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; JOSEPH C. GREENLEY, Director, Department of Fish and Game, *Plaintiffs*

v.

STATE OF OREGON, STATE OF WASHINGTON, *Defendants.*

STATE OF WASHINGTON'S BRIEF IN OPPOSITION TO STATE OF IDAHO'S MOTION TO FILE A COMPLAINT

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STATE OF WASHINGTON'S BRIEF IN OPPOSITION TO STATE OF IDAHO'S MOTION TO FILE A COMPLAINT

The State of Washington by its Attorney General respectfully requests that the Court deny the application of the State of Idaho to file an original action in this Court against the states of Washington and Oregon.

STATEMENT IN OPPOSITION TO THE MOTION

The State of Idaho has requested permission to file a complaint in this Court seeking:

(1) Admission to the Oregon-Washington Columbia River Fish Compact which was ratified by Congress in 1918 (40 Stat. 515) (set forth in Appendix 1).

(2) The Court to establish what Idaho calls an "equitable portion" of the anadromous fish runs in the Columbia River to be preserved for the State of Idaho and its citizens.

We respectfully submit that there is no basis for granting the relief requested by the State of Idaho. This Court on a number of occasions involving original suits by states in this Court has stated:

> "The burden upon the State of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude, and it must be established by clear and convincing evidence." *New York v. New Jersey*, 256 U.S. 296, 309 (1921); also see, *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); and *Missouri v. Illinois*, 200 U.S. 496, 521 (1906).

The Columbia River System encompasses the states of Washington, Oregon, Idaho and the Cana-

dian province of British Columbia. Throughout most of this river system anadromous fish are produced and these fish spawn in fresh water and migrate as juveniles to the Pacific Ocean. After varying periods of time, the fish which have survived the outward migration and the salt-water environment reenter the Columbia River and try to return to their original spawning areas which are on tributaries and the main stream of the river throughout the Columbia River System. One of the major tributaries of the Columbia River is the Snake River, which originates in the State of Idaho. This river forms the border between the states of Washington and Idaho for approximately thirty miles. It then proceeds through the State of Washington for nearly 140 miles, flowing into the Columbia River, which at that point is nearly 300 miles from the Pacific Ocean. The Columbia River then forms the border between the states of Washington and Oregon for approximately 270 miles, extending to the Pacific Ocean. The concerns and contentions expressed by the State of Idaho relate to this lower portion of the Columbia River and the Snake River and the anadromous fish populating the same.

The states of Washington and Oregon have been exercising effective management control for a number of years with reference to the harvesting and conservation of anadromous fish runs in the Columbia River. In 1915 the Washington legislature (§ 116, chapter 31, Laws of 1915) and the Oregon

legislature (§ 20, chapter 188, Laws of 1915) authorized the creation of the Oregon-Washington Columbia River Fish Compact contingent upon approval by Congress pursuant to Article I, § 10 of the United States Constitution. Congress in 1918 (40 Stat. 515) approved and ratified the Compact. Idaho is now seeking by its proposed complaint to become a member of the Oregon-Washington Columbia River Compact. The Governor of the State of Washington by an executive request (House Bill 156, quoted in Appendix 2) has sought legislative approval for the addition of the State of Idaho to the Oregon-Washington Compact. The bill passed the Washington House of Representatives 93-5 and was recommended for final passage by the Senate committee. However, the legislature ended before the Senate approved the bill. A compact under the United States Constitution, Article I, § 10, clearly requires the consent of the states and Congress. The judicial relief being sought by Idaho is an attempt to compel consent not only from the states of Washington and Oregon but also from the United States Congress, which is not named or proposed as a party in this action. The failure to join the United States is significant in light of this Court's dismissal of *Arizona v. California*, 298 U.S. 558, 571 (1936), because the United States, which was a necessary party, had not been included as a party.

