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
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
of access to usual and accustomed fishing sites for the purpose of fishing there, 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 to fishing areas the only constraint upon supply. Nonetheless, I believe that the compelling inference to be drawn from the language and history of the treaties is that the Indians sought and retained only the right to go to their accustomed fishing places and there to fish along with non-Indians. In addition, the Indians retained the exclusive right to take fish on their reservations, a right not involved in this litigation. In short, they have a right of access to fish.

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, or that the Indians would be guaranteed a percentage of the catch. Quite to the contrary, the language confers upon non-Indians precisely the same right to fish that it confers upon Indians, even in those areas where the Indians traditionally had fished. United States v. Winans, 198 U.S. 371 (1905). As it cannot be argued that Congress intended to guarantee non-Indians any specified percentage of the available fish, there is neither force nor logic to the argument that the same language—the "right to take fish"—does guarantee such a percentage to Indians.
This conclusion 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. See ante, at __. There is no reason apparent from the language used in the treaties why the "right of taking fish" should mean 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. Since the Court interprets the right of taking fish in common to be an entitlement to half of the entire catch taken from fisheries passing the Indians' traditional fishing grounds, it therefore should follow that the Court would interpret the exclusive right of taking fish to be an entitlement to all of the fish taken from fisheries passing the Indians' reservations. But the Court apparently concedes that this exclusive right is not of such draconian proportions. Indeed, the Court would reduce the Indians' 50 percent portion by those fish caught on the reservation. The more 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 to fish—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 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, over and above their exclusive fishing right on their reservations, to roam 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 any of the parties 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

Prior decisions of this Court have prevented the dilution of these treaty rights, but none has addressed the issue now before us. I read these decisions as supporting the interpretation set forth above. This is particularly true of United States v. Winans, 198 U.S. 371 (1905), the case most directly relevant. 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,'" id., at 380, thereby interfering with the Indians' treaty right of access to fish. 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—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." Id., at 381 (Emphasis added).

The Court thus viewed these treaties as intended to "giv[e] 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 Winans Court concluded, on the facts before it, that the right of access to fish in these areas had been abridged. It stated 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 solely upon the basis of a treaty-secured right of access to fish. Moreover, the Court's analysis of the treaty right at issue in Winans strongly indicates that nothing more than a right of access fairly could be inferred from the treaty.4/

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.,
The issue before the Court in *Puyallup I* was the extent to which the state could regulate fishing. It held that,

"...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 of fishing...necessary for the conservation of fish,' not being defined or established by the treaty, were within the reach of state power."

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. But it does not follow from this that an affirmative right to a specified percentage of the catch is guaranteed by the treaties to Indians or to non-Indians, for the Court misapprehends the nature of the basic right sought to be preserved by Congress. This, as noted above, was a right of the Indians to reach their usual and accustomed fishing areas. Put differently, this right, described in *Winans* as a servitude or right over land not owned by the Indians, entitles the Indians to trespass on any land when necessary to reach their traditional fishing areas, and is a right not enjoyed by non-Indian residents of the area.

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. Accordingly, in Washington Game Department v. Puyallup Tribe, 414 U.S. 44 (1973) (Puyallup II), we considered whether the conservation measures taken by the State had been even-handed in the 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 the escape of at least 25% of the entire run was required for hatcheries and spawning, the sport fishing totally preempted all commercial fishing by Indians. The State therefore imposed a 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 held in Puyallup II that the ban on net fishing, as it applied to Indians covered by treaty, was an infringement of their rights. 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 preempted by non-Indians, is allowed." 414 U.S., at 48. 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," Id., 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.

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 the catch at Indians' "accustomed" fishing sites 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, [was] allowed." 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.6/

Emerging from our decisions in Winans, 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 conserving the fisheries from which they draw. Even in situations where such regulations are required, however, the State must be evenhanded 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 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 decisions of this Court. The application of this doctrine, and particularly the construction of the term "in common" as requiring a basic 50-50 apportionment, is likely to result in an extraordinary economic windfall to Indian fishermen in the commercial fish market by giving them a substantial position in the market wholly protected from competition from non-Indian fishermen. Indeed, non-Indian fishermen apparently will be required from time to time to stay out of fishing areas completely while Indians catch their Court-decreed allotment. In sum, the District Court's decision will discriminate quite unfairly against non-Indians.
To be sure, if it were necessary to construe the treaties to produce these results, it would be our duty so to construe them. But 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 give to the Indians two significant rights that should be respected. As made clear in Winans, the purpose 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. Indians also have the exclusive right to fish on their reservations, and are guaranteed enough fish to satisfy their ceremonial and subsistence needs. Moreover, 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. 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. This package of rights, privileges, and exemptions--possessed only by Indians--is quite substantial. I find no basis for according them additional advantages.
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. Ibid., at 199.

5. The treaty right was repeatedly referred to in Puyallup I as a "right to fish." This phrase was used no less than seven times in the course of the opinion, with no distinction being made between the right "to fish" and the right "to take fish." Id., at 397-99.

6. Having decided that some regulation was required, but that the treaty forbad the State to choose to regulate only Indian fishing for conservation purposes, we remanded for an apportionment between net fishing and sport fishing. 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.
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,

[Signature]

Mr. Justice Powell

Copies to Mr. Justice White
Mr. Justice 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
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 the 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 fishermen 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 forbade 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,

Mr. Justice Stevens

cc: The Conference
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,

[Signature]

Mr. Justice Powell

Copies to the Conference
Re: 78-119 - Washington v. United States, etc.

Dear Lewis:

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

Sincerely yours,

Mr. Justice Powell

Copies to the Conference
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 treaties guaranteed to the Indians, or to a single Indian if he was the only Indian fisherman, 50% of the commercial salmon harvest in perpetuity, I also have difficulty in arriving at a principal basis for reserving to 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,

[Signature]

Mr. Justice Stevens

Copies to the Conference

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