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WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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MAR 1985
U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
W.M.W.

10 UNITED STATES OF AMERICA,
Plaintiff,

No. CR-84-0396-MAG

11 vs.

12 TOM WILSON and SORNY ERICKSON
Defendants.

13 UNITED STATES OF AMERICA,
Plaintiff,

No. CR-84-0395-MAG

14 vs.

15 GIG AND JEANETTE EBERHARDT,
Defendants.

16 ORDER GRANTING MOTIONS TO DISMISS OF DEFENDANTS
17 TOM WILSON AND JEANETTE EBERHARDT

18 Defendant Tom Wilson was charged by Information
19 dated June 25, 1984 with five counts of violating the so-
20 called Lacey Act Amendments, 16 U.S.C. 3372(a)(1), to-wit:
21 that he sold salmon and steelhead in violation of the Code
22 of Federal Regulations, volume 25, section 250.8(d)(e).
23 By Superceding Information dated October 9, 1984, defendant
24 Jeanette Eberhardt was charged with three violations under
25 the Lacey Act and Code of Federal Regulations, to-wit: that she
26 illegally sold salmon and sturgeon. Recognizing that these
27 cases involve common questions of law and fact, this Magistrate
28 agreed to consolidate hearings on defendants' motions to dismiss.

1 Defendants Tom Wilson ("Wilson") and Jeanette
2 Eberhardt ("Eberhardt") Motions to Dismiss Informations came
3 on for consideration through briefs and oral argument on
4 November 9, 1984. Decision on the respective motions was
5 deferred until the United States Supreme Court had an
6 opportunity to review the Petition for Certiorari in the
7 case of People v. McCovey, 36 Cal.3d 517 (1984), which case
8 involved issues which could have affected the instant motions
9 to dismiss.^{1/} The Supreme Court denied certiorari in McCovey
10 in December, 1974, and the parties to these motions were
11 notified by letter dated December 19, 1984 that the motions
12 would be deemed finally submitted on February 1, 1985 if no
13 further briefing or oral argument was requested by the
14 parties. None of the parties requested further argument
15 or briefing.

16 On February 1, 1985, the Court of Indian Offenses
17 created by the Department of Interior ("Interior") to administer
18 the Regulations here challenged, 25 C.F.R. 250, filed an
19 amicus curiae brief. That brief challenged this Court's
20 authority to hear and determine these motions, and requested
21 that the matters be transferred back to the Court of Indian
22 Offenses for resolution. By this order, this Court hereby
23 denies that request. This Court has concluded that the
24 prosecution of these cases in federal district court is
25 appropriate because the district court has concurrent
26 jurisdiction to determine these cases under the Lacey Act
27 Amendments, 16 U.S.C. 3372(a)(1).^{2/}

28 Having resolved the jurisdictional issue in favor

1 of these cases being properly before this Court, and the briefs
2 and arguments of counsel having been considered, and for good
3 cause shown, it is hereby ordered that defendants' motions
4 to dismiss are granted. This order is based on the Court's
5 conclusion that the Regulations which underlie these prosecutions
6 are invalid. The Court finds that Interior was without
7 authority to promulgate these Regulations, and that the
8 Regulations are arbitrary, capricious and an abuse of discretion
9 even if there were authority upon which they could have been
10 issued. The analysis which follows is the basis for the
11 Court's findings.

12 I.

13 HISTORY OF THE DISPUTE

14 Both of these cases involve alleged illegal fishing
15 on the Hoopa Valley Reservation. The Hoopa Valley Reservation,
16 which is located in Northern California, includes a one-mile
17 strip of land on each side of the Klamath River, extending
18 from the river's mouth at the Pacific Ocean to its confluence
19 with the Trinity River. People v. McCovey, 36 Cal.3d at 521.
20 At the point where the Klamath River meets the Trinity River,
21 the Reservation widens to a 12-mile square. Id.

