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Puget Sound Gillnetters Ass'n v. United States
District Court, Docket Nos. 77-3129, 77-3208,
77-3209, 77-3654, 77-3655 (605 F.2d 492 (9th
Cir. 1979))

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Appellee's Brief

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES,)
)
) Appellant) No. 77-3208
) v.) (DC 68-513 Oregon)
) STATE OF OREGON,)
))
) Appellee,)
)
)
) COLUMBIA RIVER FISHERMEN'S)
) PROTECTIVE UNION, INC.,)
) et al.,) No. 77-3209
)) (DC 68-513 Oregon)
) Petitioners-Appellants,)
) v.)
) UNITED STATES DISTRICT COURT)
) FOR THE DISTRICT OF OREGON,)
))
) Respondent,)
) and)
) UNITED STATES OF AMERICA,)
) et al.,)
))
) Real Parties in)
) Interest-Appellees.)

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

STATEMENT OF THE CASE

Two matters are here from U. S. v. Oregon: an original mandamus action (No. 77-3208), and an appeal from the permanent injunction of September 2, 1977 (No. 77-3209). Both have been consolidated by order of this Court for purposes of oral argument, along with several other actions arising out of a related controversy in the State of Washington (U. S. v. Washington).

STATEMENT OF FACTS

A brief history of what petitioners term "the Columbia River controversy" may be of assistance to the Court in understanding the origins of the issues presented in the mandamus proceeding and the appeal.

In 1968, the United States, as trustee of the Yakima Nation, the Confederated Tribes of the Umatilla Reservation, and the Nez Perce Tribe of Idaho, filed in the United States District Court for the District of Oregon a complaint for declaratory injunctive relief. The complaint sought to enjoin the State of Oregon from regulating fishing on the Columbia River by the aforesaid tribes in a manner which allegedly conflicted with rights guaranteed to the tribes by the various treaties of 1855 between the United States and the tribes. The three Indian tribes were subsequently permitted to intervene as plaintiffs, as were the Confederated

Tribes and Bands of the Warm Springs Reservation.

Meanwhile, a separate group of Indians brought a separate but similar action in the same Court, known as SoHappy, et al v. Smith, et al. The two cases were subsequently consolidated for trial.

The court, by pre-trial order, segregated certain issues for separate hearing and determination, and its 1969 opinion and order dealt only with those issues. The court construed the treaty right "of taking fish at all usual and accustomed places" on the Columbia River and its tributaries, and declared the manner and extent to which the State of Oregon can regulate Indian fishing. SoHappy v. Smith, 302 F Supp 899 (D. Or, 1969).

The district court retained continuing jurisdiction over the case. No one appealed, and all parties accommodated themselves to the decree until April 1974.

Events of 1974 are well set forth in this Court's opinion in SoHappy v. Smith, 529 F2d 570 (9th Cir, 1976). In that case, this Court, among other things, affirmed the order of the district court denying intervention by the Columbia River Fishermen's Protective Union, Inc. and Leslie B. Clark, the petitioners-appellants in the present proceeding before this Court. Petitioners were granted amicus curiae status.

In the summer of 1976, following the procedure suggested by this Court's 1976 opinion, the State of Oregon filed a petition for additional declaratory and injunctive relief and commenced

preparation for trial on the remaining issues, which had been segregated by the 1969 pre-trial order but were never tried. All parties agreed that it might take several years to resolve the untried issues.

With that prospect in mind, attorneys for the State of Oregon, the United States, and the intervening Indian tribes met in late August, 1976, and agreed that prior to continuing the proceedings further in the district court, it would be beneficial to the fishery resource to enter into discussions concerning the feasibility of developing a temporary plan for the management of upriver anadromous fish runs in the Columbia River. Those negotiations culminated in a motion of all parties for the approval of the plan, which became an order of the district court on February 28, 1977.

After the management plan was adopted by the order of the district court, the states of Oregon and Washington, meeting as the Columbia River Compact, adopted various fishing regulations during the 1977 fishing season which were designed to conserve the resource and to implement the plan. On August 19, 1977, the Compact agencies promulgated a regulation closing the commercial gillnet fishing season on the Columbia River as of 6:00 p.m., August 23, 1977. The purpose of this regulation was to protect a late-summer run of upriver steelhead, and to provide the treaty tribes with an opportunity to catch their share of the Columbia River fall chinook salmon destined to reach spawning grounds

above Bonneville Dam. (See Affidavit of John R. Donaldson submitted in support of the August 23, 1977 temporary restraining order.)

On August 23, 1977, the Superior Court of the State of Washington, in the case of Columbia River Fishermen's Protective Union, Inc. and Leslie B. Clark v. Dixie Lee Ray, et al, No. 58-054, orally announced that it would grant a preliminary injunction prohibiting the Governor of Washington and the Director of Fisheries for the State of Washington from enforcing the management plan. (See Affidavit of George E. Dysart submitted in support of the August 23, 1977 temporary restraining order).

