

# The Burger Court Opinion Writing Database

## *Oregon Department of Fish and Wildlife v. Klamath Tribe*

473 U.S. 753 (1985)

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

May 22, 1985

Re: No. 83-2148 - Or. Dept. of Fish & Wildlife v.  
Klamath Indian Tribe

Dear John:

I join.

Regards,

Justice Stevens

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 24, 1985

No. 83-2148

Oregon Department of Fish  
& Wildlife v. Klamath Indian Tribe

Dear Thurgood,

Please join me.

Sincerely,



Justice Marshall

Copies to the Conference

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

Circulated: OCT 1 1984

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

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

OREGON DEPARTMENT OF FISH & WILDLIFE *v.*  
KLAMATWH INDIAN TRIBE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-2148. Decided October —, 1984

JUSTICE WHITE, dissenting.

By a treaty with the United States signed in 1864, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians ceded their claim to roughly twenty million acres of land in southern Oregon and northern California. They received in return a reservation of some 1.9 million acres located entirely within the State of Oregon. The treaty guaranteed the tribes "the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits." Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Oct. 4, 1864, 16 Stat. 707, 708 (1866).<sup>1</sup>

Surveys of the Klamath reservation commissioned by the United States in 1871 and 1888 erroneously excluded large tracts of land from the reservation. In 1896, the United States responded to complaints from tribal members by appointing a boundary commission to determine whether an error had occurred and recommend an appropriate settlement. The commission ultimately concluded that 621,824 acres of Klamath land had been erroneously excluded and that the value of the land, based on its rock formations, the quality of its soil and timber, and its suitability for grazing, was 86.36¢ per acre. This government then entered into negotiations with representatives of the tribes, who eventually

<sup>1</sup>Although the treaty mentioned only fishing and gathering rights, the parties agree that the treaty also reserved for the Indians the right to hunt and trap on reservation land.

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

'84 OCT -4 A9:16

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

OREGON DEPARTMENT OF FISH & WILDLIFE *v.*  
KLAMATH INDIAN TRIBE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-2148. Decided October —, 1984

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

By a treaty with the United States signed in 1864, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians ceded their claim to roughly twenty million acres of land in southern Oregon and northern California. They received in return a reservation of some 1.9 million acres located entirely within the State of Oregon. The treaty guaranteed the tribes "the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits." Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Oct. 4, 1864, 16 Stat. 707, 708 (1866).<sup>1</sup>

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<sup>1</sup> Although the treaty mentioned only fishing and gathering rights, the parties agree that the treaty also reserved for the Indians the right to hunt and trap on reservation land.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 2, 1985

83-2148 - Oregon Department of Fish  
and Wildlife v. Klamath Indian Tribe

Dear John,

I agree.

Sincerely yours,



Justice Stevens

Copies to the Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 4, 1985

Re: No. 83-2148-Oregon Department of Fish & Wildlife v.  
Klamath Indian Tribe

Dear Bill:

OK I will take on the dissent in this one.

Sincerely,

*T.M.*  
T.M.

Justice Brennan

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 6, 1985

Re: No. 83-2148-Oregon Dept. of Fish and Wildlife v.  
Klamath Indian Tribe

Dear John:

In due course I hope to circulate a dissent in this one.

Sincerely,

*J.M.*  
T.M.

Justice Stevens

cc: The Conference

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Oregon Department of Fish & Wildlife v. Klamath Indian Tribe

No. 83-2148

JUSTICE MARSHALL dissenting.

The Court today holds that the Klamath Tribe has no special right to hunt and fish on certain lands although it has done so undisturbed from time immemorial. Instead, the Tribe is determined to be subject to state regulation to the same extent as any other person in the State of Oregon. This Court has in the past recognized that Indian hunting and fishing rights--even if non-exclusive, and even if existing apart from reservation lands--are valuable property rights, not fully subject to state regulation and not to be deemed abrogated without explicit indication.<sup>1</sup> Although all agree that hunting and fishing have historically been vital to the continued prosperity of the Klamath, the Court today assumes that the Klamath Tribe silently gave up its rights to hunt and fish on these lands in a 1901 agreement, approved by Congress in 1906, that had no purpose other than to benefit the Tribe for a previous injustice. It reaches this conclusion even though there is no historical evidence that any party to the agreement envisioned it as having the effect of altering tribal hunting and fishing practices, and

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<sup>1</sup>See e.g., United States v. Sioux Nation, 448 U.S. 371, 422-423 (1980); Menominee Tribe v. United States, 391 U.S. 404 (1968); Tulee v. Washington, 315 U.S. 681 (1942).

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Marshall

Circulated: JUN 25 1985

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-2148

OREGON DEPARTMENT OF FISH AND  
WILDLIFE, ET AL., PETITIONERS  
v. KLAMATH INDIAN TRIBE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[June —, 1985]

JUSTICE MARSHALL, dissenting.

