

1984

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Recommended Citation

Robert H. Abrams, *The Alaskan State Timber Sales Case: Can the State Require Local Primary Manufacture?* 1983-84 Preview U.S. Sup. Ct. Cas. 325 (1984)

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The Alaskan State Timber Sales Case: Can the State Require Local Primary Manufacture?

by Robert H. Abrams

South-Central Timber Development, Inc.

v.

LeResche, et. al.

(Docket No. 82-1608)

To be argued February 29, 1984

ISSUES

Throughout United States history, the states have enacted legislation benefiting local economic activities in preference to competing activities in other states and abroad. In both theory and purpose, the Commerce Clause of the Constitution limits parochial, protectionist state laws of this type — although the extent of this constitutional check on state power has never been precisely defined. In recent years, the Supreme Court has heard a number of cases involving Commerce Clause challenges to state laws that erect various types of in-state preferences in regard to exploitation of the natural resources found within the state. The topics of these cases in the last decade have been varied — ranging from minnow seining (*Hughes v. Oklahoma*, 441 U.S. 434 (1979)) to landfill space (*City of Philadelphia v. New Jersey*, 437 U.S. (1978)) to groundwater (*Sporhase v. Nebraska*, 102 S.Ct. 3456 (1982)) to Portland cement (*Reeves v. Stake*, 447 U.S. 429 (1980)). This case, involving timber cut on state-owned lands in Alaska, is yet another chapter in this ongoing line of cases.

The specific state practice questioned here is requiring that bidders for the purchase of Alaska's timber stands perform primary manufacturing operations within that state rather than export the logs for processing elsewhere. The major issue in this case is quite plain: Does the Alaskan primary manufacture requirement offend the Commerce Clause?

FACTS

In 1980, the state of Alaska issued a notice of sale of 49 million board feet of standing timber from state-owned lands in the area of Icy Cape, Alaska. The notice of sale, the prospectus and the proposed contract all imposed a primary manufacture requirement — the timber would have to be processed in-state prior to

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being exported into either interstate or international commerce.

(A small glossary is helpful. "Timber" means trees in their natural condition and location, live or dead from natural causes; "logs" means portions of trees cut into lengths with the limbs removed, transported off the land where they grew and ready for manufacture; "cants" are portions of logs which have been cut lengthwise and are thus flat on at least one side, but which will have to be cut lengthwise at least once again to produce "lumber" suitable for end use.)

Specifically, the primary manufacture requirement for the Icy Cape sale forbade log export while permitting export of either cants or lumber. The undisputed reason for inserting the primary manufacture stricture was to provide for local employment in the processing industry and to produce building materials for the Alaskan market.

The petitioner in this case, South-Central Timber Development, was in the business of harvesting timber in the Icy Cape area — primarily for export to Japan. Indeed, South-Central was operating on state-owned lands under a previous sale that did not include a primary manufacture requirement. At the time of the second Icy Cape sale, South-Central did not have a working mill in the area and would have had to contract out the local processing required by the state. South-Central claimed that contracting for in-state processing was "uneconomical" and that it was therefore precluded from bidding on the timber. One week before the scheduled sale, South-Central, alleging that it would suffer irreparable injury if the sale were held as scheduled, initiated litigation in the federal district court. It sought to enjoin the upcoming sale on the ground that the primary manufacture provision violated the Commerce Clause.

The United States District Court granted summary judgment in favor of South-Central and on January 6, 1981, enjoined Alaska from enforcing the primary manufacture requirement. The case was appealed to the Ninth Circuit Court of Appeals, which reversed the district court and sustained the constitutionality of the primary manufacture requirement. Interestingly, when the litigated Icy Cape sale was ultimately conducted in November of 1983, Alaska had dropped the primary manufacture requirement. While all parties to the case argue that the case is not now moot, the Supreme Court could opt to dismiss the writ of certiorari for that reason.

BACKGROUND AND SIGNIFICANCE

Among the states, Alaska is extraordinarily rich in natural resources such as timber, oil and mineral deposits that are found on state-owned lands. This reflects not only the fact that these resources are abundantly present physically, but also that Alaska, unlike virtually all of the other states, is owner of vast tracts of land within its borders. At the time of statehood and thereafter, Congress provided Alaska with the large landholdings, at least in part, to permit the state to generate revenues to help finance state-provided services to its residents and to foster development of the local economy. In a parallel vein, federal management of federal lands in Alaska has frequently sought to encourage development of the Alaskan economy. In consequence of its natural resource wealth and in harmony with these longstanding general federal policies, Alaska, through the sale and primary manufacture requirement, sought to garner both state revenue from the sale and the benefits of milling activities in Alaska — that is, jobs and lumber supply.

As noted in the "Issues" section, local preference laws in the natural resources field are of lively constitutional concern. The form of the preference in this case, a primary manufacture requirement, is one that has several times before been litigated in the Supreme Court. This preference form is usually invalidated by the Court because it "Balkanizes" the nation in contravention of the oft-cited Commerce Clause adage that "our economic unit is the nation."

