In the Supreme Court of the United States

No. 67, Original

STATE OF IDAHO,
ex rel JOHN V. EVANS,
Governor;
WAYNE L. KIDWELL,
Attorney General;
JOSEPH C. GREENLEY,
Director, Department of Fish and Game,
PLAINTIFF

vs.

STATE OF OREGON,
STATE OF WASHINGTON,
DEFENDANTS

MEMORANDUM IN REPLY TO OREGON'S MOTION TO DISMISS

WAYNE L. KIDWELL
Attorney General
State of Idaho

ROBERT M. MACCONNELL
Deputy Attorney General
Statehouse
Boise, Idaho 83720

JOHN C. VEHLOW
of counsel

Counsel for Plaintiff

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COMES NOW the Attorney General for the State of Idaho and replies to the filing of Defendant State of Oregon's Motion to Dismiss and Brief in Support of Motion to Dismiss as follows:

I.

Defendant Oregon's "Motion to Dismiss" is an improper response, being contrary to the December 7, 1976 order of this Court which directed the defendants ". . . to file answers to the bill of complaint or to otherwise *plead* . . ." *Idaho ex rel Evans* v. *Oregon and Washington,* No. 67 Original, Per curiam Order, dated December 7, 1976 (emphasis supplied). Rule 9 (2) of the Supreme Court Rules provides that pleadings and motions in original actions are to be governed by the Federal Rules of Civil Procedure. Rule 7 (a) of the Federal Rules makes it plain that a motion to dismiss does not fall within the definition of "pleading". Idaho therefore contends that Oregon's motion is inappropriate and should not be considered.

II.

This Court by virtue of its December 7, 1976 order accepted jurisdiction of this matter to the extent of plaintiff's prayer for an equitable apportionment of the upriver anadromous fish runs in the Columbia River Basin. That order laid the question of jurisdiction to rest. Oregon argues that this Court should abstain from exercising jurisdiction until plaintiff demonstrates that the United States District Court in Oregon is an inadequate forum or that the "Plan For Managing Fisheries On Stocks Originating From The Columbia River And Its Tributaries Above Bonneville Dam" (hereinafter "the Plan") adopted by said court under its continuing jurisdiction in *United States* v. *Oregon,*

Washington, et al, Civil No. 68-513, is inequitable to Idaho.

Idaho respectfully submits that a justiciable controversy exists and, as such, it is not required to go further and show the lack of another available forum. In *Georgia* v. *Pennsylvania Railroad* Co., 324 U.S. 439, (1944); reh.den. 324 U.S. 890, (1945), the Supreme Court stated as follows:

> Once a statement makes out a case which comes within our original jurisdiction, its right to come here is established. There is no requirement in the Constitution that it go further and show that no other forum is available to it. Page 466.

Accordingly, plaintiff should not be required to seek jurisdiction of its claim for an equitable apportionment of the upriver anadromous fish runs in the Columbia River system against two defendant states in a federal district court which sanctioned the Plan that fails on its face to satisfy Idaho's requirements for a fair share of these runs. Plaintiff does not believe it necessary or productive to reargue the threshold question of jurisdiction in reply to an unauthorized motion filed by the defendant herein.

Moreover, plaintiff State of Idaho contends that the motion filed by defendant State of Oregon has the effect of unnecessarily delaying litigation of this matter with no subsequent benefit to be derived by any party. In the original jurisdiction case of *Ohio* v. *Kentucky,* 410 U.S. 641, (1973), this court has said:

> 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. Page 644.

III.

Defendant State of Oregon relies heavily on the ongoing case of *United States* v. *Oregon, Washington et al,* supra and argues that the Plan approved by that court should bind Idaho by its terms. It is important to note that said case was filed at the behest of the Indian tribes in the Columbia River Basin who were claiming their treaty rights had been unlawfully curtailed by the defendants' regulations. Idaho was not joined as a party defendant and never took part in the litigation. Negotiations for the Plan which evolved from that litigation were initiated in August, 1976 as a means of ensuring the treaty users their fair share of the fish. See Oregon's Brief, Appendix B. Idaho respectfully submits the Plan has had no impact on the issues raised in its complaint herein, which was submitted eleven months earlier in September, 1975.

