Washington v. United States, No. 78-119

First Draft of Dissenting Opinion

MR. JUSTICE POWELL, dissenting.

I join parts I-III of the Court's opinion. I cannot agree, however, with the Court's conclusion that the treaties negotiated in 1854 and 1855 with the Indians of the Washington Territory require that half of all fish passing land upon which the Indians traditionally have fished be reserved for their exclusive use. On the contrary, the language, structure, and history of the treaties, as subsequently interpreted by this Court, plainly indicate that the fishing rights reserved by the Indians were rights of access only. Accordingly, I dissent.

I

At issue in these cases is the meaning of a single phrase found in each of the six Indian treaties negotiated and signed in 1854 and 1855. Each of the treaties provided 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."
question before us is whether this "common" fishing right is a right only to go to usual and accustomed fishing sites and take fish, or includes the greater right to exclude others from taking a particular portion of the fish that pass through the sites. As the Court observes, at the time the treaties were signed there was no need directly to address this question, for the surfeit of fish made lack of access the only constraint upon supply. Nonetheless, I believe that the fairest inference to be drawn from the language, structure, and history of the treaties is that the Indians sought and retained only the right to go to their accustomed fishing places and there fish along with non-Indians. Nothing in the language of the treaties indicates that any party understood that constraints would be placed on the amount of fish that anyone could take. To the contrary, the plain meaning of the language is that non-Indians would be allowed substantial freedom to take fish along with Indians even in areas where the Indians traditionally had fished. United States v. Winans, 198 U.S. 371 (1905). This interpretation is confirmed by the language used in the treaty negotiated with the Yakima Tribe, which explicitly includes what apparently is implicit in each of the treaties: the Indians' right to take fish on their reservations is exclusive. Thus, the Yakima
treaty provides that "[t]he exclusive right of taking fish in all the streams where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory...." 12 Stat. 951. The Court apparently concedes that this exclusive right to take fish does not mean that the Indians are entitled to all of the fish that would pass their reservation if left unmolested. Indeed, the Court would reduce the Indians' 50 percent portion by those fish caught on the reservation. See ante, at . But there is no reason apparent from the language used in the treaties why the "right of taking fish" means one thing for purposes of the exclusive right of reservation fishing and quite another for purposes of the "common" right of fishing at usual and accustomed places. The most reasonable conclusion, therefore, is that when the Indians and Governor Stevens agreed upon a "right of taking fish," they understood this right to be one of access—exclusive access with respect to fishing places on the reservation, and common access with respect to fishing places off of the reservation.3/  

In addition to the language and structure of the treaties, the historical setting in which they were negotiated
supports the inference that the fishing rights secured for the Indians were rights of access alone. The primary purpose of the six treaties negotiated by Governor Stevens was to resolve growing disputes between the settlers claiming title to land in the Washington Territory under the Land Donation Act of 1850, 9 Stat. 437, and the Indians who had occupied the land for generations. Under the bargain struck in the treaties, the Indians ceded their claims to vast tracts of land, retaining only certain specified areas as reservations, where they would have exclusive rights of possession and use. In exchange, the Indian tribes were given substantial sums of money and were promised various forms of aid. See, e.g., Treaty of Medicine Creek, 10 Stat. 1132. By thus separating the Indians from the settlers it was hoped that friction could be minimized.

The negotiators apparently realized, however, that restricting the Indians to relatively small tracts of land might interfere with their securing food. See Letter of George Gibbs to Captain McClellan, App. 326 ("[the Indians] require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish"). This necessary "liberty of motion" was jeopardized by the title claims of the settlers whose land abutted—or would abut—the waterways from which fish traditionally had been caught. Thus, in Governor Stevens'
report to the Commissioner of Indian Affairs, he noted the tension between the land rights afforded settlers under the 1850 Land Donation Act and the Indians' need to have some access to the fisheries. Although he expressed the view that "[i]t never could have been the intention of Congress that Indians should be excluded from their ancient fisheries," he noted that "no condition to this effect was inserted in the donation act," and therefore recommended the question "should be set at rest by law." Report of Governor Stevens to the Commissioner of Indian Affairs, App. 327. Viewed within this historical context, the common fishing right reserved to the Indians by the treaties of 1854 and 1855 could only have been the right to reproach off of the reservations in order to reach fish at the locations traditionally used by the Indians for this purpose. On the other hand, there is no historical indication that either side to the treaties understood that the Indians would be specifically guaranteed some set portion of the fisheries to which they traditionally had had access.  

