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,

Plaintiff,

vs.

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI

Izaak Walton League of America, Inc.
Oregon Division
Save Oregon's Rainbow Trout, Inc.
Idaho Wildlife Federation
Trout Unlimited
National Headquarters
Salmon River Chamber of Commerce
Boone and Crockett Club
Greater Boise Chamber of Commerce
Greater Lewiston Chamber of Commerce
Wildlife Resources, Inc.
Salmon Chamber of Commerce
Sport Fishing Institute
Trout Unlimited & Northwest Steelheaders Council
Washington State Sportsmen's Council

LANGROISE, SULLIVAN & SMYLIE
Of Counsel

ROBERT E. SMYLIE
Attorney for Amici

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MOTION FOR LEAVE TO FILE AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Izaak Walton League of America, Inc., Oregon Division; Save Oregon's Rainbow Trout, Inc.; Idaho Wildlife Federation; Trout Unlimited; Salmon River Chamber of Commerce; Boone and Crockett Club; Greater Boise Chamber of Commerce; Wildlife Resources, Inc.; Salmon Chamber of Commerce; Sport Fishing Institute; Trout Unlimited & Northwest Steelheaders Council; and Washington State Sportsmen's Council, whose addresses appear more fully set out in Appendix A to this Motion, respectfully move this Court for leave to file the accompanying brief, amici curiae, in the above-entitled proceeding. The consent of the attorney for the Plaintiff has been obtained. The consent of the attorneys for the defendants was requested but refused. The interest of the proposed amici in this case arises out of their interest in the preserva-

tion of an economically viable sport fishing and tourist industry within the State of Idaho as well as their devotion to conservation and to recreational activities in general and in particular to sport fishing. Some of the above-mentioned amici seek to minimize man's impact on the ecological system of the region involved which at the present time is endangered, while many view the threatened extinction of yet an additional species of wildlife as a degradation of spiritual and economic values.

In this case the State of Idaho seeks a determination regarding these same values and it is believed that the brief which amici curiae request permission to file will set out more completely the argument on the issues involved as well as the interests of the amici.

DATED This 9th day of September, 1975.

Respectfully submitted,

ROBERT E. SMYLIE, Esq.
300 Simplot Bldg.
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Of Counsel

PROOF OF SERVICE

I, Robert E. Smylie, attorney for the amici in the above-entitled action and a member of the United States Supreme Court Bar hereby certifiy that, on the 9th day of September, 1975, I served a copy of the Motion For Leave to File Amicus Curiae and Brief Amicus Curiae in the above-entitled matter on:

1. Honorable Daniel J. Evans, Governor of the State of Washington, State Capitol, Olympia, Washington, 98104

2. Honorable Slade Gorton, Attorney General of the State of Washington, Temple of Justice, Olympia, Washington, 98501

3. Honorable Robert Straub, Governor of the State of Oregon, State Capitol, Salem, Oregon, 97310

4. Honorable R. Lee Johnson, Attorney General of the State of Oregon, 100 State Office Building, Salem, Oregon, 97310

5. Honorable Cecil D. Andrus, Governor of the State of Idaho, Room 228, Statehouse, Boise, Idaho, 83720

6. Honorable Wayne L. Kidwell, Attorney General of the State of Idaho, Room 225, Statehouse, Boise, Idaho, 83720

7. Joseph C. Greenley, Director, Department of Fish and Game for the State of Idaho, 600 South Walnut Street, Boise, Idaho, 83707

relators and attorney for the Plaintiff and attorneys for the defendants in the above-named action by mailing the same in a duly addressed envelope with air-mail postage prepaid.

