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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

NO. 83-4265

UNITED STATES OF AMERICA,

Plaintiff,

and

QUILEUTE INDIAN TRIBE, et al.,

Plaintiffs/Intervenors/Appellees,

vs.

STATE OF WASHINGTON,

Defendant/Appellant.

APPEAL FROM AN ORDER AWARDING ATTORNEY FEES IN PHASE II OF U.S. V. WASHINGTON UNDER 42 U.S.C. § 1988

BY THE

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

THE HONORABLE WILLIAM H. ORRICK

REPLY BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, and QUILEUTE INDIAN TRIBE, ET AL., Plaintiffs/ Intervenors/Appellees, vs. STATE OF WASHINGTON, Defendant/Appellant.	NO. 83-4265 DC# CV-70-9213 PHASE II Western Washington (Seattle) REPLY BRIEF OF APPELLANT

INTRODUCTION

The exclusive issue in this appeal is whether the Phase II proceedings to address the hatchery fish issue in U.S. v. Washington may be characterized as a claim arising out of 42 U.S.C. § 1983 to support an attorney fee award under 42 U.S.C. § 1988. The critical threshold question is: With this court having previously determined that the treaty interpretation claims in Phase I proceedings did not provide a basis for a fee award under § 1988, does the treaty claim resolved in the Phase II hatchery proceedings independently qualify?

A careful review of the nature of the hatchery fish issue, and how it arose in the litigation, clearly indicates that a fee award under 42 U.S.C. § 1988 is not appropriate. The hatchery issue was similar to the treaty claims involved in Phase I proceedings, and the reasons for denial of attorneys' fees for those proceedings supports the denial of fees for the hatchery

proceedings. Furthermore, the distinguishing characteristics of the hatchery issue proceedings makes an even more compelling case for denial. Appellees' response brief simply makes no credible showing that the hatchery issue proceedings even remotely qualify for a fee award under 42 U.S.C. § 1988.

Appellees ignore that the principal purpose of the proceeding was to determine the respective interests of sovereign entities in artificially propagated fishery resources. They ignore the fact that the hatchery issue emerged in the case because of statements by the U.S. Supreme Court in Puyallup II, Washington State Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973). They ignore the district court's specific reservation of the hatchery issue for determination with the Phase II treaty claims regarding environmental rights, and the U.S. Supreme Court's observation in Washington v. Washington State Commercial Passenger Fishing Vessel Assn, 443 U.S. 658 (1979), hereafter referred to as Passenger Vessel, that the hatchery fish issue was an open question. Finally, appellees down play the fact that hatchery fish were included in the fisheries allocation during the seven years that the issue was pending.

Each of these unique characteristics make this proceeding substantially different from the typical § 1983 case, yet appellees refuse to acknowledge much less address these characteristics. The response brief contains only cursory, conclusionary arguments on the direct issues involved in this appeal. The principal focus of the brief is an attack on the previous Ninth Circuit determination on Phase I attorneys' fees.

Over half of the entire brief is devoted to a "motion for reconsideration" of that decision. There is no showing, however, of how this court could even consider such a motion in this appeal under the federal rules of appellate procedure, or why such extraordinary relief is warranted. The response brief simply restates arguments previously made in the petition for rehearing to the Ninth Circuit and the petition for a writ of certiorari to the U.S. Supreme Court.

In conclusion, appellees have established no credible reason for an award of attorney fees for Phase II proceedings, and the district court judgment should be reversed.[1] Furthermore, the motion for reconsideration has no proper place in the present appeal and should be stricken outright.

A. Reconsideration in This Appeal of the Ninth Circuit's Previous Ruling on Attorneys' Fees for Phase I Proceedings of U.S. v. Washington is Not Appropriate.

Over two-thirds of the argument section of the appellees' response brief is devoted to a request for "reconsideration" of the Ninth Circuit's decision denying Phase I attorneys' fees. The arguments presented are virtually identical to the appellees' petition for rehearing and petition for certiorari of that

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[1] The district court judgment appealed from awarded attorney fees for time spent in both the hatchery and environmental proceedings in Phase II of U.S. v. Washington. Appellees concede that the judgment be reversed in part based on the reversal of the environmental issue. 759 F.2d 1353 (9th Cir. 1985). The only remaining issue is whether the fee award for the hatchery issue proceedings must be reversed.

ruling.[2] Appellees cite absolutely no authority, either under court rule or case law, that a motion for reconsideration of a previous final order may be raised in a subsequent appeal on a separate issue. More revealing, however, appellees did not even make a nominal effort to demonstrate why this extraordinary relief is appropriate. Their motion should be stricken and denied outright.