The Court today holds that the Klamath Tribe has no special right to hunt and fish on certain lands although it has done so undisturbed from time immemorial. Instead, the Tribe is determined to be subject to state regulation to the same extent as any other person in the State of Oregon. This Court has in the past recognized that Indian hunting and fishing rights—even if non-exclusive, and even if existing apart from reservation lands—are valuable property rights, not fully subject to state regulation and not to be deemed abrogated without explicit indication.<sup>1</sup> Although all agree that hunting and fishing have historically been vital to the continued prosperity of the Klamath, the Court today assumes that the Klamath Tribe silently gave up its rights to hunt and fish on these lands in a 1901 agreement, approved by Congress in 1906, that had no purpose other than to benefit the Tribe for a previous injustice. It reaches this conclusion even though there is no historical evidence that any party to the agreement envisioned it as having the effect of altering tribal hunting and fishing practices, and even though hunting and fish-

<sup>1</sup> See e. g., *United States v. Sioux Nation*, 448 U. S. 371, 422-423 (1980); *Menominee Tribe v. United States*, 391 U. S. 404 (1968); *Tulee v. Washington*, 315 U. S. 681 (1942).

STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Marshall

Circulated: \_\_\_\_\_

Recirculated: JUN 27 1985

## SUPREME COURT OF THE UNITED STATES

No. 83-2148

OREGON DEPARTMENT OF FISH AND  
WILDLIFE, ET AL., PETITIONERS  
v. KLAMATH INDIAN TRIBE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[July 2, 1985]

JUSTICE MARSHALL, dissenting.

The Court today holds that the Klamath Tribe has no special right to hunt and fish on certain lands although it has done so undisturbed from time immemorial. Instead, the Tribe is determined to be subject to state regulation to the same extent as any other person in the State of Oregon. This Court has in the past recognized that Indian hunting and fishing rights—even if non-exclusive, and even if existing apart from reservation lands—are valuable property rights, not fully subject to state regulation and not to be deemed abrogated without explicit indication.<sup>1</sup> Although all agree that hunting and fishing have historically been vital to the continued prosperity of the Klamath, the Court today assumes that the Klamath Tribe silently gave up its rights to hunt and fish on these lands in a 1901 agreement, approved by Congress in 1906, that had no purpose other than to benefit the Tribe for a previous injustice. It reaches this conclusion even though there is no historical evidence that any party to the agreement envisioned it as having the effect of altering tribal hunting and fishing practices, and even though hunting and fish-

<sup>1</sup>See, e. g., *United States v. Sioux Nation of Indians*, 448 U. S. 371, 422-423 (1980); *Menominee Tribe of Indians v. United States*, 391 U. S. 404 (1968); *Tulee v. Washington*, 315 U. S. 681 (1942).

P. 1

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Marshall

Circulated: \_\_\_\_\_

Recirculated: JUN 28 1985

# SUPREME COURT OF THE UNITED STATES

No. 83-2148

OREGON DEPARTMENT OF FISH AND  
WILDLIFE, ET AL., PETITIONERS  
v. KLAMATH INDIAN TRIBE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[July 2, 1985]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins,  
dissenting.

The Court today holds that the Klamath Tribe has no special right to hunt and fish on certain lands although it has done so undisturbed from time immemorial. Instead, the Tribe is determined to be subject to state regulation to the same extent as any other person in the State of Oregon. This Court has in the past recognized that Indian hunting and fishing rights—even if non-exclusive, and even if existing apart from reservation lands—are valuable property rights, not fully subject to state regulation and not to be deemed abrogated without explicit indication.<sup>1</sup> Although all agree that hunting and fishing have historically been vital to the continued prosperity of the Klamath, the Court today assumes that the Klamath Tribe silently gave up its rights to hunt and fish on these lands in a 1901 agreement, approved by Congress in 1906, that had no purpose other than to benefit the Tribe for a previous injustice. It reaches this conclusion even though there is no historical evidence that any party to the agreement envisioned it as having the effect of altering tribal hunt-

<sup>1</sup>See, e. g., *United States v. Sioux Nation of Indians*, 448 U. S. 371, 422-423 (1980); *Menominee Tribe of Indians v. United States*, 391 U. S. 404 (1968); *Tulee v. Washington*, 315 U. S. 681 (1942).

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STYLISTIC CHANGES THROUGHOUT

P. 39

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Marshall

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Recirculated: JUL 1

## SUPREME COURT OF THE UNITED STATES

No. 83-2148

OREGON DEPARTMENT OF FISH AND  
WILDLIFE, ET AL., PETITIONERS  
v. KLAMATH INDIAN TRIBE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[July 2, 1985]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins,  
dissenting.