(Date) Counsel for Amici

9-9-75

Address: 300 Capitol Bldg.
Boise, Idaho

APPENDIX A

Izaak Walton League of America, Inc.
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Portland, Oregon 97225

Save Oregon's Rainbow Trout, Inc.
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Portland, Oregon 97214

Idaho Wildlife Federation
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Idaho Falls, Idaho 83401

Trout Unlimited
National Headquarters
4260 E. Evans Avenue
Denver, Colorado 80222

Salmon River Chamber of Commerce
Riggins, Idaho

Boone and Crockett Club
50 South LaSalle Street
Chicago, Illinois 60690

Greater Boise Chamber of Commerce
P.O. Box 2368
Boise, Idaho 83701

Greater Lewiston Chamber of Commerce
Ponderosa Lewis-Clark Motor Inn
Lewiston, Idaho 83501

Wildlife Resources, Inc.
Box 332
Troy, Idaho 83871

Salmon Chamber of Commerce
Salmon, Idaho 83467

Sport Fishing Institute
608 Thirteenth St., N.W.
Washington, D.C. 20005

Trout Unlimited & Northwest Steelheaders Council
One Southwest Columbia
Portland, Oregon 97201

Washington State Sportsmen's Council
P.O. Box 569
Vancouver, Washington 98660

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AMICUS BRIEF

INTERESTS OF THE AMICI

Amici are groups with varying purposes and are composed of a variety of the constitutents who share a common concern over the continuing decline in the anadromous fish runs within the Columbia River Drainage and the injury being done to the valuable and unique natural resource.

Various of the amici are interested principally in the preservation of an economically viable sport fishing and tourist industry within the State of Idaho. Some are devoted to recreational activities in general and to sport fishing in particular while others seek to minimize the impact of man on a region and an ecological system which is simultaneously both wild and fragile.

Many of the amici view the threatened extinction of yet additional species of wildlife as a degradation of

spiritual values. Besides their concern for the survival of the anadromous fish species, perhaps the only characteristic shared by the amici is their inability to take any meaningful steps on their own to halt the excessive commercial fishing which is destroying the natural anadromous runs to the detriment of sport fishermen and those who view aesthetics as an integral part of life.

Amici join the State of Idaho in appealing to this Honorable Court to exercise its constitutional powers in a manner to assure that the facts and issues involved in this problem may be fully and fairly considered. The life cycle of anadromous fish species, the susceptibility of this cycle to interference by man, and the nature of the sixty year old Columbia River Fish Compact are discussed in detail in Idaho's Motion For Leave to File Complaint and the accompanying Statement in Support of Motion. No repetition is needed here.

Amici, some with a nationwide membership, wish to emphasize that the issues dealt with here are national in scope. Only in modern times have we learned through bitter experience that an apparently innocent disturbance of one part of an ecological system cannot be confined and may cause additional injurious disturbances not presently foreseeable. We do not yet know what irreversible alterations in the life cycle of the anadromous fish and related ecological and biological constituents of the Columbia River Basin Drainage will result from the ecologically sudden and drastic decline in the anadromous fish populations.

The issue presented to this Court is not simply which state shall have access to the greater plunder, but whether a marvelous and valuable unique life form

shall be preserved or allowed to be despoiled. The interests of the amici are in its preservation.

QUESTIONS PRESENTED

I. Should the Court refuse to exercise original jurisdiction in the case where no alternative forum is available and where no alternative remedies are possible?

II. Will an order expanding an existing interstate compact and requiring it to administer an equitable apportionment burden the Court with non-judicial obligations?

SUMMARY OF ARGUMENT

I.

This Court has traditionally decided cases involving the flow of natural resources among states. The states have been considered to be the proper representatives of both their own proprietary interests and the collective interests of their citizens in the flow of such resources. In this case, a grant of original jurisdiction is the only possible means whereby amici and the State of Idaho and its citizens may be heard.

The Court has refused to exercise jurisdiction primarily in cases in which an alternative forum is available. No alternative is available here. Neither the state courts nor lower federal courts may determine the rights of states to the migrating fish of the Columbia River. Only this Court can determine the construction and validity of an interstate compact.

Original jurisdiction was established in order to provide an impartial and orderly adjudication of disputes among the various states of the Union. Since defendant states have refused to negotiate a resolution

of the problem at hand, only this Court can protect the interests of amici.

II.

The Court has become increasingly reluctant to undertake sweeping administrative obligations associated with cases presented to it. The remedy which is sought here, however, will not burden the Court with any non-judicial responsibilities. An expanded compact is an ideally suited mechanism to carry out the desired equitable apportionment of the resource in question.

An order apportioning the rights to fish according to production within each state will encourage the states to increase their facilities for the breeding of fish. A refusal to so order will discourage production and may result in the extinction of the threatened species due to over-commercial fishing.