However, assuming arguendo that the Plan is germane to the case at bar, the allocation of fish thereunder still fails to provide Idaho with a fair share of the upriver anadromous fish runs destined for Idaho waters and remains, by its very terms, inequitable. The State of Idaho was never invited to participate in the negotiations for the establishment of the Plan, in point of fact Idaho first discovered the terms of the Plan by accident (see Affidavits of David W. Ortmann and Joseph C. Greenley attached as Exhibits A and B). The resultant allocations reflect the historical problems which Idaho has faced in gaining recognition of its right to an equitable apportionment of these fish runs in the Columbia River drainage. According to the affidavit of Beverly B. Hall, attached as Appendix B to defendant Oregon's motion, consultations were held with the State of Idaho wherein Idaho sanctioned the Plan, supported Oregon's efforts and did not disagree with the allocations made under the terms of the Plan, but it is illuminating to note that the signatories to the

Plan do not include a representative of the State of Idaho among their number. See Oregon's Brief, Appendix A, page 24.

The inference that consultations with Idaho were extensive is misleading because, in actuality, these meetings were only informative sessions in which plaintiff State of Idaho was merely advised of the Plan's terms and the progress of the negotiations among the parties to *United States* v. *Oregon, Washington et al,* supra. Concurrence was never sought by Oregon, nor given by Idaho, as more fully appears in the affidavits of David W. Ortmann and Joseph C. Greenley, attached to this response as Exhibits A and B, respectively.

Defendant State of Oregon contends that it ". . . consulted with the State of Idaho concerning the provisions of the management plan and used its best efforts to ensure that the State of Idaho received an equitable portion of the upriver anadromous fish . . ." (Oregon's Brief, page 5). Yet the Plan fails to provide any specific allocation of fish to the State of Idaho. Only upon spring chinook runs of between 120,000 and 150,000 fish would the non-treaty sport fisheries in the Snake River system above Lower Granite Dam be expressly allocated any fish. This allocation would provide 7,500 spring chinook for sport fishing beyond the Plan's 30,000 minimum spawning escapement figure. However, it should be noted that these 7,500 fish set aside for the Snake River system non-treaty fisheries are not necessarily reserved for Idaho waters, but would be shared by the states of Oregon, Washington and Idaho inasmuch as each state has a fishery on the Snake River above Lower Granite Dam, as well as fisheries in the tributaries to the Snake River.

The Plan fails to provide for increasing the possible catch or escapement of spring chinook for the benefit of the Idaho sport fishery on runs greater than 150,000 fish. The Plan merely provides that additional fish would be shared on a

40% treaty fishermen/60% non-treaty fishermen basis. Conceivably, the non-treaty allocation could be allotted entirely to the lower Columbia River sport fishery, or the lower Columbia River gill net fishery, or shared by both. Thus, an allocation to Idaho of spring chinook, other than a portion of the 7,500 fish designated to the Snake River sport fishery, is not apparent in the Plan.

Likewise, even though the summer steelhead run is of great importance to the sport fishery of Idaho, no allocation to the plaintiff state is identifiable under the terms of the Plan. Although there will be no Indian or non-Indian target commercial fishery on summer steelhead under these terms, it is a misconception that a commercial take would be nonexistent since "incidental" catches of summer steelhead always occur during non-treaty or treaty commercial gill net seasons for fall chinook salmon due to the commingling of these runs.

Defendant asserts, "Minimum escapement goals of fish destined to reach the State of Idaho are 30,000 spring chinook and 30,000 summer steelhead reaching the waters above Lower Granite Dam . . ." (Oregon's Brief, page 5). As stated previously, the allocations of fish above Lower Granite Dam are not necessarily "destined" for Idaho waters since Snake River tributaries above that dam also lead into both Oregon and Washington. Furthermore, these spawning escapement figures fall far short of providing optimum production for the perpetuation of anadromous fish runs in future years. The use of "minimum escapement goals" on the Columbia and Snake River systems is a dangerous management practice since, once it appears reasonably certain to the Oregon-Washington Columbia River Fish Compact agencies that a minimum escapement goal will be reached, these regulatory agencies seemingly commence an effort to make certain that fish in excess of that goal do not escape the

fisheries. For instance, the Oregon-Washington Columbia River Fish Compact has determined the 1977 spring chinook run to be of sufficient size to open the fisheries and, as such, has opened the commercial Indian fishery, the lower Columbia River sport fishery, the upper Columbia River sport fishery and is considering soon opening the lower Columbia River non-treaty commercial gill net fishery. Idaho submits that the Plan's minimum escapement goals are unsound management practices and are designed only to assure the continued production of the runs necessary to provide the Indian allocation under the Plan and harvestable run sizes in the lower river. Further, the Plan is another example of the historic failure of the Compact states to consider Idaho's needs. Therefore, plaintiff asserts that the Plan provides an inequitable distribution of these runs and represents a continuing problem endangering the very existence of Idaho's anadromous fish resources, which constitutes a controversy of sufficient magnitude to state a justiciable claim before the Supreme Court of the United States. In *Massachusetts* v. *Missouri, et al,* 308 U.S. 1 (1939) the Supreme Court stated:

> To constitute such controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence. Page 15.