II

Insofar as prior decisions of this Court speak to the question of the extent of Indian rights under the treaties of 1854 and 1855, those decisions confirm that the fishing rights reserved to the Indians by the treaties were rights of access.
only. Perhaps the case most directly on point is \textit{United States v. Winans}, 198 U.S. 371 (1905). In that case a settler had constructed several fish wheels in the Columbia River. These fish wheels were built at locations where the Indians traditionally had fished, and "'necessitate[d] the exclusive possession of the space occupied by the wheels,'" \textit{Ibid.}, at 380, thereby interfering with the Indians' treaty right of access. This Court reviewed in some detail the precise nature of the Indians' fishing rights under the Yakima Treaty, and concluded that the treaties,

"...reserved rights...to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the Territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places,' and the right 'of erecting temporary buildings for curing them.' The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—\textit{the right of crossing it to the river}—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty." (Emphasis added.)

In \textit{Winans} the Court concluded that this right of access had been abridged, stating that "in the actual taking of fish white men may not be confined to a spear or crude net, but it does not
follow that they may construct and use a device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does." Id., at 382 (emphasis added). Thus, Winans was decided upon the basis of a treaty-secured right of access alone. Moreover, the Court's analysis of the treaty right at issue in Winans strongly indicates that nothing more than a right of access could fairly be inferred from the treaty.4/ Nor do the Puyallup cases interpret the common fishing right of the treaty to require an apportionment of Washington State fisheries in every case. In Puyallup Tribe v. Dept. of Game of Washington, 391 U.S. 392 (1968) (Puyallup I), the Court ruled that fishing regulations could interfere with the Indians' rights of access to their "usual and accustomed" fishing spots only to the extent necessary for conservation. The Court observes that this connotes something more than mere "equal access" for the Indians, inasmuch as non-Indians plainly were subject to regulations not connected with conservation. See ante, at __. Puyallup I does not, however, indicate that the treaties should be interpreted as securing anything other than some form of a right of access. As noted above, the history and the language of the accords suggest that the right of taking fish in common with residents of the Territory was included within the treaties in order to assure that Indians would be
able to leave their reservations and travel over privately owned lands to their traditional fishing areas in order to seek fish.

Under the Land Donation Act and the common law of property, this right was not one shared by every resident in the Territory. Quite the contrary, the danger the Indians sought to avoid was in part that they, like others, would be excluded from private land— in effect that those settlers who came to own land along the banks of the various waterways would come to have an effective monopoly upon the taking of fish. See supra, at ___. Thus understood, Puyallup I confirms that the treaties secured only rights of access for access greater than that generally available to residents of the Territory was precisely what the Indians bargained for and received.

In permitting the State to place limitations on the Indians' access rights when conservation so requires, the Court went farther in Puyallup I and suggested that even regulations thus justified would have to satisfy the requirements of "equal protection implicit in the phrase 'in common with.'" 391 U.S., at 403. In Washington Game Department v. Puyallup Tribe, 414 U.S. 44 (1973) (Puyallup II), we took up this suggestion and considered whether the conservation measures taken by the State of Washington had been even-handed in their treatment of the Indians. At issue was a Washington State ban on all net
fishing--by both Indians and non-Indians--for steelhead trout in the Puyallup River. According to testimony before the trial court, the annual run of steelhead trout in the Puyallup River was between 16,000 and 18,000, while unlimited sport fishing would result in the taking of between 12,000 and 14,000 steelhead annually. Because at least 25% of the entire run was required for escapement for hatcheries and spawning, the sport fishing totally preempted all commercial fishing whatsoever by the Indians, hence the ban on all net fishing. The Indians claimed that this ban amounted to an improper subordination of their treaty rights to the privilege of recreational fishing enjoyed by non-Indians.