Under law of the case principles, a court is ordinarily precluded from reconsidering an issue previously decided by the same court in the same case. The doctrine is based on the fundamental precept of common law adjudication that an issue once determined by a competent court is conclusive. Russell v. C.I.R., 678 F.2d 782 (9th Cir. 1982), Planned Parenthood v. State of Arizona, 789 F.2d 1348 (9th Cir. 1986). The doctrine is not an absolute bar to independent reconsideration of a matter previously decided, but a strong showing of a need is required to support this extraordinary relief. The court must carefully review the nature of the previous determination: i.e., whether

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[2] Appellant has previously submitted lengthly briefs on these arguments to the Ninth Circuit Court of Appeals in response to the petition for reconsideration of the ruling. The brief points out that appellees place selected emphasis on limited segments of the initial complaints and Judge Boldt's findings and conclusions, which present a distorted picture of those proceedings. Appelleees also misunderstood the Ninth Circuit's decision and exaggerate its impact.

Since there has been no showing that the court has authority in this appeal to "reconsider" the previous decision, appellants have not packed this reply brief with the previously submitted lengthly brief to rebut these arguments. It is assumed that if the court decides that the motion will be considered, the court will also request a reply.

it was a ruling of law or mere dicta; or whether it was a final ruling. The court should also assess whether there have been any substantial changes in circumstances which compel reconsideration. For instance, if there has been a U.S. Supreme Court decision directly on point after the initial decision, independent review might be appropriate. In Planned Parenthood v. State of Arizona, supra, the U.S. Supreme Court established the proper standards for multipliers in attorneys' awards in Blum v. Stenson, 465 U.S. 886 (1984), while an attorney fee issue was pending in the district court on remand from a previous appeal. The parties seeking attorneys' fees argued in the second appeal that since the Ninth Circuit in its opinion prior to Blum did not challenge or criticize the award of multiplier, law of the case principles required the award of the multiplier in the second appeal. This court rejected that argument ruling that the previous decision had remanded the entire issue of attorney fees to the district court, and that the award should be based on the standards established in Blum. In Russell v. C.I.R., supra, this court refused to apply law of the case principles with respect to a portion of a previous appellate opinion which was considered dicta rather than a ruling of law.[3]

[3] In Russell, the Ninth Circuit also indicated that another factor to be considered is whether a party is simply "panel shopping." In the present appeal it is unclear whether the motion for reconsideration is simply misguided good faith rather than "panel shopping." Presumably, appellees would not object to assignment of this appeal to the panel who considered the Phase I appeal to eliminate any suggestion that they are shopping to the extent it is permitted by internal court assignment rules.

In the present situation law of the case principles preclude "reconsideration" of the Phase I decision in this appeal. That decision reversed a district court judgment, and was a final determination as a matter of law. In addition, the petition for reconsideration and the later petition for certiorari, raising arguments identical to those presented in the response brief, were denied. Appellees seem to believe that the U.S. Supreme Court's acceptance of the petition for certiorari for Passenger Vessel after previously denying certiorari for an earlier Ninth Circuit opinion, means that any previous decision by any court can be reviewed without limitations in a subsequent proceeding in the same case. This conclusion has no merit. Law of the case principles would not preclude the U.S. Supreme Court from reviewing one or a number of appellate decisions in a continuing jurisdiction case. The doctrine does, however, generally preclude a district or appellate court from revisiting a matter previously decided by the same court, and appellees have identified no basis for further review of the Phase I determination.

Law of the case principles should also preclude reliance on arguments and selected references in the record presented in support of a fee award for Phase I proceedings, to support a fee award in the hatchery proceedings. Those arguments and references did not support a fee award for the direct proceeding of which they were a part, and should not be the basis for an award on the hatchery issue. The hatchery issue was a related but separate issue. Whether or not the hatchery proceeding

qualifies for a fee award should be evaluated based on its pleadings, purposes, and its procedural history.

It is ironic how law of the case principles applies to this appeal. The principal basis for Judge Orrick's 1980 decision was law of the case. The opinion specifically states Judge Craig's determination that Phase I was an action arising under § 1983 was "law of the case" and mandates a fee award for Phase II. Now appellees conveniently ignore this principle with Judge Craig's decision having been reversed.

B. The Principal Basis for the Phase II Attorneys' Fee Award For the Phase II Proceedings Has Been Reversed by the Ninth Circuit Court of Appeals.

Judge Orrick concluded that attorneys' fees could be awarded for Phase II proceedings because they were pendent to Phase I proceedings which previously had been determined by Judge Craig to involve "claims for relief from deprivation of constitutionally secured rights under § 1983." Judge Orrick considered Judge Craig's previous Phase I attorney fee determination to be "clearly law of the case" and concluded that since Phase II issues had been reserved by the Phase I court:

> The constitutional nature of the jurisdictional basis of the claims raised in Phase I remain an element of the proceedings in Phase II of this case. See Richmond v. Weiner, 353 F.2d 41, 44 (9th Cir. 1965) (holding that the district court continued to exercise jurisdiction over a nonfederal claim following bifurcation of the claim from federal issues).[4]

[4] See p. 4 of memorandum opinion and order dated December 15, 1981, CR 8022, Exc. p. 25.