IV.

Oregon further contends that plaintiff has failed to state a proper claim because the issues at bar are not ripe for adjudication since the effects of the drought in the Pacific Northwest upon the anadromous fish resource remain unknown. Idaho respectfully submits that the existence of a drought condition or any other condition is irrelevant to the apportionment issue and is immaterial to the case at bar. An

"equitable apportionment" of the fish resource is not dependent on the actual number of migrants; no matter what the number, Idaho maintains a claim to a fair share of the fish runs. Yet even if this case turned on a drought issue, Oregon is mistaken in comparing present problems to the disastrous low water year of 1973.

Under present low water conditions, losses will be reduced because protective screens have now been placed on the turbine intakes at the two uppermost dams on the lower Snake River facilitating diversion and capture of the majority of juveniles migrating downstream and permitting transport by truck and barge of these fish around the turbines and the other hazards of the remaining downstream dams. Thus, in 1977, the outlook for downstream migrants appears bright, as set out in the affidavit of David W. Ortmann attached to this response as Exhibit A. Furthermore, it is commonly known by fisheries biologists that low flows, rather than high flows, in the Snake and Columbia Rivers during the period of upstream passage present the best possible situation for returning adult fish. The slower flowing, less turbulent and clearer water allows the fish to make an easier, faster and safer upstream migration, as alleged in Exhibit A attached hereto.

Because of the shrinkage of stream areas during the drought, some potential production areas for salmon and steelhead will be unavailable. However, the positive effects of the passage conditions during the drought should compensate for the loss of production area. In Idaho, some production areas have not been utilized for many years because of underescapement, drought conditions notwithstanding. If Oregon truly believes that "the result may be such a depletion of anadromous fish runs that the survival of the species will mandate a moratorium on all fishing efforts for the next few years" (Oregon's Brief, page 8), plaintiff would encour-

age Oregon to initiate such a moratorium on their fishing efforts immediately.

V.

Idaho has at no point in this litigation claimed ownership of the upriver migrating anadromous fish which are the subject of this dispute. For purposes of this suit plaintiff concedes their status as *ferae naturae.*

The question here is not ownership, but the responsibility of defendants Oregon and Washington to regulate the resource in order to assure plaintiff an equitable share in these fish. Defendant State of Oregon cites *Missouri* v. *Holland,* 252 U.S. 416, (1920) for the proposition that ". . . the federal government may not, pursuant to an international treaty, exercise some control over migratory birds when they were located within a state's borders." (Oregon's Brief, page 10). Idaho respectfully suggests that a reading of Justice Holmes' eloquent opinion in that case reveals the Court held that Congress was well within its Constitutional prerogatives when it passed a statute implementing a 1916 treaty with Great Britain which authorized the Secretary of Agriculture to promulgate regulations affecting the hunting of migratory birds within the United States. Thus, plaintiff contends that Oregon's argument herein is inadequate to deprive Idaho of its legal status as plaintiff.

VI.

A stay in the proceedings for three years is neither necessary nor wise. Idaho has contended from the inception that the upriver fish runs are already depleted to a dangerous level. A three year stay may well be long enough to cause irreversible harm to the resource due to the failure of the Plan to provide any more than "minimum escapement". The urgency of the situation requires that the request for a stay

be denied and the matter proceed to hearing on the merits.

THEREFORE, plaintiff requests the Court not to consider defendant State of Oregon's "Motion to Dismiss" and to appoint a Master forthwith to hear this matter.

WAYNE L. KIDWELL
Attorney General
State of Idaho

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 1977, three copies of Memorandum In Reply to Oregon's Motion to Dismiss were mailed, postage prepaid to:

Dixy Lee Ray
Governor
Office of the Governor
Olympia, Washington 98504

Slade Gorton
Attorney General
Temple of Justice
Olympia, Washington 98504

Edward B. Mackie
Deputy Attorney General
Temple of Justice
Olympia, Washington 98504

Robert Straub
Governor
Office of the Governor
Salem, Oregon 97310

James A. Redden
Attorney General
State Office Building
Salem, Oregon 97310

Beverly B. Hall
Assistant Attorney General
State Office Building
Salem, Oregon 97310

Raymond P. Underwood
Assistant Attorney General
State Office Building
Salem, Oregon 97310

Honorable Wade McCree
Solicitor General
Department of Justice
Washington D.C. 20530

Wendell Wyatt
Souther, Spaulding, Kinsey,
Williamson & Schwabe
1200 Standard Plaza
Portland, Oregon 97204

Robert E. Smylie
300 Simplot Building
Boise, Idaho 83702

and further that all parties required to be served were served.