We ruled in Puyallup II that the ban on net fishing, insofar as it applied to Indians covered by treaty, was an infringement of their rights. In effect, the State in the name of conservation was discriminating against the Indians "because all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians, is allowed." 414 U.S., at 48 (emphasis added). Because "[o]nly an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species," Ibid., at 48, we remanded to the Washington courts for a fair apportionment of the steelhead run between Indian net
fishing and non-Indian sport fishing. Despite the Court's statements to the contrary, see ante, at __, we did not rule in Puyallup II that all fisheries passing by Indian fishing sites in the State of Washington must be apportioned between Indian and non-Indian fishermen. Rather, the question before the Court in that case was the narrow one whether the State was free to exhalt methods of fishing used exclusively by non-Indians over Indian methods of fishing, once it was determined that some regulation of fishing was required for purposes of conservation. Having decided that some regulation was required, but that the treaty forbade the State to choose to regulate only Indian fishing for conservation purposes, we remanded for an apportionment between net fishing and sport fishing.

Emerging from our decisions in Puyallup I and Puyallup II, therefore, is the proper approach to interpretation of the Indians' common fishing rights at the present time, when demand outstrips supply. The Indians have the right to go to their traditional fishing grounds to fish. Once there, they cannot be restricted in their methods or in the size of their take, save insofar as restrictions are required for the sake of conserving the fisheries from which they draw. Even in situations where such regulations are required, however, the State must be even-handed in limiting Indian and non-Indian fishing activity. It
is not free to make the determination—apparently made by Washington with respect to the ban on net fishing in the Puyallup River—that Indian fishing rights will be totally subordinated to the interests of non-Indians.

III

In the present case, the District Court did not find any particular State fishing regulation to be invalid because it restricted impermissibly the Indians' right to take fish at their usual and accustomed fishing places. Rather, after concluding that Indian fishing off of the reservation properly was subject to some State regulation in the interests of conservation, the court immediately considered an apportionment between Indians and non-Indians, noting that "[b]y dictionary definition...'in common with' means sharing equally." 384 F.Supp., at 343. The court interpreted this equal sharing to require that "non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish...." Ibid.

In my view this approach was a substantial departure from our prior cases. Indeed, in effect it reformed the bargain.
struck with the Indians in 1854-1855 to conform with what they might perceive as a just result. Under Puyallup I it is plain that the State of Washington properly can impose regulations on Indians as well as non-Indians when it is necessary in order to preserve and protect the fisheries of the State. But the regulations promulgated for this purpose need not take the form of a specific apportionment of the harvestable fish between Indians and non-Indians. Under our decision in Puyallup II the Indians' right under the treaties is only to be free even from conservation-based fishing regulation where it is shown that the State in structuring its conservation program has chosen to subordinate the rights of Indian fishermen to those of non-Indians. Here there was no such showing. On the contrary, from what appears in the record, the regulations in force at the time of the District Court's decision were entirely even-handed. Nothing more is required by the treaties, save insofar as access to the fishing places is concerned.

To be sure, the unforeseen circumstances developing in the last 115 years may have affected seriously the Indians' ability to catch fish in the Pacific Northwest. This is not the result, however, of State regulation, but rather of changes in the population of the area and in the technology that makes commercial fishing an attractive business. To some extent the
disadvantages visited upon the Indians from these unavoidable changes may be ameliorated by special federal programs to modernize the Indians' fishing equipment in order to make them truly competitive with their non-Indian counterparts. But this Court should not undertake to rewrite the treaties of 1854-1855 in order to achieve what it may perceive to have been a just bargain in retrospect. I therefore would reverse the judgment of the Ninth Circuit and remand for consideration whether the regulations in force before the District Court acted in this case were based upon the State's decision to subordinate the Indians' fishing rights to those of the non-Indians.
Footnotes


2. Treaty of Medicine Creek, supra, at 1133. There were some slight, immaterial variations in the language used. See, e.g., Treaty with the Yakimas, quoted infra, at ___.