At the time this brief was prepared the states of Washington and Oregon through the Compact have

closed the entire Columbia River below the conflux with the Snake River, and the Snake River within the State of Washington to fishing by either commercial or sports fishermen. The total closure is an effort to protect spawning stock so that the fish runs will have the opportunity to naturally replenish and continue in the future. A major source of adverse impact on fish runs in the Columbia River has been the construction of large hydroelectric dams by the federal government. In the first 270 miles of the river which forms the border between the two states, there are three large federal dams. There are four additional federal dams within the State of Washington on the remaining portion of the Columbia and Snake Rivers with which Idaho is concerned. Thus, anadromous fish seeking to return to Idaho waters are confronted with seven major federal dams which are responsible for a substantial fish mortality. The states of Washington, Oregon and Idaho, individually and collectively, have sought improvements in these dam facilities to reduce fish mortality. The fish mortality due to these dams means that during those periods in which there are adequate fish runs in the Columbia River to support a reasonable sport and commercial harvest a substantial curtailment of that harvest will simply increase the fish mortality due to dams without necessarily resulting in any real increases in fish reaching the State of Idaho. Such a curtailment of an appropriate harvest would effectively increase

the natural wastage of the resource. If one assumes that Idaho has some interest in the anadromous fish outside of its jurisdiction, and we are not conceding that assumption, this Court in *Kansas v. Colorado*, 206 U.S. 46, 117 (1907), has recognized that the beneficial use of water by Colorado, even though some injury occurred to the State of Kansas, did not justify relief. We submit that the beneficial use of the fish in the lower Columbia which minimizes natural wastage of the resource is similar and outweighs the "injury" to Idaho.

Washington and Oregon are concerned with the conservation of the fish run as evidenced by the restrictions that they have placed on fishing activities within their jurisdictions for a number of years. Since 1957 no commercial fishing has been permitted above Bonneville Dam, which is the first dam on the Columbia River, except for Indian fisheries. It should be noted that at the present time the states of Washington and Oregon are required by judicial decree in *Sohappy v. Smith*, 302 F. Supp. 899 (D.C. Ore. 1969) to permit Indians to obtain an equitable portion of the entire fish run. More recently, the United States District Court of Oregon in 1974 amended the *Sohappy* decree, *supra*, under its continuing jurisdiction and specifically decreed that Indians are entitled to 50% of the harvestable fish. That amendment was based on a decision rendered in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (aff'd Ninth Cir.,

June 4, 1975). The complexities of managing the fish runs and recognizing treaty Indian fisheries on the Columbia River and its tributaries present a complex regulatory situation which is a strong argument for not exercising judicial intervention. This Court noted in *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945), that situations involving the interest of quasi-sovereigns:

> "* * * present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiations and agreement, pursuant to the Compact Clause of the federal constitution."

The legislative action already taken by the State of Oregon to permit the addition of the State of Idaho to the Oregon-Washington Columbia River Fish Compact and the similar action now pending in the State of Washington strongly support the suggestion that the Court reject the Idaho suit without prejudice.

We submit that the water right adjudication cases involving states, for example, *Arizona v. California*, 283 U.S. 423 (1931), 298 U.S. 558 (1936), 373 U.S. 546 (1963), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *Wyoming v. Colorado*, 259 U.S. 419 (1921), and *Kansas v. Colorado*, 206 U.S. 46 (1907), *supra*, are not apropos to the current proceeding. In the situations giving rise to those cases

either a state or its citizens were appropriating water which by virtue of its appropriation was not available for use by others, and if the upstream diversion or use could be enjoined, the water would in fact be available for use by the downstream consumer. In the present situation, a failure to harvest fish downstream on the Columbia River does not automatically mean that those fish will be available for harvest by an upstream state and its citizens. First, there are mixed stocks of fish in the river which spawn in various areas; not all of the fish are destined for the Snake River and its tributaries. Further, there is a substantial natural mortality of the fish involved in the upstream migration. Thus, the preclusion of an appropriate harvest can simply result in greater natural wastage of the resource. Furthermore, in the water cases the Court has recognized an interest in water, and we are unaware of any cases which have held that a state has a proprietary interest in migratory animals located outside of its jurisdiction.

The Court in *Missouri v. Holland*, 252 U.S. 416 (1920), rejected the contention of the state of Missouri that the federal government could not, pursuant to an international treaty, exercise some control over migratory birds when they were located within the state of Missouri. The Court noted that the subject matter; i.e., the birds, were only transitorily within the state and had no permanent habitat therein. *Supra* at 435. The Court further

rejected the contention that the state could exercise exclusive authority by virtue of an assertion of title to the migratory birds. *Supra* at 434. We believe it would be anomolous for the Court, having recognized limitations on the authority of the state over a migratory resource within its boundaries, to find that a state has sufficient interest to affect the actions of other states regarding migratory fish located within another state's jurisdiction. The concept argued here on behalf of the State of Idaho would appear to apply with equal force to migratory animals, birds or fish. We respectfully submit that there is no basis for the assertion of such claims for extraterritorial jurisdiction over those resources.

