In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 67, Original

STATE OF IDAHO, ex rel. CECIL D. ANDRUS, Governor, WAYNE L. KIDWELL, Attorney General, and JOSEPH C. GREENLEY, Director, Department of Fish and Game,

Plaintiff,

v.

STATE OF OREGON and STATE OF WASHINGTON,

Defendants.

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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TABLE OF AUTHORITIES

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This is not an appropriate case for the exercise of this Court's original jurisdiction. Not only should the issues presented by this case be determined initially by the Congress, but also this petition raises complicated questions of fact which cannot easily be resolved by an appellate court without placing an undue burden on the Court's regular schedule. Moreover, recent legislation enacted by the State of Oregon makes the grievances set forth in Idaho's petition moot, at least with respect to Oregon.

The Columbia River and its tributary, the Snake River, are now commercially navigable from the Pacific Ocean as far inland as Lewiston, Idaho. This river system has always been a major channel of interstate commerce, and it is both the prerogative and the responsibility of the Congress to enact such regulations governing the use of the river and its resources as Congress may deem appropriate.

Additionally, Article I, Section 10, clause 3, of the Constitution of the United States requires Congressional approval of any compact or agreement between the States. Idaho is thus asking this Court to dictate the terms of a compact having the force of law and then send it to Congress for approval. This does not really fall within the scope of this Court's judicial power pursuant to Article III of the Constitution, and it is questionable whether this Court is constitutionally authorized to fashion the legislative remedy sought by Idaho.

In any event, Congress is the proper forum wherein Idaho should seek relief in the first instance. As this Court pointed out in *United States v. Nevada*, 412 U.S. 534, 538 (1973):

> "We seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim. *Illinois v. City of Milwaukie*, 406 U.S. 91 (1972); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *Massachusetts v. Missouri*, 308 U.S. 1 (1939)."

Idaho complains on page 12 of its petition that if this Court does not assume jurisdiction of this case, Idaho

will be left without a remedy, because 28 U.S.C. § 1251(a)(1) makes this Court's jurisdiction *exclusive* in suits between states. However, this Court has construed that statute more liberally, holding in *Illinois v. City of Milwaukie*, 406 U.S. 91, 93 (1972), that:

> "It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly,' *Utah v. United States*, 394 U.S. 89, 95. We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases."

Noting that "appropriateness" involves the availability of another forum wherein relief may be had, this Court went on to discuss its reluctance to assume original jurisdiction in most cases, even where such jurisdiction may clearly exist, supra, 93-94:

> "We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer. *Washington v. General Motors*, 406 U.S. 109."

Likewise, in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), a dispute between the State of Ohio and various major corporations located in other states and in Canada, involving the pollution of Lake Erie, this Court refused to assume the jurisdiction it specifically found existant. The Court discussed at length the difficulty of fact finding by an appellate court, and the probability that the matter might be better resolved by means other than a trial to the Court. In refusing to assume jurisdiction, the Court noted, supra, at 497:

". . . changes in the American legal system and the

> development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another, even though the dispute may be one over which this Court does have original jurisdiction."

and again, at 499:

> "What gives rise to the necessity for recognizing such discretion is pre-eminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court."

The adjudication of Idaho's claim will involve innumerable disputed questions of fact concerning the numbers of fish, the various reasons for their alleged decline, and the optimum allocation of the remaining fish amongst the States. This Court is aware of the potential administrative and evidentiary problems this poses, as noted in *Ohio v. Wyandotte,* supra, at 498:

> "This Court is, moreover, structured to perform as an appellate tribunal, ill-equipped for the task of fact-finding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence."

Moreover, the problem can probably best be resolved in a non-judicial setting. The futility of attempting to determine such complex technical and political matters in court was well put in *New York v. New Jersey,* 256 U.S. 296, 313 (1921):

> "We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem

> of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."

Indeed, in the 50 years since that decision was rendered, this Court has tended increasingly to require litigants seeking to invoke this Court's original jurisdiction to settle their differences by other means. For example, in *Vermont v. New York*, 417 U.S. 270 (1974), this Court refused to approve the proposed settlement of a dispute between the two states involving pollution in Lake Champlain, noting that the parties had other and more appropriate means of reaching the desired results, such as an interstate compact under Article I, Section 10, clause 3, or through a settlement based upon agreement of the parties, which might be the basis for a motion to dismiss the complaint. The same philosophy is equally applicable to the allocation of a diminishing natural resource amongst the three States and numerous Indian tribes which compete for the anadromous fish in the Columbia River system.