3. Indeed, if the Court's interpretation of the treaties were correct, then the exclusive right with respect to reservation fishing would be largely superfluous. If the Indians had the right to 50%, and no more, of the fish irrespective of where they are caught, then it hardly would be of any great value to them that they could keep others from taking fish from locations on the reservation. The most reasonable way to interpret the exclusive right of reservation fishing so that it was of value, therefore, is as a special right of access.

4. The Government's brief in Winans, cited approvingly by the Court in that case, indicates that the Government also understood the treaty to guarantee nothing more than access rights to traditional fishing locations. In that brief, the
Government advocated only "a way of access, free ingress and egress to and from the fishing grounds." Brief for Appellant, No. 180, O.T. 1904, p. 56.

This interpretation of Winans was unequivocally affirmed by the Court a short time later in Seufert Bros. Co. v. United States, 249 U.S. 194 (1919). At issue in that case was whether Indians from the Yakima nation had the right under their treaty to cross the Columbia River and fish from the south bank, which admittedly had belonged to other tribes at the time of the treaty. The Court viewed Seufert, a case unquestionably involving only the right of access, to be squarely controlled by its earlier decision in Winans. 249 U.S., at 198. Moreover, the Court reaffirmed its view that the effect of the reservation of common fishing rights to the Indians amounted to a servitude.

5. Puyallup Tribe v. Washington Game Dept., 433 U.S. 165 (1977) (Puyallup III), is of little assistance in deciding the issue in the present cases. The Court in that case decided only that the regulations permitted in Puyallup I could be applied against Indian fishing on the reservations, as well as off of them.
I am not in agreement, however, with the Court's conclusion that the treaties negotiated in 1854 and 1855 with the Indians of the Washington Territory require, as a starting point for determining the fishing rights of Indians and non-Indians, a "50-50" division of all fish passing land upon which the Indians traditionally have fished. Ante, at 25 et seq. The Court's opinion, as I read it, accepts the District Court's "50-50" division between the contending parties, subject to some downward adjustment on the Indians' side. The treaty language to "take fish . . . in common" is construed to require this. The Court apparently views the treaties as guaranteeing in effect to the Indians a specified percentage of the runs of the anadromous fish in question. As I do not believe the language and history can be construed to support the Court's interpretation, I dissent.
In short, they won a right of access to fish. In addition, the Indians retained the exclusive right to take fish on their reservations, a right not involved in this litigation.
Quite to the contrary, the language confers upon non-Indians the same right as is conferred upon Indians even in areas where the Indians traditionally had fished. *Wash. v. U.S.* Winans, 198 U.S. 371 (1905). It hardly could be argued that Congress intended to guarantee non-Indians any specified percentage of the *fish taken* and Indians were given no different right.
All that the Indians had before non-Indians arrived in the Territory was the natural right to fish, a right exercised at identifiable locations. All that the treaties sensibly could have provided was the preservation of a right of access to these locations for the purpose of fishing there in common with non-Indians who had such access.

II

Prior decisions of this Court have prevented the dilution of these treaty rights, but none addressed the issue presently before us. I read these decisions as supporting the view expressed above. This is particularly true of U. S. v. Winans, 198 U. S. 371 (1905), the case most directly relevant.
The Court thus read these treaties as intending to "give[] a right in the land" — a "servitude" upon all non-Indian land — to enable Indians to fish "in common with citizens of the Territory". The focus was on access to the traditional fishing areas for the purpose of enjoying the "right of fishing". Id., at 380. The Court concluded, on the facts before it in *Wineau*, that the right of access to fish in these areas had been abridged. It stated that
Nor do the Puyallup cases interpret the treaties to require that any specified proportion of the catch be reserved for Indians. Indeed, Puyallup Tribe v. Dept. of Game of Washington, 391 U. S. 392 (1968) (Puyallup I), consistently with Winans, described the right of Indians under the treaties as "the right to fish 'at all usual and accustomed places'." Id., at 398.* The issue before the Court in Puyallup I was the extent to which the state could regulate fishing. It held:

"... the 'right' to fish outside the reservation was a treaty 'right' that could not be qualified or conditioned by the State. But 'the time and manner not being defined or established by the treaty, were within the reach of state power.'" Id. at 399.