On that same date, the United States and the State of Oregon jointly moved for the issuance of a temporary restraining order prohibiting petitioners and all persons acting in concert or participation with them from engaging in chinook salmon fishing with gillnets for commercial purposes in the Columbia River below Bonneville Dam after 6:00 p.m. on August 23, 1977 and during the pendency of the order. The District Court granted this motion on August 23, 1977.

On September 2, 1977, a hearing was held upon motion for an order to make the temporary restraining order a permanent injunction, and petitioners appeared through counsel and opposed the motion. The motion was granted and the permanent injunction here being appealed from was issued.

ARGUMENT

The State of Oregon will brief the following issues, listed A through E, which appear to be the most significant to the case of U. S. v. Oregon. The State of Oregon urges this Court to separately consider the issues raised in U. S. v. Oregon.

- A. The geographical reach of personal jurisdiction by the United States District Court for the District of Oregon includes the waters north of the mid-channel boundary of the Columbia River.

The geographical boundary between Oregon and Washington is the mid-channel in the Columbia River. Act of July 31, 1958, PUB.L. 85-575, 72 Stat 455; ORS 186.510; RCW 43-58-050.

Under the Act of Congress admitting Oregon to the Union, the State of Oregon has "jurisdiction in civil and criminal cases upon the Columbia River. . . concurrently with" bordering states. Act of February 14, 1859, ch 33, section 1, 11 Stat 383. The geographical reach of personal jurisdiction of the District Court of Oregon is identical to that of the Oregon State courts. See 28 USC § 17. The District Court for Oregon has held that its process is effective on the Columbia River even north of the mid-channel boundary. The Annie M. Smull, 1 Fed Cas. 938 (D. Or, 1967).

Petitioners claim that Neilson v. Oregon, 212 US 350 (1909) is applicable to the present situation. In that case Oregon law specifically prohibited fishing on the Columbia River on Sundays, and Washington law specifically authorized such fishing. Neilson, a Washington citizen, was convicted by an

Oregon court for fishing on Sunday on the Washington portion of the river. The United States Supreme Court reversed, holding that the State of Oregon could not override the will of the Washington legislature and punish a person for doing in Washington something he was authorized by the laws of that state to do.

The situation presented here is different. The action by Judge Belloni does not purport to enforce "Oregon" law in conflict with "Washington" law; rather, the temporary restraining order and the permanent injunction seek to protect rights established by federal law (the Indian treaties).

B. The September 2, 1977 permanent injunction is valid and enforceable as against petitioners.

Petitioners argue that the permanent injunction is unenforceable against them because they were not "parties" to the underlying litigation (U. S. v. Oregon), were not connected with any of the parties as "officers, agents, servants, employes, and attorneys", and were not acting "in active concert or participation with" any party. Fed. R. Civ. P. (65(d)).

The State of Oregon generally adopts the argument set forth in the U. S. Government's Response to the Petition for Mandamus at pp. 46-55, that the petitioners were in privity with either the State of Oregon or the State of Washington and are therefore bound by the orders of the court in the underlying litigation in U. S. v. Oregon.

The citizens of both of those states have a common public right in the salmon resource of the Columbia River. Both

states, in their sovereign capacity, through the exercise of their police powers, regulate the salmon resource for the common public good. The regulation of that resource is a joint effort implemented through the Oregon-Washington Columbia River Compact.

Regulations are formulated under guidelines provided to the staff by each state in accordance with state policy, with such modifications as may be directed by federal or state court decisions. In so regulating and managing this resource, both states have had to consider obligations under various treaties with Indian tribes. In litigation concerning these obligations, the states clearly are representing the common public interest in that resource, and, as such, are representing all their citizens. Where a matter of sovereign interest is concerned, a state is often held to adequately represent the interests of its citizens. See City of Tacoma v. Taxpayers of Tacoma, 357 US 321 (1957); New Jersey v. New York, 345 US 369 (1953).

Petitioners claim that they have a special private interest which the state did not or could not adequately represent. Presumably, this claimed interest is the privilege derived from the state to commercially harvest the salmon resource. The State of Oregon did represent all its citizens, in their common interest in that resource; and the mere fact that some citizens have an expectation of commercially harvesting the resource does not create a compelling private interest sufficient to warrant that they be treated differently than other citizens or be not

bound by the state's representation of the common public interest in the underlying litigation of U. S. v. Oregon.

- C. The September 2, 1977 permanent injunction is not void for failure to recite findings of fact and conclusions of law.

