State v. McCormack, 321 Or. App. 551, ___ P.3d ___ (Sept. 8, 2022)

- **Holding:** State failed to establish by clear and convincing evidence that prohibiting two Nez Perce tribal members' gillnet fishing in the Columbia River mainstem at a usual and accustomed fishing place was necessary to conserve the affected salmon species' continued existence.
- **Summary:** In May 2019, two members of the Nez Perce Tribe were cited under Or. Rev. Stat. § 509.006 for taking a food fish (Chinook salmon) through use of gillnets not compliant with Or. Admin. R. 635-04-0025(3). No dispute existed that Defendants' conduct occurred at a usual and accustomed fishing place reserved under the 1855 Nez Perce Treaty. Equally undisputed was that the fishing occurred in "Zone 6" of the 2018-2027 *United States v. Oregon* Management Agreement to which the Nez Perce and several other Tribes with fishing rights in the Columbia River mainstem have treaty-reserved rights and several States (Idaho, Oregon and Washington) are parties. Defendants moved to dismiss "because the state could not prove that that restriction, and its application to treaty fishers, was necessary for the conservation of Columbia River fish populations." In opposition, the Oregon Department of Fish and Wildlife

  > fisheries manager testified that, although gillnets are allowed for commercial fishing at certain times and places in other zones of the Columbia River, gillnets are not allowed for treaty subsistence fishing in Zone 6. He explained that, in the area where defendants were fishing in Zone 6 near the dam, fish "congregate as they are looking for the fish ladders to ascend the ladders and continue migrating" and "can be present in greater concentrations [near the ladders] than they might be in the rest of the river." The ODFW fisheries manager testified that the gillnet regulation in OAR 635-041-0025(3) was necessary for conservation, because there are 13 fish species in the Columbia that are listed as either "threatened" or "endangered" under the federal Endangered Species Act, including spring-run Chinook; that "[g]ill nets have the capacity to catch a tremendous amount of fish in a short amount of time"; and that, "even if just by accident [a gillnet] was left too long or unattended or just an unlucky swarm of fish came through in a very short amount of time, you could catch a high amount of fish and there is the potential that those would be endangered or listed." He explained that, for him, the "specific concern" was that use of gillnets at the location where defendants were fishing near the dam had the "potential capacity to impact those endangered stocks in a short amount of time."

  The fisheries manager, however, also testified "that the treaty tribes are allotted a certain quantity of fish that they may harvest pursuant to [the Management Agreement] with the state ... [and] that he did not believe the tribes had exceeded the catch amounts for any threatened or endangered fish species during the 2019 spring run[.]" Nor was he "aware of any instance where treaty fishing had impeded the recovery of any fish population in the Columbia River." The county circuit court denied the motions to dismiss, finding in part "that the regulation at issue was 'required to prevent a demonstrable harm to actual conservation' and was 'essential' to perpetuating 'the spring runs of the salmon.'" It thereafter convicted Defendants after a stipulated-facts bench trial.

  The court of appeals reversed. After first discussing the nature of the fishing right reserved under the 1855 Treaty, the panel turned to the components of the conservation

necessity standard that the United States Supreme Court has recognized can trump a treaty usufructuary right. As it explained:

> To satisfy the conservation necessity standard—and, therefore, to enforce the regulation against treaty fishers at usual and accustomed sites—the state must prove three requirements: "(1) [T]he regulation is a reasonable and necessary conservation measure; (2) the application of the specific regulation to treaty fishers is necessary in the interest of conservation, and (3) the regulation does not discriminate against treaty fishers." ... [¶] Regarding the first prong, to show that its regulation is a reasonable and necessary conservation measure, "the state must show that ... the regulation [is] the least restrictive which can be imposed consistent with" achieving the state's conservation goal, ... and the "state must demonstrate that the tribe's own conservation measures are insufficient to meet the needs of conservation[.]"

The panel further held that not only does "the state bear[] the burden of proof" to establish such necessity but also that it must do so by clear and convincing evidence. On the latter point, it recognized that other courts have applied a preponderance of evidence test but chose to follow those that use the more stringent standard. The panel identified two reasons in a footnote that justified this choice. First, "requiring the higher clear and convincing standard, rather than the lower preponderance standard, is more consistent with the limitations on state regulatory power enshrined in the conservation necessity standard and with the status of Indian treaty-fishing rights under the Supremacy Clause." "Second, when a federal law (rather than state law) has the effect of restricting an Indian treaty right, federal courts have required 'clear evidence' or 'clear and convincing evidence' that Congress intended to abrogate that treaty right."

Against these standards, the panel deemed the prosecution's evidence insufficient. So, for example, "the state presented little, if any, evidence about the Nez Perce Tribe's own conservation measures, much less evidence demonstrating clearly and convincingly that any such measures are insufficient to ensure the perpetuation of the fish in the Columbia River." It stressed in this regard that "testimony from the ODFW fisheries manager showed that the tribes had not violated the catch amounts for any threatened or endangered fish species during the 2019 spring run, and that he was not aware of any instance where treaty fishers had impeded the recovery of any of the fish populations in the Columbia River." The prosecution, the panel added, had not shown that the State had been "'unable to preserve [the] run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction[:]'"

> Here, the state's witness explained that gillnets are not allowed for treaty subsistence fishing in Zone 6 of the Columbia River, but gillnets are allowed for non-treaty commercial fishing in other zones of the river. However, nothing in the record shows that the state was unable to preserve the spring-run Chinook by forbidding the catching of fish by other individuals under its ordinary police power and, therefore, had to adopt this particular gillnet regulation. Similarly, the state did not show that further restriction of non-treaty fishers would be insufficient to accomplish conservation of the Columbia River fish populations.

The State gained no purchase by reliance on the Management Agreement because "the test for determining the permissibility of a state restriction on treaty-reserved fishing rights is whether that restriction is necessary for conservation (i.e., necessary for the

perpetuation of a species), not whether it is 'consistent with' a co-management agreement." It noted, moreover, that "nothing in the Management Agreement requires the Nez Perce to subject their treaty-reserved fishing rights to a gillnet restriction such as that contained in OAR 635-041-0025(3), nor does the agreement otherwise proscribe the use of the type of fishing gear for which defendants were cited under OAR 635-041-0025(3)."

- **Relevant (2022) Deskbook Sections:** 9:15 nn.9, 12; 9:17 nn.6, 12; 14:20 nn.8, 29, 30