sheet

portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas." 384 F. Supp., at 328.

[16] Moreover, fish caught by individual Indians at off-reservation locations that are not "usual and accustomed" sites, was treated as if it had been caught by nontreaty fishermen. 384 F. Supp., at 410.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 20, 1979

MEMORANDUM TO THE CONFERENCE

Cases Held for No. 77-983, et al. - Washington v. Washington Fishing Vessel Assn.

Three consolidated certiorari petitions are being he for the Washington Fish Case: No. 78-973 - Harrington v. Uni States; No. 78-987 - Dolman v. United States; and Minnich v. United States. In all three, violators of the District Court injunctions enforcing its allocation of the fisheries challen their convictions for criminal contempt. They raise two clai First, they argue that persons not parties to the suit in whi the enforcement injuctions were issued may not be punished fo violating those injuctions. Second, they claim that the Dist Court orders which they violated were invalid assertions of federal power. Assuming that the Washington Fish Case is dec ded this Term and is decided along the lines proposed in my memorandum, I think that an appropriate disposition of these cases would be to grant, vacate, and remand them to CA9 for reconsideration in light of our decision.

My memorandum clearly rejects petitioners' first claim, so that the Court of Appeals' disposition of that issue is entirely correct. Moreover, although my proposal would modify the District Court's allocation order as approved by th Court of Appeals, it largely validates the enforcement efforts undertaken by the District Court, and it is apparently those efforts that petitioners are objecting to in their second clai Therefore, I think a "deny" on that question would also be appropriate. However, it is theoretically possible that the modifications to the District Court's allocation order require by my proposed opinion would have some impact on the validity of the orders violated by petitioners. Accordingly, out of an abundance of caution, I will vote to "GVR" these cases if the Washington Fish Case is decided this Term along the lines I have proposed.

Respectfully,

John

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: JUN 26 '79

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

1, 11-13, 17, 25-27, 30, 31, 35

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–983, 78–119, AND 78–139

State of Washington et al., Petitioners, 77–983 *v.* Washington State Commercial Passenger Fishing Vessel Association et al.	On Writ of Certiorari to the Supreme Court of Washington.
State of Washington et al., Petitioners, 78–119 *v.* United States et al.	On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.
Puget Sound Gillnetters Association et al., Petitioners, 78–139 *v.* United States District Court for the Western District of Washington (United States et al., Real Parties in Interest).	

[June —, 1979]

MR. JUSTICE STEVENS delivered the opinion of the Court.

To extinguish the last group of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia River in what is now the State of Washington,[1] the

[1] By three earlier treaties the United States had extinguished the conflicting claims of Spain and Russia in 1824, 8 Stat. 252, 302, and Great Britain in 1846, 9 Stat. 969. In 1848 Congress established the Oregon