

Docket Nos. 247 and 319
Indian Fishing Rights (Hunting and
fishing rights under treaties with
the United States)

ASSOCIATION OF AMERICAN LAW SCHOOLS

Committee on Supreme Court Decisions

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THE PUYALLUP TRIBE, Petitioner

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON and
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON, Respondents

Docket No. 247

NUGENT KAUTZ, et. al., Petitioners

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON and
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON, Respondents

Docket No. 319

Memorandum on Case in the United States Supreme Court

This is one of a series of memoranda on cases pending before the United States Supreme Court prepared pursuant to a program of the Association of American Law Schools, in which the American Bar Foundation is collaborating. They are being distributed to representatives of the press, radio and television for the purpose of contributing to a better public understanding of the work of the United States Supreme Court.

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Analysis prepared by:
Professor Arthur E. Bonfield
University of Iowa
March 22, 1968

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Opinion below: Department of Game, et al. v. The Puyallup Tribe, Inc., et al., 422
P.2d 754 (1967). The Kautz case is unreported.

Related opinion: Maison v. Confederated Tribes of Umatilla Indian Reservation,
314 F.2d 169 (1963).

SUMMARY MEMORANDUM

Background

In 1854 the "tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets" entered into a treaty with the United States government. Among the Indian signatories to this treaty were the Puyallup and Nisqually Tribes. The Indians ceded to the United States most of the large area they then occupied, and agreed to discontinue hostilities in return for a token payment of money, exclusive possession and use of a small area which was to be their Reservation, and "The right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." Relying on the treaty commitment described above the decedents of these Indians in the State of

Washington freely fished with nets and traps as their forebears had at their usual and accustomed places in the waters of the Puyallup River, Commencement Bay, and the Nisqually River.

In 1954 the State of Washington charged a Puyallup Indian with fishing, in violation of the Washington conservation laws, at one of the usual and accustomed fishing grounds of the tribe. Dismissal of this prosecution by the Superior Court of Washington was affirmed by a divided Washington Supreme Court in State v. Satiacum, 50 Wash. 2d 513, 314 P.2d 400 (1957).

Facts in Present Cases

The present controversy was initiated by the Washington State Departments of Fisheries and Game when they instituted two suits, one against the Puyallup Tribe, and the other against Kautz et al, members of the Nisqually Tribe. In these suits the State agencies sought a declaration that outside of the reservation these Indians are subject to and must abide by the State conservation laws, even when they are fishing in their usual and accustomed grounds and stations within the meaning of the Treaty of 1854. The agencies also requested an injunction enforcing that declaration.

In the Puyallup case, the Superior Court of Washington permanently enjoined the Puyallup Indians from fishing in the Puyallup River and Commencement Bay in any manner that is contrary to the rules and regulations of the Department of Fisheries of the State of Washington. While an appeal was pending to the Washington Supreme Court, Robert Satiacum, who had been acquitted by the Washington Supreme Court in the 1957 case, was found guilty of contempt of court for violating the Superior Court's injunction, and was punished by 60 days in jail. The Washington State Supreme Court subsequently held that the trial court's injunction was somewhat too broad and had to be modified. It also held that a member of the Puyallup Tribe cannot be enjoined from fishing at one of the usual and accustomed places of that tribe, "unless he is violating a statute or regulation of the Department promulgated thereunder, which has been established to be reasonable and necessary for the conservation of the fishery." The court noted, however, that the state met that test here. According to the Court the evidence established that continued use by the Indians of their drift and set nets would result in the nearly complete destruction of the salmon and steelhead fish runs in the Puyallup River, and that a regulation prohibiting the use of such nets in those waters was necessary for the preservation of the fishery. The trial court thereupon modified its original injunction to prohibit all members of the Puyallup Tribe from "drift net or set net fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington." In the Kautz case the Superior Court issued a permanent injunction barring Kautz et al. from fishing in any manner contrary to the state statutes and regulations of the State Departments of Game and Fisheries and the Supreme Court of Washington affirmed that decision.

The Issue and Its Significance

On review in the United States Supreme Court the most significant issue involved in these cases is the extent to which a state may impose its conservation laws on Indians claiming off-reservation fishing rights under treaty provisions similar to or identical to the Treaty involved here. The states immediately affected by these

decisions will be Washington, Oregon and Idaho. Several groups of Indians residing in those states claim the right to engage in unregulated fishing at certain places off the reservation by virtue of the treaty involved here or one of several others with identical language on this point.

At present the law on this subject seems confused. Each of the three states affected by the problem of off-reservation fishing rights granted Indians by treaty considers itself bound by a different rule respecting the extent of its authority to regulate such off-reservation Indian fishing. Idaho follows State v. Arthur, 74 Ida. 251, 261 P.2d 135 (1953) holding that it may not, under its conservation laws, regulate activities reserved to the Indians by a treaty with the United States; Oregon follows Maison v. Confederated Tribes of Umatilla Indian Reservation, 314 F.2d 169 (1963) permitting that state to regulate such treaty rights as are involved here only where it can demonstrate that the specific regulation sought to be enforced is "indispensable" to the state's conservation program; and the Washington Supreme Court enunciated the rule in the Puyallup case being reviewed here that Washington may regulate off-reservation Indian fishing rights reserved under a Treaty where it can be shown the regulations are "reasonable and necessary" to conservation.

The states of Oregon and Idaho filed amicus curie briefs urging that the United States Supreme Court review these cases and affirm the Washington Supreme Court's view of the law which the three states consider essential to their conservation efforts. Washington argues that the language of the Treaty reserves the right to the Indians to fish at their accustomed and usual places only "in common with all citizens of the Territory" and, therefore, the Indians are subject in the exercise of their treaty rights to reasonable state conservation laws applicable to all Washington citizens.

The Indians consider the "reasonable and necessary" test of the Washington Supreme Court inappropriate and improper because it would completely destroy their treaty rights. In its place the Puyallups and a brief amicus curie of the Association on American Indian Affairs support the indispensable test of the Maison case "or a similar test or standard which would allow for the exercise of the fishing rights reserved to them by a solemn Treaty with the United States." They want to force the State Department of Fishery to use the available alternative suggested in the Maison case of reducing the allowable catch of the non-Indian commercial and sports fisherman by an amount sufficient to secure the conservation of the fish instead of barring off-reservation Indian net fishing in their tribe's traditional and usual places.