The most desirable resolution to this dispute would be for the states involved to agree among themselves on a solution to the problem. So far, the States of Washington and Oregon have refused to negotiate on the matter. A grant of original jurisdiction may encourage them to review their decisions and may result in an agreement which will solve the problems presented by this case without resort to a hearing on the Complaint.

ARGUMENT

I.

THIS COURT SHOULD NOT DECLINE TO EXERCISE ORIGINAL JURISDICTION OVER AN EXISTING AND SERIOUS CONTROVERSY AMONG STATES WHEN NO OTHER FORUM IS AVAILABLE FOR RESOLUTION OF THE DISPUTE.

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), the Court dealt with a West Virginia statute which required that natural gas deprived from that state's field of production be devoted to the satisfaction of domestic needs before export to other states would be permitted. Pennsylvania and Ohio sought and were granted original jurisdiction by this Honorable Court under the *United States Constitution*, art III, § 2, cl. 2 and 28 U.S.C. § 1251(a). The Court at that time framed the issue in that case in words appropriate to the dispute presented in the instant case:

> "Each suit presents a direct issue between two states as to whether one may withdraw a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of the other."
> Id. at 591

The Court further found that the complaining states were justified in seeking the redress of grievances offered by the remedy of original jurisdiction:

> "The attitude of the complainant states is not that of mere volunteers attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a two-fold interest, — one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are substantial and both are threatened with serious injury."
> Id. 591

Similarly in this case, the State of Idaho seeks to vindicate the rights of its citizens. Its representation of citizens' interests before this Court is appropriate for the protection of both public interests, such as preserving state resources, and of private interests, such as aiding the threatened tourist industry.

In *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), this Court declined to exercise jurisdiction in a suit by the State of Ohio against foreign polluters. In its discussion, the Court announced a standard for declining to hear a complaint:

> ". . . [A]s a general matter, we may decline to entertain a complaint brought by a State against the citizens of another State or country only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant *and* (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities." *Id.* at 499 (emphasis supplied).

It is submitted that neither of two conditions set out above as requisite to the declination of jurisdiction is present in the case at bar.

In *Wyandotte Chemicals Corp.* the Court enunciated two principles underlying the grant of original jurisdiction. First was the policy that a state should not have to seek justice in the tribunals of a sister state. Second was that:

> ". . . [A] State, needing an alternative forum, of necessity had to resort to this Court in order to ob-

tain a tribunal competent to exercise jurisdiction over the acts of non-residents of the aggrieved State."

Id. at 500.

Because the instant case involves a dispute between states rather than one between a state and legal persons, these two policies are in effect a single policy which has appeared in numerous cases: the Court may decline jurisdiction when an alternative forum is or has been available for redress of grievances. *See Massachusetts* v. *Missouri*, 308 U.S. 1, 18-19 (1939), quoted in *Washington* v. *General Motors Corp.*, 406 U.S. 109, 113 (1972).

The set of circumstances present in the case at bar indicates that the case involves the construction and validity of an interstate compact, a subject totally within the purview of this Court. *Nebraska* v. *Iowa*, 406 U.S. 117 (1972); *Virginia* v. *West Virginia*, 78 U.S. 39 (1871). Since both the State of Washington and the State of Oregon are named as defendants, neither state is available as a forum for resolving this dispute, even if either or both states were prepared to hear the case. Further, the fact that this Court's jurisdiction in actions between states is exclusive forecloses any suit in the lower federal courts. Neither Oregon nor Washington has shown any willingness to amend or expand the Columbia River Fish Compact to include the State of Idaho, and congressional action is thereby foreclosed. Amici are likewise incapable of being heard in any forum and in any manner other than as amici curiae in an action in this Court.

In *Illinois* v. *Michigan*, 409 U.S. 36 (1972), this Court declined to exercise jurisdiction because an appellate procedure could have been employed by the

Plaintiff for the redress of the grievances in issue. No alternative procedures are available in this case. A declination of jurisdiction by this Court will mean that the issues involved can never, and will never, be decided.