Petitioners urge the court to strictly construe Fed. R. Civ. P. 52(a) by finding the district court's order of September 2, 1977 void for failure to include findings of fact and conclusions of law. While the language of Rule 52(a) appears to dictate that every injunction must contain findings of fact and conclusions of law or it will fall, the cases interpreting Rule 52(a) do not mandate such a strict construction.

A failure to make the necessary findings does not require remand if a complete understanding of the issues may be had without the aid of separate findings. United States v. Hudspeth, 384 F2d 683 (9th Cir, 1967). Swanson v. Levy, 509 F2d 859 (9th Cir, 1975).

In the present action, the record provides this Court with a full understanding of the facts upon which the September 2, 1977 permanent injunction was entered. On February 28, 1977, the district court entered its order adopting the management plan. The petitioners, on August 23, 1977, sought a preliminary injunction in the Washington Superior Court. That court orally indicated that it would enjoin the State of Washington from complying with the federal district court order. Furthermore, the affidavit of John Donaldson filed in support of the temporary restraining order of August 23, 1977 indicates that the closure of August 23,

1977 was necessary to insure that the treaty users received their fair share of the fall chinook run. The district court permanently enjoined petitioners because they were fishing, or intended to fish, in contravention of the management plan and order of the district court. The record is clear that this court may fully determine the basis for the district court's actions.

Furthermore, cases concerning Rule 52(a) also clearly require that prior to the avoidance of an injunction for failure to make findings and conclusions, a petitioner must in some manner be prejudiced. Huard-Steinheiser, Inc. v. United States, 280 F2d 79 (6th Cir, 1960). The petitioners have not been prejudiced by the lacking of findings and conclusions in the September 2, 1977 order of permanent injunction.

D. The Attorney General of the State of Washington had authority to represent the State of Washington in U. S. v. Oregon, and therefore the State of Washington is bound by the agreement and order of February 28, 1977.

Petitioners argue that the federal courts are bound by the Washington State court's holding that the Governor and the Director of Fisheries for the State of Washington had no authority to enter into the agreement which became an order of the district court on February 28, 1977.

The State of Oregon takes the position that the Washington state courts have not ruled on the question whether the Attorney General for the State of Washington had the authority to represent the State of Washington in U. S. v. Oregon and thereby bind the state. The Attorney General for the State of Washington has broad authority to represent the State of Washington in lit-

igation concerning the interests of that state. RCWA 43.10.30.

If the parties in U. S. v. Oregon entered into the agreement that was the foundation of the district court order on the mistaken belief that Washington had authority to enter into and enforce such an agreement, then any party can ask the district court to change or modify the February 28, 1977 Oregon order under Rule 59, the Federal Rules of Civil Procedure. As yet, no party has presented such a motion. Until some party moves to set aside the order on the grounds that Washington lacked the authority to enter into and enforce such an agreement, or that the Attorney General for the State of Washington did not have the authority to represent the State of Washington, the question of whether Washington had authority to enter into or enforce such a plan is immaterial to the question of the district court's power to enforce an agreed order of that court.

The State of Oregon asserts that petitioners' collateral attack in the Washington State courts, their petition for writ of mandamus and appeal in this Court are not the proper procedures to decide this issue. This issue should properly be brought before the district court of Oregon.

E. The September 2, 1977 permanent injunction is not overbroad.

Petitioners argue that the order of permanent injunction in U. S. v. Oregon is overbroad, primarily because it effectively "immunizes" the Compact regulations from a state court test on any basis.

Petitioners argue that the language of the order must be read to mean that even if Compact regulations were found unlawful for some reason, fishermen still could not fish because of the language of the injunction.

Such a reading of the order is not reasonable. The order provides, in part, as follows:

"It is ordered that the Columbia River Fishermen's Protective Union, an Oregon non-profit corporation, and Leslie Clark, an individual, and all persons in active concert or participation with them, and all other persons having notice of this order, are permanently enjoined and restrained from commercial fishing on the Columbia River on salmon or steelhead stocks destined to reach the intervening treaty tribes' usual and accustomed fishing grounds above Bonneville Dam, except in accordance with the regulations promulgated pursuant to the Oregon-Washington Columbia River Fish Compact, . . ."

The State of Oregon submits that the order should be read to mean lawful regulations promulgated pursuant to the Oregon-Washington Columbia River Fish Compact, and thereby allowing challenges to regulations which have no impact on the Indians' opportunity to catch their fair share of the resource. Such an interpretation is reasonable and avoids any of the real or imaginary problems alleged by the petitioners.

CONCLUSION

The State of Oregon contends that it is not at all unusual for parties to a lawsuit to agree to a settlement which is incorporated into a court order which subsequently may be enforced

by the court. This is exactly the situation here, and the State of Oregon asks this Court to deny the petition for writ of prohibition or mandamus and to affirm the district court's permanent injunction.

Respectfully submitted,

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