*The treaty right was repeatedly referred to in Puyallup I as a "right to fish". This term was used no less than five times in the course of the opinion, with no distinction being made between the right "to fish" and to take fish". Id., at 398-99.
The Court today finds support for its views in *Puyallup I* because the Court there recognized that apart from conservation measures, the State could not impose restrictive regulations on the treaty rights of Indians. It does not follow from this that an affirmative right to a specified percentage of the catch is guaranteed by the treaties. The Court misappreciates the nature of the basic right sought to be preserved by Congress. This, as noted above, was a right of access by Indians to their usual and accustomed fishing areas - a right to reach these areas - described in *Winans* as a servitude or right over land not owned by Indians. Putting it differently, this is a right to trespass on any land when necessary to reach the traditional fishing areas, and is a right not enjoyed by non-Indian residents of the Territory or such residents following statehood.
Relying upon the reference in *Puyallup II* to "apportionment", the Court expansively reads the decision in that case as strongly implying, if not holding, that all fisheries at Indians' "accustomed" fishing sites in the State must be apportioned between Indian and non-Indian fishermen. This view certainly is not a necessary reading of *Puyallup II*. Indeed, I view it as a quite unjustified extension of that case. *Puyallup II* addressed an extremely narrow question: whether there had been "discrimination" by state regulations under which "all Indian net fishing [was] barred and only hook and line fishing entirely pre-empted by non-Indians, is allowed." *Id.*, at 48. The entire opinion of the Court is confined to less than five pages of the U. S. Reports, and Mr. Justice Douglas stated at the outset that the issue of "allocating the catch" was mentioned "only to reserve decision on it". *Id.*, at 48. In any event, to the extent language in *Puyallup II* may be read as supporting some general apportionment of the catch, it is dictum that is plainly incompatible with the language and historical understanding of these treaties.
In my view, the district court below - and now this Court - has formulated an apportionment doctrine that cannot be squared with the language or history of the treaties, or indeed with the prior decision of this Court. It has been argued to us that the application of this doctrine, and specifically the construction of the term "in common" as requiring a basic 50-50 apportionment, will result in an extraordinary economic windfall to Indian fishermen in the commercial fish market. This is said to give them a substantial position in the market wholly protected from competition from non-Indian fishermen. Apparently, non-Indian fishermen would be required from time to time to stay off fishery areas completely while Indians catch their Court-decreed allotment. In sum, it is urged that the district court's decision, if affirmed in substance by this Court, will discriminate quite unfairly against non-Indians. I find it difficult to reject these arguments as being unfounded.

To be sure, if the treaties must be construed to produce such a result, it would be our duty so to construe them. For the reasons stated above, I think the Court's construction virtually ignores the historical setting and purpose of the treaties, considerations that bear compellingly upon a proper reading of their language. Nor do
the prior decisions of this Court support or justify what seems to me to be a substantial reformation of the bargain struck with the Indians in 1854-1855.

I would hold that the treaties gave to the Indians two significant rights that should be respected: as made clear in *Winans*, the clear intention of the treaties was to assure to Indians the right of access over private lands so that they could continue to fish at their usual and accustomed fishing grounds. See also *Seufert Bros. Co. v. United States*, 249 U.S. 194 ( ). As subsequently construed, the treaties exempt Indians from state regulation (including the payment of license fees) except that necessary for conservation in the interest of all fishermen. Moreover, Indians have the exclusive right to fish on their reservations, and are guaranteed enough fish to satisfy their ceremonial and subsistence needs. Finally, under *Puyallup II*, it is settled that even a facially neutral conservation regulation is invalid if its effect is to discriminate against Indian fishermen.

The foregoing package of rights, privileges and exemptions - possessed only by *non-Indians* - is quite substantial. I find no basis for according additional advantages to Indian fishermen.
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