No. 67, Original

In the Supreme Court of the United States

October Term, 1975

State of Idaho ex rel. Cecil D. Andrus, Governor, et al., plaintiff

v.

State of Oregon and State of Washington

On Motion for Leave to File a Complaint

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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No. 67, Original

STATE OF IDAHO EX REL. CECIL D. ANDRUS, GOVERNOR, ET AL., PLAINTIFF

v.

STATE OF OREGON AND STATE OF WASHINGTON

ON MOTION FOR LEAVE TO FILE A COMPLAINT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted pursuant to this Court's order of October 6, 1975, inviting the Solicitor General to express the views of the United States in this case.

The State of Idaho seeks to invoke the original jurisdiction of this Court to require the States of Washington and Oregon to admit it to the Columbia River Fish Compact (Complaint, p. 21), a compact between the States of Washington and Oregon approved by Congress on April 8, 1918, 40 Stat. 515, under which the two States jointly regulate their fishery for Columbia River anadromous fish.[1] Idaho also prays that the Court determine

[1]The Columbia River flows from the mountains of Idaho through a portion of the Canadian province of British Columbia across the State of Washington, becoming the border between Washington and Oregon for its final approximately 270 miles before entering the Pacific Ocean. One of its principal tributaries, the Snake River, begins in Idaho and joins the Columbia in southern Washington. The Columbia River system is a significant producer

its equitable portion of the fishery (Complaint, p. 21) and require Washington and Oregon to modify their regulation of the fishery so as to protect Idaho's interests. Washington and Oregon are named as defendants and have opposed the motion; the United States is not a party to the suit.

While we are not unsympathetic to Idaho's desire to protect its fisheries, we suggest that the Court should not grant leave to file the complaint at this time but should deny the motion without prejudice to the filing of a subsequent motion and complaint.

1. The thrust of Idaho's complaint is that it should be made a party to the Columbia River Fish Compact and that it should be assured that its interests will be protected within the compact. At the time Oregon filed its Memorandum in Opposition, the Oregon Legislature had passed a bill granting that State's consent for Idaho to join in the Compact. (Ore. Memo. in Opp., p. 5). That bill has now become law. Chap. 709, Oregon Laws of 1975.

A similar bill sponsored by the Governor of Washington was introduced in the Washington legislature, passed the Washington House of Representatives 93 to 5, and was recommended for passage by the pertinent Senate committee (Wash. Br. in Opp., p. 4). But the term of the legislature ended before Senate approval of the bill (*ibid.*). We are informed by counsel for the State of Washington that the next plenary session of the Washington legislature will be in January 1977 and there is reason to believe that the bill may be enacted in that session. If so, the

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of anadromous fish, which are spawned in Washington, Oregon and Idaho, migrate to the sea, and seek to return to their original spawning grounds. These fish are the subject of important commercial fisheries in the sea and as they return to their spawning grounds (see, *e.g.*, Mot. 2-5; see also *1975 Commercial Atlas & Marketing Guide*, pp. 544-545 (106th ed.)).

three states will then be in a position to present the broadened compact to Congress for its approval (United States Constitution, Art. I, Sec. 10) and that aspect of Idaho's complaint in this Court would become moot.

Similarly, Idaho's request for an equitable apportionment and for judicial supervision of the fishery may well become unnecessary if it is made an equal member in the Compact, and can thus participate in the day-by-day management of the fishery in the three-state area.

There is thus no need for the Court to exercise its original jurisdiction at this time. Moreover, the relief asked by Idaho would require the Court to involve itself in "[t]he complex factual pattern surrounding the anadromous fish problem * * * " (Mot. 4) and would also require the Court to modify a compact approved by Congress between two States, a matter entrusted by the Constitution to the States with the consent of Congress (Art. I, Sec. 10).[2]

Accordingly, the Court should decline to exercise its original jurisdiction on these pleadings at this time. See *West Virginia ex rel. Dyer* v. *Sims,* 341 U.S. 22, 27; *Illinois* v. *City of Milwaukee,* 406 U.S. 91. However, if Washington should fail to enact legislation permitting Idaho to join the Compact and new pleadings are then filed, the Court may wish to consider the questions presented anew.

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[2]While this Court has been called upon to interpret interstate compacts, *Arizona* v. *California,* 373 U.S. 546, or to apportion water rights in the absence of such compacts, *Arizona* v. *California,* 298 U.S. 558, we are unaware of an instance in which the Court has ordered that a State be made a member of such a compact.

2. While for the reasons stated above it is unnecessary to reach the issue now, it appears that the United States is an indispensible party to this litigation. As the Court is aware, there are Indian tribes in Washington and Oregon which have treaty-protected fishing rights. See *Department of Game* v. *Puyallup Tribe,* 414 U.S. 44. See also *United States* v. *State of Washington,* 520 F.2d 676 (C.A. 9), certiorari denied, January 26, 1976 (Nos. 75-588, 75-592, and 75-705). The tribes in Oregon and Washington which have such rights on the Columbia River include the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Reservation, and the Confederated Tribes and Bands of the Yakima Indian Nation; in Idaho the Nez Perce Tribe of Idaho has similar rights. *Sohappy* v. *Smith,* 302 F. Supp. 899, 904 (D. Ore.).

Thus, even though the States may properly agree by compact to take conservation measures with respect to the fishery, it would be improper for a court to make an equitable apportionment of the fishery among the three States in the absence of the Tribes or the United States (as their trustee) or both.[3] Since the Tribes' fishing rights are guaranteed by treaties with the United States, the States are not free to divide the fishery in such a way as to interfere with those rights. See *Department of Game* v. *Puyallup Tribe, supra.* Thus, as in an equitable apportionment between States of the waters of an interstate stream as to which the United States has rights, the United States would be an indispensible party. See *Arizona* v. *California,* 298 U.S. 558, 571.

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[3]There may well be conflicts between the interests of the upstream and downstream tribes which would require separate representation.

This obstacle to proceeding with the litigation could perhaps be overcome by the intervention of the United States for the purpose of protecting the rights of the Indians as was ultimately done in *Arizona* v. *California,* 373 U.S. 546, and more recently in *State of Texas* v. *State of New Mexico,* No. 65, Original, October Term, 1975. See also *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102. Whether the United States would ultimately seek to intervene here, however, need not be decided at this time, pending further action by the state legislatures and by Congress toward a solution of the fisheries management problem through interstate compact.

For the foregoing reasons, the motion for leave to file a complaint should be denied at this time.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.