WAYNE L. KIDWELL
Attorney General
State of Idaho

EXHIBIT A

AFFIDAVIT OF DAVID W. ORTMANN

STATE OF IDAHO)
) ss.
County of Ada)

I, David W. Ortmann, being first duly sworn, make the following statement:

1. That I am a biologist employed by the Idaho Department of Fish and Game as Anadromous Fisheries Supervisor. I am responsible for the supervision of some of the major anadromous fish programs conducted by the Idaho Department of Fish and Game.

2. That, in 1976 there were stocked in the State of Idaho, under combined state and federal programs, approximately 7,789,000 spring chinook, 520,000 summer chinook and 4,282,000 summer steelhead and, it is estimated that similar quantities will be stocked in 1977.

3. That in relationship to the number of anadromous fish stocked annually by Idaho through natural and artificial means into the Columbia River drainage, plus the maintenance of over 3,000 miles of natural salmon and steelhead stream habitat in Idaho, the "Plan For Managing Fisheries On Stocks Originating From The Columbia River And Its Tributaries Above Bonneville Dam" (hereinafter "the Plan" executed by the parties to *United States* v. *Oregon, Washington et al,* fails to provide Idaho with a fair share of the upriver anadromous fish runs destined to return to the waters of Idaho.

4. That the Plan fails to provide any specific allocation of upriver adult anadromous fish to the State of Idaho. The nearest the Plan comes to a specific allocation of fish for the State of Idaho is the allocation of 7,500 spring chinook passing Lower Granite Dam for the Snake River sport fishery on

runs between 120,000 and 150,000 fish, However, the 7,500 fish set aside for the Snake River system under the terms of the Plan are not necessarily destined for Idaho waters because the fisheries above Lower Granite Dam are shared by the states of Oregon, Washington and Idaho, and these waters include tributaries to the Snake River which lead into both Oregon and Washington.

5. That although the Plan states that no target Indian or non-Indian commercial fishery on summer steelhead will exist, this does not mean that a commercial take of summer steelhead will not occur, since "incidental" takes of these fish occur during commercial fall chinook fisheries because the upstream migrations of the adult fish of these two species overlap. The use of nets with a minimum mesh size of eight inches on both treaty and non-treaty commercial fisheries on the mainstem of the Columbia River may lessen the incidental catch of steelhead during the commercial salmon season, however, it will not eliminate it. Further, the opening of a mainstem Columbia River sport fishery on summer steelhead only on runs in excess of 150,000 fish does not necessarily permit additional summer steelhead to escape into the State of Idaho as alleged in Oregon's Brief, page 7.

6. That no fishery is presently justified on summer chinook salmon because of critically low escapements.

7. That minimum escapement goals of 30,000 spring chinook and 30,000 summer steelhead passing Lower Granite Dam as contemplated in the Plan do not necessarily provide these numbers of fish for spawning purposes to the waters of the State of Idaho because portions of the Snake River spring chinook and summer steelhead runs above Lower Granite Dam are destined for Oregon and Washington tributaries. Further, the Plan's use of minimum escapement goals is a management practice falling far short of providing optimum production for the perpetuation and

full utilization of anadromous fish runs in future years.

8. That the Plan's goal of maintaining a minimum average run size of 250,000 upriver spring chinook is clearly not within the average run size of these fish in recent years as alleged in Oregon's Brief, page 6 and Appendix C thereto. According to figures taken from the Oregon Department of Fish and Wildlife and the Washington Department of Fisheries publication entitled "Columbia River Fish Runs and Fisheries, 1957-1975, Volume 2, Number 1", the average run size of spring chinook for the period of 1960 through 1964 was 162,000, for the period of 1965 through 1969 it was 171,800 and for the period of 1970 through 1974 the average was 195,800. The 1975 run was listed at 104,100.