The Ninth Circuit reversed Judge Craig's order. Judge Orrick has not had the opportunity to review the Phase II order and judgment in light of the Ninth Circuit's reversal of the Phase I fee award or the U.S. Supreme Court's denial of the petition for certiorari. It is clear, however, that if the district court continued to rely on law of the case principles, fees would be denied for Phase II proceedings.

Judge Orrick's opinion also indicated that Phase II proceedings, standing alone, qualified as claims arising out of 42 U.S.C. § 1983. This determination however was based on a mistaken conclusion that under Maine vs. Thiboutot, 448 U.S. 1 (1980) all federal statutory rights are enforceable under § 1983.[5] This conclusion likewise has not been reviewed in light of case law subsequent to 1981 which has clarified the scope of federal rights enforceable under 42 U.S.C. § 1983.

There are clear limitations on the types of federal rights enforceable under § 1983. Rights secured by the supremacy clause or the commerce clause are not enforceable under § 1983 action. See Consolidated Freightways v. Kassel, 556 F. Supp. 740 S.D. Iowa 1983, aff'd 730 F.2d 1139 8th Cir., cert. den., 105 S.Ct. 126 (1984). White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1987), cert. den. ____. Federal statutes also do not automatically create rights enforceable under § 1983. It must be established that there was a congressional intent to

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[5] See p. 6, lines 1-10, of memorandum opinion and order CR 8022, Exc. p. 25.

create a private cause of action in the statute. It also must be clear that Congress did not preclude § 1983 enforcement by establishing a comprehensive remedial program. Further in order to create a private cause of action, the statute must identify or refer to a specific class or group, and there must be clear and specific guidelines or standards. In other words there must be a direct command to the state to follow a particular specified course of conduct. See Wright v. Roanoke Redevelopment and Housing Authority, ____ U.S. ____, 93 L. Ed. 2d 781, 788 (1987), Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), Middlesex County Sewerage Authority v. National Seaclammers Assn., 453 U.S. 1 (1981), Boatowners and Tenants Assn. v. Port of Seattle, 716 F.2d 669, (9th Cir. 1983), Perry v. Housing Authority, 664 F.2d 1210 (4th Cir. 1981), Phelps v. Housing Authority, 742 F.2d 816 (4th Cir. 1984).

These cases illustrate that Phase II hatchery proceedings do not qualify for attorneys' fees awarded under § 1988 as a case arising out of § 1983. The hatchery issue involved a determination of the nature and extent of the rights of sovereign entities in an artificially propagated resource. The principal purpose was to interpret the treaty to determine the nature and extent of the respective rights. This proceeding is substantially different from the typical § 1983 action.

C. The Phase II Hatchery Issue Was Never Referred to by Either the Parties or the Courts as a § 1983 Action While it Was Being Litigated.

The first time the Phase II proceedings were characterized as a § 1983 action was after the motion for attorneys' fees under

42 U.S.C. § 1988 filed in 1981. Prior to that date, during the almost seven years the hatchery issue was pending, it was never characterized by any of the parties or the courts as a § 1983 type action. The amended and supplemental complaints filed in 1986, which formally raised the Phase II issues for determination, did not refer to § 1983 either directly or indirectly.[6] Neither the statement of relevant proceedings, the claims for relief, or the prayer of the amended complaint, even hinted that the hatchery issue was potentially a § 1983 type claim. Also in the previous proceedings recognizing or involving the hatchery issue there was no characterization of the claim as a § 1983 claim. In the Puyallup series of cases, Judge Boldt's reference in the trial opinion and the subsequent proceedings in 1975 and 1976, the hatchery issue was never described as a § 1983 action. Judge Orrick's opinion on the summary judgment motion and the Ninth Circuit's subsequent opinions on appeal did not mention § 1983. This of course is not surprising because the parties and the court considered the hatchery issue to involve treaty interpretation of the nature and extent of the tribal fishing right with respect to fish artificially propagated.

Appellees' current attempts to label the hatchery proceeding as a § 1983 action is simply without merit. Appellees' attempts to also retroactively recharacterize the State positions in the litigation constituting a "deprivation of rights" is likewise

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[6] See plaintiffs United States and Tribes amended and supplemental complaints CR 2352, Exc. 1-7, CR 2490, Exc. 8-15.

without merit. The hatchery issue dealt with the potential limitation of the scope of the fishery harvest right rather than a "deprivation of a right" as that phrase is used in 42 U.S.C. § 1983. The hatchery issue was specifically reserved by the district court, and as appellees stated in their amended complaint, needed to be resolved so that the long-range management plan could be implemented.[7]

The hatchery issue emerged and assumed importance in the litigation because of the concurring opinion in Puyallup II which stated that "the treaty does not obligate the state of Washington to subsidize Indian fishery with planted fish paid for by sports fishermen. 414 U.S. 49. The district court did not address the hatchery issue when if first arose but specifically reserved it for future determination. Hatchery fish were not excluded from the initial allocation, and remained in the allocation during the seven years that the issue was pending for resolution.