22 In order to fill a regulatory vacuum created by the
23 lack of a tribal governing body, Interior in 1977 promulgated
24 the Regulations governing Klamath River fishing by Indians
25 of the Hoopa Valley Reservation. 42 Fed. Reg. 40904-40905
26 (August 12, 1977). These Regulations, as well as subsequent
27 Regulations, expressly recognized a federally-reserved
28 Indian fishing right to take fish from the Klamath River

1 for commercial purposes. 42 Fed. Reg. at 40905, 25 C.F.R.
2 258.1(c); 258.5; 43 Fed. Reg. 30048 (July 1978).

3 In 1979, in response to what Interior concluded
4 to be decreased salmon runs, new regulations were promulgated
5 which banned all commercial fishing and the sale of fish
6 by Indians on the Reservation. 44 Fed. Reg. 17144-17155
7 (March 20, 1979). Although these Regulations reaffirmed
8 the Indians' right to fish commercially on the Klamath
9 River and guaranteed that the right would be renewed when
10 salmon runs increased, the Regulations prohibiting the
11 Indians' commercial fishing have never been lifted and thus
12 remain in effect. Id. at p. 17146; 25 C.F.R. 250.8(d), (e).

13 During the month of June 1982, agents of the United
14 States Fish and Wildlife Service, working in an undercover
15 capacity, met Eberhardt; in July 1982, the agents met Wilson.
16 Both Eberhardt and Wilson are Yurok Indians who are entitled
17 to fish on the Hoopa Valley Reservation.

18 The agents allege that Wilson and Eberhardt, on
19 separate occasions, offered to sell the agents salmon and
20 steelhead that each of them had caught in the Klamath
21 River in violation of the Regulations. In June 1984, both
22 Eberhardt and Wilson were charged in the instant informations
23 with violating the Regulations in a manner and to a degree
24 which allows prosecution under the Lacey Act.

25 All parties to these prosecutions agree that the
26 Indians on the Hoopa Valley Reservation possess the right
27 to take fish for commercial purposes. By omission, the
28 plaintiff appears also to concede that a Congressional intent

1 to abrogate that right is not to be lightly imputed. Menominee
2 Tribe v. United States, 391 U.S. 404 (1968), is sufficient
3 authority for that proposition even absent the plaintiff's
4 supposed concession.

5 Having agreed that the Indians possess the right
6 to fish for commercial purposes and that the abrogation of
7 that right shall not be lightly imputed, the parties at this
8 point diverge. Plaintiff urges this Court to find that
9 the Regulations were promulgated under sufficient authority;
10 defendants urge a finding that the Regulations were in
11 excess of authority. Plaintiff also urges this Court to
12 find that the Regulations were reasonable; defendants urge
13 to the contrary that the Regulations are arbitrary,
14 capricious and an abuse of authority.

15 II.

16 AUTHORITY TO REGULATE

17 Defendants maintain that the specific provisions of
18 law contained in the authority clause of the Regulations are
19 general statutes which do not empower Interior to abrogate
20 the Indians' right to fish commercially. This Court finds
21 that none of those statutes, 43 U.S.C. 1457, 25 U.S.C. 2, 9,
22 13, and the Reorganization Plan No. 3 of 1950, or any
23 combination thereof, is sufficient to enable these Regulations.
24 The plaintiff's attempt to rebut defendants' contention, by
25 its assertion that the California Supreme Court rejected
26 similar arguments in the McCovey case, is without merit.

27 As further support for these Regulations, plaintiff
28 suggests that because Interior has the power to create

1 Courts of Indian Offenses, it can regulate Indian fishing as
2 well. To make such a leap of faith would require this Court
3 to run afoul of the prohibition against lightly imputing
4 Congressional intent discussed supra, and it is concluded
5 that this Court is without authority to do so.

6 Finally, plaintiff argues that the Regulations in
7 question do not abrogate, but merely suspend, the Indians'
8 right to fish for commercial purposes. Since 1979, that
9 right has been lost through federal regulation. Under any
10 terminology, there can be no question that for the last
11 six years the right has been abrogated.

12 The Court has no choice but to find that a federally-
13 protected right has been abrogated without sufficient authority.

14 III.

15 THE REGULATIONS

16 Both defendants concede the fact that the stocks
17 of anadromous fish on the Klamath River and in the Pacific
18 Ocean have been greatly depleted in the last several years.
19 They maintain, however, that the Regulations in question place
20 an impermissible burden on the Indians to remedy that
21 depletion, in contravention of the standard enunciated in
22 Fryberg v. United States, 622 F.2d 1010 (9th Cir.) cert denied
23 101 S.Ct. 545 (1980). Once again, plaintiff chooses not to
24 rebut defendants' argument, but instead uses hornbook trust
25 law in an attempt to convince this Court that Interior has
26 the right to declare a "moratorium" on an Indian right in
27 order to preserve it for later generations.

28 This Court is convinced that it is constrained

1 to follow the Fryberg analysis. Specifically, this Court is
2 required to consider whether these Regulations apply in
3 a non-discriminatory manner to both Indians and non-Indians
4 and whether the application of the Regulations to federally-
5 protected rights is necessary to achieve its conservation
6 purpose. Id. at 1015. Unlike the Fryberg court, however,
7 this Court is not able to find that the requisite criteria
8 have been satisfied. The answers to the required questions
9 are found in the Regulations themselves.

10 As to the requirement that the application of
11 the Regulations to federally-protected rights is necessary
12 to achieve its conservation purpose, the Regulations have
13 said:

14 The ocean troll and recreational fisheries
15 which are regulated without regard to the
16 in-river fisheries and Indian fishing
17 rights also exert severe pressures on the
18 salmon resources of the Klamath and Trinity
19 Rivers. Also, in the past, fishing by
20 non-Indians as well as Indians on the
21 reservation has been relatively unrestrained.
22 Other problems affecting the fishery include
23 the substantial diversions of water from
24 the Trinity River, other environmental
25 problems affecting water temperature,
26 quality, and flow and the reduced or
27 blocked fish access to many spawning
28 grounds. . . . The Department recognizes
that the regulation of the Indian fishery
on the reservation will provide only a
small degree of protection for this resource.
43 Fed. Reg. 30047 (July 13, 1978).

A thorough review of the Trinity River task
force and other environmental problems of
the watersheds which affect the fishery
should be undertaken by federal and state
agencies and Indians with interests and
responsibility on the river and adjacent
lands in order to formulate firm recommendations
to reduce the negative environmental pressures
on the fishery resource on the reservations.

1 . . . The best management of the diverse
2 fisheries on the salmon and steelhead stock
3 of the Klamath and Trinity River can occur
4 only when an appropriate data base exists
5 to assess the run size of each stock against
6 its escapement goal, and determine the rela-
7 tive impact which each user group will have
8 on the harvestable resource. Much of this
9 information has not yet been developed for
10 the fish stocks of these rivers. However,
11 this year's regulation of the Indian fishery
12 will assist in developing this data base.
13 . . . Unfortunately, the total size of the
14 Klamath and Trinity river stocks, and the
15 extent of ocean stocks by the troll and
16 recreational fisheries, is unknown.
17 43 Fed. Reg. 30048-49 (July 13, 1979).

18 In other words, Interior promulgated, and continued to re-enact,
19 Regulations which required the Indians to bear the entire
20 burden of conserving a resource which Interior readily admitted
21 was likely being most greatly diminished by non-Indian fishers.
22 There is simply no showing, indeed the Regulations admit
23 otherwise, that these Regulations were necessary to achieve
24 a conservation purpose.-- especially in light of plaintiff's con-
25 cession at oral argument that a data base still does not exist
26 because the Department of Commerce has refused to cooperate.

27 As to the third Fryberg criteria, that the Regulations
28 equally distribute the conservation burden between Indians
and non-Indians, it is equally clear that these Regulations
are inadequate. One year after the initial commercial fishing
"moratorium" was declared in the Regulations, Interior admitted
that the ocean fisheries, under the control of the Department
of Commerce and its subgroup the Pacific Fish Management
Council had not assumed their fair share of the anadromous
fish conservation burden. 44 Fed. Reg. 19144 (March 20, 1979).
Amazingly, this recognition was used by Interior as justification

1 for continuing the ban on the Indians' commercial fishing. In
2 1982, the Hoopa Valley Tribe itself sued the Department of
3 Commerce to get it to limit off-shore fishing. Hoopa Valley
4 Tribe v. Baldrige, No. C-82-3145-MHP. That lawsuit resulted
5 in a June 1984 opinion which awarded declaratory relief to
6 the Hoopa Valley Tribe in the form of invalidating the 1982
7 Department of Commerce Regulations managing the fall-run
8 chinook salmon on the Klamath River. (Order, at p. 50.)
9 Judge Patel found that the Commerce Department regulations
10 which ignored a recommendation that the Pacific Fish
11 Management Council should adopt a chinook salmon quota were
12 arbitrary, capricious and an abuse of discretion. Although
13 Judge Patel specifically refused to address the issue of
14 Indian fishing rights as regulated by Interior, there is
15 good reason for applying the reasoning in that order to
16 the instant case because there is a commensurate duty on
17 the part of Interior to provide reasoned bases for its
18 Regulations. Additionally, just as Judge Patel required
19 the Department of Commerce to rely upon the best scientific
20 information available, this Court is hereby requiring Interior
21 to do so as well. It is clear to this Court that the
22 Interior Regulations fall far short of those requirements.

23 The plaintiff's attempt to use hornbook trust
24 law to support its claim that it is fulfilling its obligation
25 to the Indians is likewise without merit. Hornbook Indian
26 rights law indicates,

27 [T]he federal trust responsibility imposes strict
28 fiduciary standards on the conduct of executive
 agencies . . . Since the trust obligations are

1 binding on the United States, these standards
2 of conduct would seem to govern all executive
3 departments that may deal with Indians, not
4 just those such as the Bureau of Indian
5 affairs. . . ." Cohen, Handbook on Federal
6 Indian Law (1982 ed.), p. 225.

7 Even if this Court were to assume that Interior was fulfilling
8 its own trust obligation to the Indians, it could not also
9 find that the Regulations meet the exacting fiduciary standards
10 imposed on the Government as a whole.

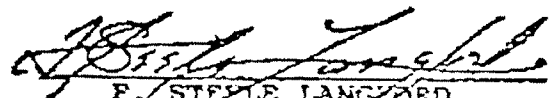
11 IV.

12 CONCLUSION

13 Under any analysis, it is clear that the Regulations
14 which underlie the instant Lacey Act prosecutions are invalid.
15 The Lacey Act itself provides, "Nothing in this chapter
16 shall be construed as -- (2) repealing, superseding, or
17 modifying any right, privilege, or immunity granted, reserved
18 or established pursuant to treaty, statute, or executive
19 order pertaining to any Indian tribe, band, or community."
20 16 U.S.C. 3378. Therefore, any prosecution under the Lacey
21 Act must be premised on a valid rule, regulation or law.
22 Since this Court finds that the Regulations are invalid,
23 it must accordingly grant the defendants' motions to dismiss.

24 IT IS SO ORDERED..

25 Dated: March 5, 1985

26 
27 F. STEELE LANGFORD
28 United States Magistrate

FOOTNOTES

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^{1/} For example, the State of California argued in its petition for certiorari that California has sovereign power under the equal footing doctrine to regulate fisheries in navigable waters with respect to Indian reservations created after California's admission to statehood. The State also argued that California has the right to regulate and prohibit off-reservation sales of fish by Indian fisherman. Since the Supreme Court denied certiorari, it is presumed that neither of these arguments has merit.

^{2/} 3372. Prohibited Acts.

(a) Offenses other than marking offenses

It is unlawful for any person---

(1) to import, export, transport, sell, receive, acquire or purchase any fish . . . taken or possessed in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;