In the case of *Nebraska* v. *Wyoming*, 325 U.S. 589, 608 (1945), *order modified*, 345 U.S. 981 (1953), a case involving apportionment of river water, this court exercised original jurisdiction to deal with,

> ". . . a clash of interests which between sovereign powers could be traditionally settled only by diplomacy or war."
> *Id.* at 608.

The day of warfare among the states is thankfully long since past. However, "diplomacy" has failed to solve the problem at hand. As a result, this Court is now the only forum capable of resolving the dispute.

II.

THIS COURT WILL NOT BE BURDENED BY ADMINISTRATIVE DUTIES WHICH CAN BE CARRIED OUT BY EXISTING INSTITUTIONS.

The second reason that this Court declined to exercise jurisdiction in the case of *Ohio* v. *Wyandotte Chemicals Corp.*, *supra*, was that the Court was presented with so many responsibilities that it was fearful of allocating such a great portion of time to resolving issues of fact and was reluctant to undertake sweeping administrative obligations regarding the case. The Court also appears to be increasingly reluctant to allow isolated cases of secondary importance to monopolize its attention. Recently the Court rejected a proposed settlement by a special master because the Court would "be acting more in an arbitral rather

than a judicial manner." *Vermont* v. *New York*, 417 U.S. 270, 277 (1974).

It is submitted that the relief sought by Idaho would not require extensive findings of fact by the Court, and would not require the Court to perform administrative or arbitral functions. Idaho desires first that the Columbia River Fish Company be expanded to include Idaho; and second that the states along the migration route of the anadromous fish be allowed to remove these fish only in a proportion which to some extent would be based on the production of the fish within each state and which would appear equitable to the Court. The first remedy requires no over-sight on the part of the Court. The second is based on a straightforward formula which may be administered, once it is established by the Court, by the expanded compact. Oppression by a majority of the states within the compact could result at most only in an appeal to this Court to order anew or modify the equitable apportionment formula which is being sought in the first instance. In the event of continuing controversy among the states, the Court could appoint a special master to determine any facts necessary for enforcement of an apportionment decree. No permanent supervisor is requested and none would be foreseeably necessary.

An expanded compact is fully capable of a fair determination of the factual basis for apportionment. There is no reason to believe that it would exercise its fact finding power other than with good faith or that it could not assume responsibilities required by the desired remedy. To the contrary, an order expanding the compact and ordering equitable apportionment of the fish among the parties' would be administerable in the same manner as decisions by the present compact.

Fish hatcheries are now operated by governmental agencies in all of the affected states. Fish populations can be determined with near-mathematical precision. There is no obstacle to the determination of the contribution each state makes to the total population of the migrating species. The decision sought here will encourage all states to maintain and increase their share in the production of young fish. A contrary decision can lead only to the reduction of the total fish population to the irreparable damage of all involved.

In *Ohio* v. *Kentucky*, 410 U.S. 641 (1973), this Court refused to allow Ohio to amend its previously filed complaint. The major reason that the complaint was disallowed was that the special master appointed in the case had recommended that the proposed amendment failed to state a cause of action and therefore would have been of no benefit. The Court in that case at page 644 stated the purpose of the exercise of original jurisdiction:

> "Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage. . . . Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible, we dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear."
> *Id.* at 644.

In that case the Court did not allow amendment because of the failure to state a cause of action in the amended portion of the complaint but did set out that

speedy resolution of interstate disagreements was the goal of the Court.

This case, too, can be decided quickly since the administrative machinery necessary is already in existence. It may well be that the exercise of jurisdiction by this Court will encourage the States of Washington and Oregon to review their refusal to expand the compact and to produce that kind of settlement by agreement which was viewed with approval in *Vermont* v. *New York*, *supra*. A refusal to exercise jurisdiction would, on the other hand, justify the intransigence of the defendant states and guarantee that no accommodation would ever be offered.

CONCLUSION

Only an exercise of original jurisdiction by this Court can protect the life cycle of the threatened species of anadromous fish. Amici are otherwise powerless to protect their interests. The remedy sought by the State of Idaho will serve the interests of the amici and will not burden the Court with administrative obligations.

For the foregoing reasons it is respectfully submitted that the Motion for Leave to File Complaint be granted.

DATED This 9th day of September, 1975.

Respectfully submitted,

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