In any event, the issues raised by Idaho's petition are, or soon will be moot as concerns the State of Oregon. The Oregon Legislature has passed Senate Bill 373,[①] set forth herein as Appendix A, which provides for the admission of Idaho to the interstate compact. As this Court

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① At this writing [June 23, 1975], the bill in question has not yet been signed by the Governor.

so wisely noted in *Sears v. Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419,* 397 U.S. 655, 657 (1970):

> " 'To adjudicate a cause which no longer exists exists is a proceeding which this Court uniformly has declined to entertain.' *Oil Workers Union v. Missouri,* 361 U.S. 363, 371, quoting from *Brownlow v. Schwartz,* 261 U.S. 216, 217-218. See also *Hall v. Beals,* 396 U.S. 45, *Brockington v. Rhodes,* 396 U.S. 41, *Golden v. Zwickler,* 394 U.S. 103."

Accord: *Los Angeles Herald Examiner v. Kennedy,* 400 U.S. 3 (1970). It is thus obvious that as far as Idaho's admission to the interstate compact is concerned, the matter is, or soon may be moot.

We think it is equally apparent that the other issues raised by Idaho's petition can be better solved by Congress, by agreement among the parties, or by virtually any means other than adjudication by this Court.

Respectfully submitted,

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APPENDIX A

Oregon Laws 1975, ch. ——— (Senate Bill 373)

AN ACT

Relating to the Columbia River Compact; creating new provisions; amending ORS 506.045; repealing ORS 507.020 and 507.030; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this Act is added to and made a part of ORS chapter 507.

SECTION 2. If the Congress of the United States by virtue of the authority vested in it under the Constitution of the United States, providing for compacts and agreements between the states, ratifies the following as a definite compact between the states of Idaho, Oregon and Washington, there shall exist between the states of Idaho, Oregon and Washington, upon ratification by Idaho and Washington, a compact and agreement, the purport of which shall be substantially as follows:

The compact states acknowledge that they have a common interest in the conservation and management of anadromous fish stocks in the Columbia River drainage and they mutually agree to assume joint responsibility in developing commercial and sports fisheries programs which will recognize and give consideration to the interests of all users of the resource.

Membership from the compact states shall be the Idaho Fish and Game Department, the Oregon State Fish

and Wildlife Commission, the Washington Department of Fisheries and the Washington Department of Game.

All rules and regulations for the conservation and management of anadromous fish in the waters of the main stem of the Columbia River from its mouth to the mouth of the Snake River and the waters of the main stem of the Snake River from its mouth to the headwaters of both the Clearwater and the Salmon Rivers, shall be made, changed, altered and amended in whole or in part by majority vote of the states. In voting on rules and regulations, each state is entitled to one vote. Idaho shall vote only on those rules or regulations which relate to steelhead trout, spring chinook salmon and summer chinook salmon.

The individual states shall be responsible for the management of anadromous fish stocks in pertinent tributary streams and shall be guided in such management by the intent and purpose of this compact.

SECTION 3. ORS 506.045 is amended to read:

506.045. There are excluded from the operation of ORS 506.136 to 506.151, [*507.030,*] 508.025, 508.285, subsection (1) of 500.025, ORS 509.206, [*and*] 509.216 **and section 2 of this 1975 Act and rules and regulations adopted pursuant thereto,** any Warm Springs, Umatilla, Yakima, Wasco, Tenino, Wyum and other Columbia River Indians affiliated with these tribes and entitled to enjoy fishing rights, who have not severed their tribal relations, in so far as it would conflict with any rights or

privileges [*granted to*] **reserved by** such Indians under the terms of the treaties made by the United States with the Warm Springs Indians on June 25, 1855, and with the Umatilla and Yakima Indians on June 9, 1855.

SECTION 4. ORS 507.010, 507.020 and 507.030 are repealed.

SECTION 5. Sections 3 and 4 of this Act take effect on the effective date of the compact provided in section 2 of this Act.