CONCLUSION

We do not believe that it is appropriate for the Court to assume jurisdiction of this matter, and in support we quote the following language by Justice Frankfurter in *West Virginia v. Sims*, 341 U.S. 22, 27 (1951):

> "* * * The delicacy of interstate relationships and inherent limitations upon this Court's ability to deal with multifarious local problems have naturally led to exacting standards of judicial intervention and have inhibited the formation of a code for dealing with such controversies."

Similar sentiments were expressed by the Court in *New York v. New Jersey*, 256 U.S. 296, 313 (1921), when the Court observed that the problems between New York and New Jersey were,

> " * * * more likely to be wisely solved by cooperative study, by conference and mutual concession on the part of representatives of the state so vitally interested in it than by proceeding in any court, however constituted."

We respectfully submit that the Court should deny the motion by the State of Idaho for leave to file a complaint in this action.

DATED this 31 day of July, 1975.

Respectfully submitted,

SLADE GORTON
Attorney General

EDWARD B. MACKIE
Deputy Attorney General
Attorneys for
State of Washington

APPENDIX 1

40 STAT. 515

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress of the United States of America hereby consents to and ratifies the compact and agreement entered between the States of Oregon and Washington relative to regulating, protecting, and preserving fish in the boundary waters of the Columbia River and other waters, which compact and agreement is contained in section twenty of chapter one hundred and eighty-eight of the general laws of Oregon for nineteen hundred and fifteen, and section one hundred and sixteen, chapter thirty-one, of the session laws of Washington for nineteen hundred and fifteen, and is as follows:

> "All laws and regulations now existing, or which may be necessary for regulating, protecting, or preserving fish in the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said States, which would affect said concurrent jurisdiction, shall be made, changed, altered, and amended in whole or in part, only with the mutual consent and approbation of both States."

Nothing herein contained shall be construed to affect the right of the United States to regulate commerce, or the jurisdiction of the United States over navigable waters.

APPENDIX 2

WASHINGTON HOUSE BILL NO. 156

1975 Legislative Session as passed by the Washington State House of Representatives

AN ACT Relating to anadromous fish; providing for a compact between the states of Washington, Oregon and Idaho relative to anadromous fish in the waters of the Columbia and Snake Rivers and providing for the ratification thereof; repealing section 75.40.010, chapter 12, Laws of 1955 and RCW 75.40.010; and repealing section 75.40.020, chapter 12, Laws of 1955 and RCW 75.40.020; and repealing the compact now existing between Oregon and Washington relating to fish in the concurrent waters of the Columbia River only upon approval by the congress of the compact provided for in section 1 of this 1975 act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. Should congress by virture of the authority vested in it under Article 1, section 10, of the Constitution of the United States, providing for compacts and agreements between states, ratify the following as a definite compact and agreement between the states of Washington, Oregon and Idaho, then, and in that event, there shall exist between the states of Washington, Oregon and Idaho 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 sports and commercial fishery programs and regulations which will maintain and preserve the resource for the interest and benefit of all users.

Membership from the compact states shall be the Idaho fish and game department, the fish commission of the state of Oregon, Oregon wildlife commission, Washington department of fisheries and the Washington department of game or the successor agency to any of the above. The compact members may appoint advisors to serve as needed.

All rules and regulations now existing or which may be necessary 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 mouth of the Salmon River, shall be made, changed, altered and amended in whole or in part by a majority vote. In voting on rules and regulations, each state shall be entitled to one (1) vote. Idaho will vote only on those regulations which might have a substantial impact on fish destined for Idaho waters.

The individual states shall be responsible for the management of anadromous fish stocks in per-

tinent tributary streams and shall be guided in such management by the intent and purpose of this compact.

NEW SECTION. Sec. 2. The compact and agreement now existing between the states of Washington and Oregon for the purpose of regulating, protecting or preserving fish in the waters of the Columbia River, or its tributaries, over which the states of Washington and Oregon have concurrent jurisdiction, or which would be affected by said concurrent jurisdiction shall be of no force and effect upon ratification by the congress of the compact and agreement provided for in section 1 of this 1975 act.

NEW SECTION. Sec. 3. The following acts or parts of acts are each hereby repealed:

(1) Section 75.40.010, chapter 12, Laws of 1955 and RCW 75.40.010; and

(2) Section 75.40.020, chapter 12, Laws of 1955 and RCW 75.40.020;

It is the intention of the legislature that the repealers contained in this section shall become effective only upon ratification by the congress of the compact and agreement provided for in section 1 of this 1975 act.