Counterpoised to this line of cases, however, is the recently enunciated doctrine that when a state acts as a market participant (instead of as regulator), it is free to act in many of the same ways as would private participants in the market. Two such behaviors include selectively refusing to deal with another party and conditioning contracts on the agreement to abide by fixed contractual terms. Specifically, the Supreme Court on this theory has found that state (or local) governments can grant priority to in-state purchasers of state-produced cement in time of regional cement shortage and insist that contractors awarded contracts to perform work for the government employ a specified percentage of local residents. The Alaskan timber case stands squarely in the intersection of these opposed lines of cases. As such, whatever the decision of the Court, if the decision addresses the conflict between protectionism and market participation, the case will be of doctrinal significance.

Other factors in the case may allow the Supreme Court to dispose of it in a way that avoids these issues. As noted above, the ultimate sale of timber was made without a primary manufacture requirement. This could result in a mootness dismissal, despite the parties' claims that a live controversy remains among them. Second, it is generally conceded that Congress' plenary power

under the Commerce Clause allows authorizing states to act in ways that would otherwise run afoul of the anti-Balkanization principle enforced by the Supreme Court's case-by-case determinations. In this case, the unique history of Alaska and the behavior of Congress regarding Alaskan natural resources offers the possibility that the Court could decide that Congress has ratified the local preference involved in this case.

ARGUMENTS

For South-Central Timber Development, Inc.

1. The primary manufacture requirement does not evenhandedly regulate in-state and out-of-state timber processors and is therefore a violation of the Commerce Clause.
2. The primary manufacture requirement directly burdens interstate commerce and therefore violates the Commerce Clause.
3. Congress has not expressly or impliedly consented to Alaska's primary manufacture requirement.
4. The market participant doctrine does not apply to this case because the timber market is not one that the state has created.
5. The market participant doctrine does not apply to this case because it involves competition for raw materials rather than refined products.

For the state of Alaska and Kenai Lumber Co., Inc.

1. Congress has endorsed Alaska's primary manufacture requirement and removed it from Commerce Clause scrutiny.
2. The Commerce Clause does not limit a state in choosing the terms on which it will enter into contracts.

AMICUS ARGUMENTS

For the United States in Support of South-Central Timber

1. Congressional consent to the primary manufacture requirement cannot be inferred from "parallel" federal timber policies in Alaska.
2. The primary manufacture requirement impermissibly burdens interstate commerce.
3. Alaska's primary manufacture requirement is not within the market participant doctrine.

For Pacific Rim Trade Association and Washington Citizens for World Trade in Support of South-Central

1. The large export trade from the Pacific Northwest to the Orient is important to the region's economy.
2. Douglas fir and hemlock-spruce logs are a valuable export commodity — the trade in which is jeopardized by log export restrictions that protect local processors.
3. Restrictions on export of logs cut on state-owned lands will be increasingly economically significant in the future.

For Northwest Independent Forest Manufacturers, Northwest Timber Association and International Woodworkers of America in Support of Alaska

1. The primary manufacture requirement has a minor effect on interstate and foreign commerce.

2. Invalidating the primary manufacture requirement would have a substantial effect on the local public interest.

ARGUMENTS: FEBRUARY SESSION

Tuesday, February 21

1. Hayfield Northern RR Co., Inc. v. Chicago & North Western Transportation Co. (82-1579) (*Preview* 321-323)
2. Schneider Moving & Storage Co. v. Robbins (82-1860)
Prosser's Moving & Storage Co. v. Robbins (82-1862)
3. Seattle Times Co. v. Rhinehart (82-1721) (*Preview* 317-319)
4. Capital Cities Cable, Inc. v. Crisp (82-1795)

Wednesday, February 22

5. Tower v. Glover (82-1988)
6. Palmore v. Sidoti (82-1734)
7. Limbach v. The Hooven & Allison Co. (83-96)
8. Kirby Forest Industries, Inc. v. United States (82-1994)

NOTE: Monday, February 20, is a holiday.

Monday, February 27

1. Heckler v. Community Health Services of Crawford County, Inc. (83-56)
2. Heckler v. Ringer (82-1772)
3. McDonald v. City of West Branch, Mich. (83-219)
4. Ruckelshaus v. Monsanto Co. (83-196)

Tuesday, February 28

5. Board of Education of Paris Union School Dist. No. 95 v. Vail (83-87)
6. Koehler v. Engle (83-1)
7. James v. Kentucky (82-6840) (*Preview* 315-316)
8. Patton v. Yount (83-95)

Wednesday, February 29

9. Allen v. Wright (82-757)
Regan v. Wright (81-970)
10. Summa Corp. v. California Ex Rel. State Lands Commission (82-708)
11. South-Central Timber Development, Inc. v. LeResche (82-1608) (*Preview* 325-327)
12. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. (82-1005)
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apeake and Potomac Telephone (81-2332)
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Louisiana v. Mississippi (86 Orig.) (*Preview*
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