The State advocated that hatchery fish in part should be excluded based on the concurring opinion in Puyallup II, and sought a determination of this issue. This does not, however, constitute a "deprivation" of rights as that term is used in § 1983 cases. In fact in the amended complaints, state actions now characterized for the purpose of a fee award as "repeated attempts to deprive the Tribes of rights", were described only as attempts to have piecemeal adjudication of the hatchery

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[7] See amended and supplemental complaint for declaratory judgment p. 2, lines 18-22, CR 2490, Exc. p. 9.

issue.[8] See amended and supplemental complaint p. 3, lines 13-18, CR 2490, Exc. p. 10.[9] In conclusion, appellees' attempts to characterize the proceeding as "fulfilling all the requirements" for a § 1983 action is without merit.

D. An Award of Attorneys' Fees for Phase II Hatchery Proceedings Conflicts With the Ninth Circuit's Denial of Attorneys' Fees in the Same Case With a Similar Issue.

In the Phase I attorney fee decision, this court concluded that a proceeding whose principal purpose was to interpret a treaty to determine the rights, authorities, and limitations of sovereign entities and the scarce natural resource was not a claim recognizable under 42 U.S.C. § 1983. An attorney fee award under 42 U.S.C. § 1988 was not therefore supportable. The nature and purpose of the Phase II hatchery fish proceeding was similar to the issue addressed in Phase I. The Tribes sought to extend the harvest treaty fishing rights to all artificially propagated fish regardless of their origin or fund source. The issue was specifically linked to the initial treaty allocation question addressed in Phase I as it arose during those proceedings and was

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[8] 459 F. Supp. 1072.

[9] Similarly the 1975 supplemental proceeding 459 F. Supp. 1042 addressed the propriety of extending the trial court decision from the Puyallup III series into one other watershed involving steelhead species only. Judge Boldt's reservation for future consideration of the hatchery issue had indicated an intent to permit the state courts to address the issue on remand from Puyallup II prior to addressing the issue in U.S. v. Washington. Like the 1976 proceedings, the state action is more realistically characterized as an attempt to address the hatchery issue in a piecemeal manner, rather than attempt at deprivation of an established right.

reserved for future determinations by the district court in U.S. Supreme Court. The treaty interpretation of the status of hatchery-produced fish assumed significance in the fishery allocation as the Phase I litigation proceeded because of the magnitude of the State's hatchery programs and statements by the U.S. Supreme Court in the Puyallup series of cases. Finally, the principal rule of the district court was treaty interpretation. The parties sought declaratory judgment regarding the status of the hatchery-produced fish, with appropriate injunctive relief. There was no exclusion of hatchery fish from the allocation during the pendency of the issue. The similarities with the nature and purpose of the Phase I proceedings presents a compelling case for denial of attorneys' fees for the Phase II hatchery fish issue.

Appellees suggest that a fee award for this proceeding does not conflict with the denial of fees for Phase I because the hatchery issue was resolved after Passenger Vessel. This overly simplistic approach ignores the approach used by the Ninth Circuit to resolve the Phase I fee issue. More importantly, it also omits a key fact--that the hatchery issue was specifically severed from Phase I and reserved for later determination in Phase II. The U.S. Supreme Court specifically considered the hatchery issue in open question when it decided Passenger Vessel. See 443 U.S. 688, fn. 30.

The hatchery issue also did not involve the "deprivation" of a right as suggested, but the determination of whether there was a limitation on the tribal fishing rights. Finally, the Ninth

Circuit Phase I decision suggests that it is necessary to look at the nature and purpose of the proceedings, who and what was involved, and how the issue was treated and resolved by the parties. In the present situation of the fact that the hatchery issue was similar in purpose and scope to the Phase I proceedings, along with the fact that the issue was specifically reserved for separate determination, present a compelling case for denial of attorneys' fees on the rationale employed in the Phase I proceeding.

CONCLUSION

In conclusion, the principal basis for the award of attorney fees for the Phase II proceedings was the district court award in Phase I. That decision having been reversed by the Ninth Circuit, and there being no circumstances which independently support a fee award, the district court judgment should be reversed in its entirety.

DATED this 1st day of November, 1988.

KENNETH O. EIKENBERRY
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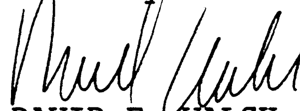

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