The Court today holds that the Klamath Tribe has no special right to hunt and fish on certain lands although it has done so undisturbed from time immemorial. Instead, the Tribe is determined to be subject to state regulation to the same extent as any other person in the State of Oregon. This Court has in the past recognized that Indian hunting and fishing rights—even if non-exclusive, and even if existing apart from reservation lands—are valuable property rights, not fully subject to state regulation and not to be deemed abrogated without explicit indication.<sup>1</sup> Although all agree that hunting and fishing have historically been vital to the continued prosperity of the Klamath, the Court today assumes that the Klamath Tribe silently gave up its rights to hunt and fish on these lands in a 1901 agreement, approved by Congress in 1906, that had no purpose other than to benefit the Tribe for a previous injustice. It reaches this conclusion even though there is no historical evidence that any party to the agreement envisioned it as having the effect of altering tribal hunt-

<sup>1</sup>See, e. g., *United States v. Sioux Nation of Indians*, 448 U. S. 371, 422-423 (1980); *Menominee Tribe of Indians v. United States*, 391 U. S. 404 (1968); *Tulee v. Washington*, 315 U. S. 681 (1942).

W

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 2, 1984

Re: No. 83-2148, Oregon Department of Fish &  
Wildlife v. Klamath Indian Tribe

Dear Byron:

Please join me in your dissent from denial of  
certiorari in this case.

Sincerely,



Justice White

cc: The Conference

83-2148-3

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 24, 1985

Re: No. 83-2148, Oregon Dept. of Fish & Wildlife  
v. Klamath Indian Tribe

Dear John:

Please join me.

Sincerely,



Justice Stevens

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 30, 1985

83-2148 Oregon Department v. Klamath Indian Tribe

Dear John:

Please add at the end of the next draft of your opinion that I took no part in the consideration or decision of the above case.

Sincerely,



Justice Stevens

lfp/ss

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

October 2, 1984

Re: No. 83-2148 Oregon Department of Fish & Wildlife v.  
Klamath Indian Tribe

Dear Byron,

Please join me in your dissent from denial of certiorari.

Sincerely,

*WR*

Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

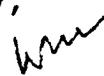
May 1, 1985

Re: 83-2148 - Oregon Dept. of Fish & Wildlife  
v. Klamath Indian Tribe

Dear John:

Please join me.

Sincerely,



Justice Stevens

cc: The Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

Circulated: APR 30 '85

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-2148

OREGON DEPARTMENT OF FISH AND  
WILDLIFE, ET AL., PETITIONERS  
v. KLAMATH INDIAN TRIBE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[May —, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

In 1901 the Klamath Indian Tribe ceded 621,824 acres of reservation land to the United States. The question presented in this case is whether the Tribe thereafter retained a special right to hunt and fish on the ceded lands free of state regulation. In answering that question we consider not only the terms of the 1901 Cession Agreement but also the predecessor 1864 Treaty that established the Tribe's original reservation and certain other events in the history of the Tribe.

I

In the early 19th century, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians claimed aboriginal title to approximately 22 million acres of land extending east from the Cascade mountains in southern Oregon. In 1864 these tribes (now collectively known as the Klamath Tribe) entered into a Treaty with the United States, ceding "all their right, title and claim to all the country claimed by them" and providing that a described tract of approximately 1.9 million acres "within the country ceded" would be set apart for them, to be "held and regarded as an Indian reservation." 16 Stat. 707, 708.<sup>1</sup> The 1864 Treaty also provided that the

<sup>1</sup>Treaty of Oct. 14, 1864 (ratified by the Senate on July 2, 1866, and proclaimed by President Grant on February 17, 1870).

Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

STATISTIC CHANGES THROUGHOUT  
SEE PAGES:

From: **Justice Stevens**

Circulated: \_\_\_\_\_

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MAY 29 1985

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-2148

OREGON DEPARTMENT OF FISH AND  
WILDLIFE, ET AL., PETITIONERS  
v. KLAMATH INDIAN TRIBE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[May —, 1985]

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### I

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<sup>1</sup>Treaty of Oct. 14, 1864 (ratified by the Senate on July 2, 1866, and proclaimed by President Grant on February 17, 1870).

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 24, 1985

Re: 83-2148 - Oregon Department of Fish  
& Wildlife v. Klamath  
Indian Tribe

Dear Chief:

Since I do not plan to make any changes in response to Thurgood's dissent, this case can come down whenever the printer can get it ready. (I am sending this note because I do not expect to be at the conference tomorrow morning).

Respectfully,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 1, 1985

No. 83-2148 Oregon Dept. of Fish and Wildlife  
v. Klamath Indian Tribe

Dear John,

Please join me.

Sincerely,



Justice Stevens

Copies to the Conference