9. That at no time was the State of Idaho invited to participate in negotiations leading to establishment of the Plan even though the State of Idaho places over 50 percent of the summer steelhead and 50 percent of the upriver spring chinook into the system each year. Idaho never supported the efforts of Oregon to develop any comprehensive management plan for allocating the anadromous fish resource of the Columbia River Basin drainage which excluded the State of Idaho from entering into the negotiations. Although the State of Idaho was sympathetic to the need for negotiations between the litigants in *United States* v. *Oregon, Washington et al,* which might bring an end to the continual disputes between the treaty Indians and the states of Oregon and Washington, concurrence with the Plan was never given by Idaho. In fact, Idaho was only privy to three informal consultations with Oregon in which plaintiff State of Idaho was merely advised of the draft plan's terms and the progress of the negotiations. On December 17, 1976, Idaho sent an Assistant Attorney General and the affiant to a scheduled meeting between the Plan's negotiators at the Oregon Department of Fish and Wildlife headquarters only to be de-

nied admittance to a "closed session" meeting.

10. That the State of Idaho was inadvertently given a draft copy of the Plan by an employee of the Oregon Department of Fish and Wildlife prior to its adoption and thereafter was requested to maintain secrecy involving the tentative terms of this Plan by the Oregon Department of Fish and Wildlife. Consequently, Idaho did not voice its complaints publicly regarding the inequitable allocation of fish under the Plan until it was publicized because Idaho was respecting Oregon's request for secrecy in the matter.

11. That although some potential production area for salmon and steelhead may be unavailable due to the shrinkage of streams in the Pacific Northwest because of the current drought, the conditions for Idaho's downstream migrating juveniles and returning upriver adults appear favorable in 1977. Low flows in the Snake and Columbia Rivers during the upstream passage of adults present the best possible situation since the slower flowing, less turbulent and clearer water allows the fish to make an easier, safer and faster upstream migration. Further, fish ladders at the dams are more effective under low flow conditions, passage is easier, and therefore losses of adults at the dams are lessened. This year the loss of downstream migrating juveniles is expected to be only 20 percent or less due to decreased effects of nitrogen supersaturation at the dams from less spill and the screening of turbine intakes at the two uppermost dams allowing more efficient diversion and capture of downstream migrating juveniles for the purpose of transporting these fish by truck and barge safely around the turbines and the other adverse effects of the remaining downstream dams.

12. That the losses of downstream migrating juveniles and returning adult fish as a result of dam-related mortalities certainly exists, but in addition, any fishing activity further reduces the numbers of fish available to spawn.

13. That the State of Idaho has no commercial anadromous fishery because of an insufficiency of fish, and defendants' practices are endangering Idaho's sport fishery which is of extreme sociological, economical and recreational importance to the State.

/s/
DAVID W. ORTMANN

Subscribed and Sworn to before me this 21st day of April, 1977.

NOTARY

/s/ T. Williamson
Notary Public for Idaho
Residing at:

EXHIBIT B

AFFIDAVIT OF JOSEPH C. GREENLEY

STATE OF IDAHO)
) ss:
County of Ada)

I, Joseph C. Greenley, being first duly sworn, make the following statement:

1. That I am employed by the State of Idaho as Director of the Idaho Department of Fish and Game. I am responsible for the general supervision and control of all activities, functions and employees of the Department under the direction and supervision of the Idaho Fish and Game Commission.

2. That the Plan For Managing Fisheries On Stocks Originating From The Columbia River And Its Tributaries Above Bonneville Dam (hereinafter "the Plan") fails to provide the State of Idaho an equitable allocation of the upriver anadromous fish of the Columbia River drainage.

3. That the State of Idaho was never invited to participate in negotiations for the establishment of this Plan even though Idaho contributes substantial numbers of natural and hatchery-propagated offspring to the river system, annually.

4. That I was present at a meeting in executive session of the Oregon Fish and Wildlife Commission on August 19, 1976, wherein an offer for the allocation of anadromous fish by the treaty Indians was discussed, but discussions of the specific terms of said offer were restrained by the presence of the press.

5. That the State of Idaho only became aware of the specific terms of the Plan when inadvertently given a draft copy of the Plan by an employee of the Oregon Department of Fish and Wildlife. Thereafter, I was privy to only two conferences where the Plan was discussed, an informal luncheon conversation on December 17, 1976, in Portland with the

Director of the Oregon Department of Fish and Wildlife, his attorney, and members of my staff, and a briefing given by an Oregon official at our offices in Boise on January 10, 1977, explaining the terms of the Plan. However, at no time was I contacted personally regarding my opinion of the fish allocation established under the Plan.

6. That the State of Idaho never concurred with the terms of the Plan.

7. That the State of Idaho's anadromous fish resource is being endangered by the overharvesting of these fish before the survivors of the hazardous downstream and upstream migrations can return safely to Idaho to provide a sport fishery and to spawn.

/s/
JOSEPH C. GREENLEY

Subscribed and sworn to before me this 25th day of April, 1977.

NOTARY

/s/ T. Williamson
Notary Public for Idaho
Residing at: