In the Supreme Court of the United States

October Term, 1976

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,

v.

STATES OF OREGON and WASHINGTON,

Defendants.

BRIEF OF STATE OF OREGON ON AFFIRMATIVE DEFENSES

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QUESTIONS PRESENTED

1. With the facts before this Court, which were not before the Court when it granted leave for Idaho to file its complaint, should Idaho's complaint be dismissed for lack of jurisdiction and failure to state a claim against defendants upon which relief can be granted?

2. If the Court should decide to maintain jurisdiction, should this suit proceed in the absence of the United States as a party?

STATEMENT OF THE CASE

The Columbia River is probably the most complex waterway management system and fishery that exists

in the world today, not only because of the institutional arrangement that has developed over time, which includes government agencies, political subdivisions, states and Canada, but also because the fishery itself is a very complex one naturally, with fish stocks that are intermingled at various times of movement upstream and downstream. All of these factors together require a very complex management program. (Tr. 204).

There are no short or long term solutions to the complexly interrelated environmental, social, economic, legal, political and philosophical conflicts contributing to contemporary Columbia Basin salmon and steelhead problems. Demand for the basin's valuable salmon and steelhead resources has exceeded the supply for more than a century. The gap will continue to widen. Historic run sizes and geographical distribution are not recoverable within even the most distant foreseeable future. Nonetheless, given the tools, mandate and requisite public and political support the basin's fishery agencies can rehabilitate and maintain productive sport and commercial fisheries throughout that part of the basin still available to salmon and steelhead. (Exhibit W-3, p. 38).

Competing user groups of the fisheries on the Columbia River have been involved in litigation over allocation of anadromous fish since 1968. *United*

States v. Oregon, No. 68-513, United States District Court, District of Oregon. (Exhibits 0-7 to 0-22). The Honorable Robert Belloni, United States District Judge has retained continuing jurisdiction over the case to implement his 1969 Decree, *Sohappy v. Smith,* 302 F Supp 899 (DC Oregon, 1969). Until recently, every spring and fall, coinciding with the up-river Chinook salmon runs, the Indians went to court to enjoin state regulations in an effort to insure that more fish would pass over Bonneville Dam and reach their traditional fishing areas. The Indians have an exclusive commercial fishery above Bonneville Dam as a result of an informal agreement worked out after the 1969 Decree. In March of 1977, a management plan was finally agreed upon by the Indians and the states of Oregon and Washington. Judge Belloni adopted this management plan by court order on February 28, 1977.

The litigation began in 1968 when a group of Indians filed in the United States District Court, District of Oregon, a complaint for declaratory and injunctive relief. *Sohappy v. Smith,* No. 68-409.

Subsequently, the United States, as trustee of the Yakima Nation, the Confederated Tribes of the Umatilla Reservation, and the Nez Perce Tribe of Idaho filed a separate but similar action in the same court known as *United States v. Oregon,* No. 68-513. The

complaint sought to enjoin the State of Oregon from regulating fishing on the Columbia River by the tribes in a manner which allegedly conflicted with the various treaties of 1855 between the United States and the tribes. The three Indian tribes were subsequently permitted to intervene as plaintiffs, as were the Confederated Tribes and Bands of the Warm Springs Reservation. The two cases were subsequently consolidated for trial.

The court, by pre-trial orders, segregated certain issues for separate hearing and determination, and its 1969 Opinion and Order dealt only with those issues. The Court construed the treaty right "of taking fish at all usual and accustomed places" on the Columbia River and its tributaries, and declared the manner and extent to which the State of Oregon can regulate Indian fishing. *Sohappy v. Smith,* 302 F Supp 899 (DC Oregon, 1969).

The District Court retained continuing jurisdiction over the case. No one appealed, and all parties accommodated themselves to the Decree until April, 1974. Events of 1974 are well set forth in the Ninth Circuit Court of Appeals Opinion in *Sohappy v. Smith,* 529 F2d 570 (9 CCA 1976). In that case, the Ninth Circuit, among other things, affirmed the order of the District Court denying intervention by the Columbia River Fishermen's Protective Union, Inc., and Leslie B.

Clark. Petitioner's were granted amicus curiae status. The Columbia River Fishermen's Protective Union was also amicus curiae on Idaho's motion for leave to file in the case at bar.

In the summer of 1976, following the procedure suggested by the Ninth Circuit's 1976 Opinion, the State of Oregon filed a petition for additional declaratory and injunctive relief and commenced preparation for trial on the remaining issues, which had been segregated by the 1969 pre-trial order but were never tried. All parties agreed that it might take several years to resolve the untried issues.

With that prospect in mind, attorneys for State of Oregon, the United States, and the intervening Indian tribes met in late August, 1976 and agreed that prior to continuing the proceedings further in the District Court, it would be beneficial to the fishery resource to enter into discussions concerning the feasibility of developing a temporary plan for the management of upriver anadromous fish runs in the Columbia River. These negotiations culminated in the motion of all parties for the approval of the plan, commonly referred to as the Columbia River Management Plan, which became an order of the United States District Court on February 28, 1977. (Exhibit O-12A, Tab 20) or (Oregon's Motion to Dismiss).

Under this management plan adopted by the Court *first priority* is given to spawning escapement to insure protection and achievement of desired spawning escapement levels for continuation of the runs. Second priority goes to Indian ceremonial and subsistence fishing. Third priority is to provide increased numbers of fish to Idaho for the purpose of providing for harvest opportunity by the sport fishery of Idaho. The lowest priority is for the allocation between treaty and non-treaty fisheries of spring Chinook and fall Chinook salmon. (Tr. p. 168-169).

Idaho was not a party to the Columbia River litigation nor did Idaho attempt to intervene in that litigation. Even so, Idaho was given the opportunity to attend and participate in negotiating sessions on the Columbia River Management Plan. (Tr. 214-217).

Fishing regulations in Oregon and Washington are established on the basis of pre-season predictions. During the course of a run of fish other measurement or counting proceedures provide the opportunity to refine pre-season estimates in order to make final fish harvest adjustments to insure that the management goals are met. The regulations are designed to maximize the harvest of fish consistent with necessary escapement returns to Idaho and the catch for the Indian fishery. (Tr. 177-178).

Fishery management decisions must be flexible from one year to another because environmental conditions change or because various changes occur in run size or behavior patterns. Management goals are desired levels established in an attempt to achieve the best fishery management program based upon historical experience. By using this historical information agencies manage for the probability that an escapement goal will be met. Management decisions depend upon catch information, river conditions and run size. When a run begins these decisions are made on a day-to-day basis. (Tr. 190-191). The resource managers of these fisheries need the flexibility to make instantaneous decisions based upon constantly changing information. (Tr. 192). There are new management methods and practices. The state of the art is constantly changing with regard to fish propagation, hatchery methods and harvest techniques. Some of these methods work and some do not work. The management agencies are constantly experimenting, seeking better management techniques. (Tr. 192).

The real cause of problems for anadromous fish in the Columbia River Basin is the construction of numerous dams.

In moving downstream on the Snake River, a fish encounters eight dams operated by the Army Corps of Engineers, in the following order: Lower Granite

Dam, Little Goose Dam, Lower Monumental Dam, Ice Harbor Dam, McNary Dam, John Day Dam, The Dalles Dam and finally Bonneville Dam. (Tr. 119-120).

A fish migrating down stream must go over the spillway of a dam or through its turbines. Fewer mortalities are caused by fish going over the spillway of a dam than through its turbines. (Tr. 115). However, water going over the spillways creates another problem. As the water plunges to the base of the dam it become super-saturated with nitrogen. The resulting effect on fish is similar to the bends a diver would encounter when changing depths at a rapid rate. (Tr. 119).

Nitrogen super-saturation can be dealt with in the construction of dams. For example, Lower Granite Dam has been constructed in such a way that water going over the spillway is prevented from plunging to the base of the dam. However, such construction or modification is within the power of the Army Corps of Engineers. (Tr. 146-147).

Other experimental passage problems are being conducted. Recently the National Marine Fisheries Service has been conducting experimental transportation from the upper-most dam on the Snake River to a point below Bonneville Dam. The National Marine Fisheries Service contracts with the Army Corps of

Engineers to transport the fish. Without such programs, it is estimated that 90% of all downriver migranting fish (smolts), which must pass all eight dams, are killed before passing Bonneville Dam. (Tr. 115-116).

Fish migrating upstream must also traverse the dams. All of the dams have fish passage facilities known as fish ladders. The objective of the fish ladder is to attract the migrating anadromous fish so that they may swim up the ladder which has water flowing down it. (Tr. 120). The fish ladders do not guarantee the upstream migration of anadromous fish because there are many problems associated with the ladder. (Tr. 120-123). If problems occur with the fish ladders a request for correction must be made to the Army Corps of Engineers. (Tr. 123-124).

Mortality rates on upstream migration are also high. It is estimated that only 50% of the upstream migratory fish which cross Bonneville Dam will cross Lower Granite Dam, eight dams upstream. (Tr. 209). In a good passage year, like 1977, with low water flows, only about 25% of the fish crossing Bonneville Dam destined above Lower Granite Dam will be victims of dam mortality. (Tr. 229). The dams built and operated by the Army Corps of Engineers have a very dramatic effect on anadromous fish mortality

when compared with mortality from all other sources. (Tr. 210).

Even the Army Corps of Engineers recognizes the devastating effect its dams have had on anadromous fish. Exhibit 0-2, p. 91 sets forth the conclusions of the Corps with respect to fishery losses attributable to the four lower Snake River dams. At that time the Corps estimated it would cost over $45,000,000 to implement a compensation plan and that it would cost nearly $3,000,000 per year to maintain the plan.

Exhibit 0-3 also attributes the problems of anadromous fish passage in the Snake River to the dams. The report concludes the problem will continue to grow with increasing energy demands unless corrective action is taken immediately.

Even Idaho admits that anadromous fish are killed in large numbers as a result of dams on the migratory path and slack water caused by the dams. (Statement in Support of Motion for Leave to File Complaint, p. 4).

When downstream migrating fish reach the ocean they travel in many different directions. Depending upon the route they choose to return to the Columbia River they may be caught as ocean stock by Californians, or Canadians. International negotiations are being conducted between the United States Department of State and Canada. Oregon and Washington are parties to the negotiations which are trying to

resolve various questions concerning Canada catching fish ginating in the Columbia River system and Oregonians and Washingtonians catching fish originating in Canadian waters. (Tr. 206-207).

In addition to the devastating impact on anadromous fish of United States dams on the Columbia and Snake Rivers, many other agencies of the United States government have an important role in the management of anadromous fish resources.

The Pacific Fishery Management Council has jurisdiction of ocean stocks from three miles to two hundred miles from our coast line. It consists of fish agency directors from the pacific coast states, California, Oregon, Washington and Idaho. It also includes the Director of the National Marine Fisheries Service. The Secretary of Commerce also appoints public members to that Council. The objective of the Council is to establish allocation of ocean stocks for both U.S. citizens and foreigners. (Tr. 198-199). The decisions of the Council are enforced through a cooperative arrangement between the United States Coast Guard, National Marine Fisheries Service and the three coastal states' law enforcement bodies. (Tr. 200). 16 U.S.C. §§1801-1861.

Decisions that are made with respect to the harvest of fish from three miles to two hundred miles have a definite effect on the number of fish that ultimately

end up in the Columbia River Basin. (Tr. 200). The National Marine Fisheries Service and the U.S. Fish and Wildlife Service are deeply involved in the management of Columbia River stocks. (Tr. 200).

The Pacific Fishery Management Council is charged with preparation of a management plan. Exhibit 0-4 is a draft of that plan which, when and if approved, would take effect in 1978. It is the second step in developing a comprehensive management scheme for salmon fisheries under the jurisdiction of the Pacific Fishery Management Council. The purpose of the plan is to manage the salmon fisheries for optimum yield, conservation of the stocks, and allocation and harvest among domestic fishermen.

The plan addresses the need to control the ocean salmon fishery in order to maintain or increase escapement of salmon into many Washington, Oregon and Idaho streams. Severe passage problems at mainstem Columbia River dams in conjunction with some ocean harvests are resulting in inadequate spawning escapement of Snake River spring and summer runs of Chinook salmon. Federal court rulings have required the states of Washington and Oregon to provide treaty Indians with an opportunity to take fifty percent of the total U.S. harvest allowed on runs of fish destined for treaty Indians' ususal and accustomed fishing areas. Specific management objectives for the deter-

mination of optimum yield include first the maintenance of optimum spawning stock escapements. This draft plan again demonstrates the numerous considerations that go into allocating this valuable resource.

The Bureau of Indian Affairs and the Department of Interior represent the interests of the Indians. Their interests are represented not only with respect to harvest but to various habitat management decisions. (Tr. 201).

The Bonneville Power Administration, the Army Corps of Engineers and the Bureua of Reclamation play significant roles in fish management decisions because they are responsible for certain federal projects which determine stream flows. Stream flows determine fish movement and fish production. (Tr. 201). In low water years the Army Corps of Engineers must choose between spilling water for fish and using the water to generate power. (Tr. 147).

In a water spilliage question involvement of several federal agencies may be necessary to achieve a requested spillage. In 1977 it took the coordination of the Bonneville Power Administration, the Bureau of Reclamation, the Corps of Engineers, and several public utility districts which are under the jurisdiction of the Federal Power Commission to accomplish the spillage which was ultimately provided. (Tr. 149-154).

Without the cooperation of the federal government in adjusting water flow, providing transportation and providing special spill management at each of the federal projects, there would have been a complete disaster for the downstream migration of salmon and steelhead in the Columbia Basin in 1977. Because of the role played by the federal government, mortality rates were greatly reduced compared to what would have been expected without the special flow regulation and emphasis on the transportation program. (Tr. 241).

Exhibit W-5 demonstrates the effects of Army Corps of Engineers decisions on the flow of water through the Columbia River system and its hydroelectric projects. See the conclusions beginning on page 20 of the exhibit.

Oregon, Washington and Idaho have no authority in the determination of water management when dealing with these federal agencies. The states may ask, but the federal agencies decide. (Tr. 269-270). As the demand for electrical power continues to grow in the northwest, the conflict between water for power generation and water for fish is likely to become more troublesome in the future. It is projected that by 1980 with the addition of additional generating facilities and storage facilities in the Columbia River Basin, it may be unnecessary to spill any water over the dams

because it may all be used for the generation of electrical energy. (Tr. 126-127).

A Committee on Fishery Operations has been created to formulate recommendations on water flow which are sent to the Bureau of Reclamation, Bonneville Power Administration and the Army Corps of Engineers. This Committee is composed of representatives of all the fishery agencies which include the National Marine Fisheries Service, Fish and Wildlife Service, Washington Department of Game, Washington Department of Fisheries, Oregon Fish and Wildlife Department and Idaho Fish and Game Department. It also has representatuves of the water management agencies including Bonneville Power Administration, the Corps of Engineers, Bureau of Reclamation, the public utility districts on the Mid-Columbia River and a representative of the private utilities in the Columbia Basin. The objective of the water flow recommendations is to manage the flows for maximum survival of salmon and steelhead migrants. (Tr. 235).

Other federal government agencies having an impact on the anadromous fish resources include the Bureau of Land Management and the U.S. Forest Service. These agencies principally manage the primary rearing and spawning areas of the fish within the Columbia River Basin. Their management decisions

concerning timber lands and range land have a definite impact upon fish production because their land use decisions ultimately determine the water course within the area they manage. The water's ability to produce fish is contingent upon these land use decisions because fish production is totally keyed to water quality and water quantity. If water quality deteriroates, fish production is thereby lowered. (Tr. 201-202).

An excellent summary of the sources of management problems facing these many agencies is outlined in Exhibit W-4, Report S. The federal government has admitted its responresponsibility for depletion of anadromous fish resources in the Columbia River Basin. A number of mitigation programs are in effect which attempt to offset damage to the fish resources caused by federal water impoundment projects. (Tr. 194).

The Federal Power Commission also recognizes the mitigation problem in granting licenses to private power projects. The three mid-state projects, Hells Canyon Dam, Oxbow Dam, and Brownlee Dam, which are on the Snake River bordered by Idaho and Oregon, eliminate a significant amount of salmon and steelhead habitat. Several of the hatcheries that now exist are mitigation efforts to offset the loss of these

production areas and are financed by Idaho Power Company. (Tr. 269).

Within the Pacific Northwest there are many competing interests for the use of the waters within the Columbia River Basin. There are conflicts between the producers of electricity, the users of electricity, sports fishermen, commercial fishermen, navigation interests and irrigation interests. (Tr. 270-272).

Even within the State of Idaho there are competing and conflicting interests regarding the use of waters within the Columbia River Basin. The agricultural irrigation intersts in Idaho do not favor a higher priority being given to fish related water uses. In fact, the agricultural intersts within Idaho represent a much stronger political block than the recreational sports fishery interests. These conflicts are being actively discussed within Idaho's own political system and the priorities between conflicting interests are being established by the Idaho legislature. (Tr. 272-274).

"Despite current serious problems, the facts do not support precocious harbingers of doom for Chinook salmon and steelhead runs of the upper Basin. Requisite knowledge, technology and opportunity are available now to substantially improve mainstem dam passage conditions and depressed natural production. The requisite public and political support is potentially available." (Ex. W-3, p. 38).

ARGUMENT

I.

IDAHO'S COMPLAINT SHOULD BE DISMISSED.

A review of the case law indicates the United States Supreme Court has used many reasons to decide the question of jurisdiction in suits between states. While numerous reasons have been used to deny jurisdiction, the Court seems to be making policy decisions based upon the facts before it in each case. Some of the reasons given, which will be discussed in more detail below, are lack of subject matter jurisdiction, lack of a sufficiently serious threatened invasion, political questions, lack of susceptibility of judicial enforcement, lack of a claim upon which relief can be granted, and the exercise of jurisdiction by another court. Now that the Court has before it a record establishing the real nature of the dispute alleged by Idaho, facts which were not before the Court on Idaho's Motion for Leave to File Complaint, it becomes clear that this is not an appropriate case for the exercise of the Court's origninal jurisdiction and that Idaho's complaint should be dismissed.

The law is very clear that the Supreme Court will not exercise its extraordinary power to control the conduct of one state sued by another unless the threatened invasion is of a very serious magnitude.

This principal was stated in the case of *New York v. New Jersy,* 256 US 296, (1921). That case involved the discharge of sewerage by the State of New Jersey into waters of Upper New York Bay. The complaint was dismissed without prejudice. The futility of attempting to determine such complex technical and political matters in the courts was well put:

> "We cannot withhold the suggestion inspired by the consideration of this case, that the grave problem of sewerage 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 study and by conference and mutual concession on the part of representatives of the state so vitally interested in it, than by proceedings in any court however constituted." 256 US at 313.

In the fifty years since the decision in *New York v. New Jersey* 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 US 270, (1974), this Court refused to approve the proposed settlement of a dispute between the two states involving pollution in Lake Champlaine, noting that the parties had other and more appropriate means of reaching the desired results, such as an interstate compact under Article I, §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 Basin. With the evidence now before the Court which demonstrates the complexity of the management decisions which must be made concerning the anadromous fisheries, the Court has sufficient grounds to recommend the complaint be dismissed.

The same principal was used by the Court in *Connecticut v. Massachussetts,* 282 US 660, a water diversion case in which the bill was dismissed without prejudice to sue in case of future injuries. Likewise, in *Alabama v. Arizona,* 291 US 286, (1934) the court denied leave to file where Alabama sought relief against 19 states which had enacted statutes to regulate or prohibit sales of articles produced by convict labor. Finally, in *Colorado v. Kansas,* 320 US 383, *reh den* 321 US 803, (1943), the court explained the principle as follows:

> "The reason for judicial caution in adjudicating the relative rights of states in such cases is that while we have jurisdiction of such disputes, they involve the interests of quasi-soverigns, present complicated and delicate questions, and, due to the

> possiblity 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 negotiation and agreement, pursuant to the compact clause of the Federal constitution. We say of this case, as the court has said of interstate differences of like nature, that such accomodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatroy power." 320 US at 392. (Footnotes omitted.)

The evidence before the Court shows that the anadromous fish runs are not being destroyed. To the contrary, the management agencies have set their highest priority on escapement of sufficient fish for spawning purposes. Likewise, it is clear that managment of the fishery resources is an extremely complex problem requiring constant change and experimentation. As demonstrated in *United States v. Oregon, supra,* continuing jurisdiction of this Court would be a necessity because of the constantly changing factors in managing this resource.

Idaho has sought to achieve through the judicial process what it has not been able to achieve through the political system. The problem Idaho presents to this Court is a political problem and therefore not justiciable. In *Georgia v. Stanton,* 73 US 50, (1967), the Corut first set forth one often repeated formula for determining justiciability:

> "[T]he rights and dangers, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the juris-jurisdiction of a court either in law or equity." 73 US at 76.

In that suit, Georgia sought to enjoin several members of the federal government from carrying out certain of the reconstruction acts. The Court in *Georgia v. Stanton,* did, however, distinguish boundary disputes and said that when sovereign states submit a boundary question for resolution it ceases to be political. 73 US at 71.

In *Louisiana v. Texas,* 176 US 1, (1900), Louisiana had filed a bill complaining that Texas had imposed an embargo and quarantine on all goods coming from New Orleans on the pretense of protecting citizens of Texas from Yellow Fever. Louisiana alleged the true motive was to help promote the commerce of the Port of Galveston, Texas, a rival port of New Orleasns. The prayer was for a declaration that Texas had no right to impose such an absolute embargo and for an injunction to the same effect. The Court sustained the demurrer and dismissed the bill:

> "[I]n order that a controversy between states, judiciable in this court, can be held to exist, something more must be put forward than that the citizens of one state or injured by the maladministration of the laws of another." 176 US at 22.

The court found that:

> "[Q]uarantine laws belong to that class of state legislation which is valid until displaced by Congress, and . . . such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government." 176 US at 19.

Idaho is alleging a maladministration of the fish and game laws of Oregon and Washington.

Idaho feels that *Pennsylvania v. West Virginia,* 262 US 553, (1923), supports its position. The states of Pennyslvania and Ohio succeeded in that suit in having the Court issue a decree enjoining West Virginia from enforcing its statutes whereby the flow of natural gas in interstate commerce from West Virginia would be interrupted. The court dealth quite directly with the issue of justiciability;

> "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. . . . This is essentially a judicial question." 262 US at 591.

The Court stressed the seriousness of the injury threatened and the fact that each of the complaining states was suing to protect two interests: one as the proprietor of various public institutions, and the other as the representative of the consuming public. The breadth of potential impact was also stressed:

> "The private consumers in each state, not only include most of the inhabitants of many urban communities, but constitute a substantial portion of the state's population. Their health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern which the state, as the representive of the public, has an interest apart from that of the individuals affected. It is not a remote or ethical interest but one which is immediate and recognized by law." 262 US at 592.

The case at bar turns on whether the regulation and exploitation of the fish resources is more analogous to the quarantine laws in *Louisiana v. Texas, supra* or to the state's protection of its own natural resources in *Pennsylvania v. West Virginia, supra.* Idaho has alleged she has no commercial fishery. The analogy to natural gas fails on that one critical point. Idaho does not purchase fish from Oregon and Washington as Pennsylvania purchased natural gas from West Virginia. Another clear distinction is the seriousness of the harm threatened; and as noted above, each case must run on its own facts.

Idaho bases its claim for relief on a property theory. But the property claim is purely a manufactured one which raises the question of whether Idaho's claim is susceptiable of judicial determination and enforcement. The concept of justiciability as a jurisdictional requirement was early set out in *Hans v.*

Louisiana, 134 US 1, (1890). In *Arizona v. California,* 298 US 558, *reh den* 299 US 618, (1936), Arizona sought a judicial apportionment among the states in the Colorado River Basin of the unappropriated water of the river. The Court said:

> "A justiciable controversy is presented only if Arizona, as a sovereign state, or her citizens, whom she represents, have present rights in the unappropriated water of the river, or if the privilege to appropriate the water is capable of division and when partitioned may be judically protected from appropriations by others pending its exercise." 289 US at 567.

The court left unanswered the question of whether or not such an apportionment was possible where such present rights or interests had been shown. The Petition for Leave to File was denied because of the absence of the United States, which had been deemed an indispensable party. The indispensability question will be discussed below.

The appropriate question now seems to be whether or not there is a federal common law rule governing rights to fisheries. In *Organized Village of Kake v. Egan,* 174 F Supp 500 (D.C. Alaska 1959), the Court said:

> "The state regulates and controls wildlife resources and fisheries in the marginal sea. This was originally based on the concept of ownership. This theory has to some extent been repudiated and the modern concept contemplates that state control is

> founded upon the power to regulate in this state the protection of these resources for all the people. The state has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people. The right to control fisheries rests in the state in the absence of affirmative action of Congress. The fish and game are owned by the states, not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people in common." 174 F Supp at 504. Citations omitted.

The question was addressed somewhat obliquely by the Unites States Supreme Court in the recent case of *Douglas v. Sea Coast Products, Inc.,* 431 US 265, (1977). The issue in that case was the validity of two Virginia statutes that limited the right of non-residents and aliens to catch fish in the territorial waters of the Commonwealth of Virginia. Plaintiffs were federal fishing licensees and much of the discussion dealth with preemption of state right to control fisheries by the Commerce Clause and the action of Congress thereunder. Appellant, Commissioner of the Virginia Marine Resources Commission, argued that the Submerged Lands Act and a number of Supreme Court decisions recognized that the states have a title or ownership interest in the fishes swimming in their territorial waters, and that because the states own the fishes, they can exclude federal licensees. The Court said: "The contention is of no avail" 431 US at 283. Addressing itself to the argument concerning the

Submerged Lands Act, the Court found that when Congress made the grant, it expressly retained for the United States all constitutional powers of regulation and control over these lands and waters for purposes of commerce, navigation, national defense and international affairs; and consequently did not alter the preemptive effect of fisheries licensing made pursuant to the commerce power.

Then addressing the common law idea of fishery ownership, the Court said:

> "A state does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds or animals. Neither the states nor the federal government, any more than any hopeful fisherman or hunter, have title to these creatures until they are reduced to possession by skillful capture."

The court further states:

> "The 'ownership' language of cases such as those cited by appellant must be understood as no more than nineteenth century legal fiction expressing 'the importance to its people that a state have power to preserve and regulate the exploitation of an important resource.' " 431 US at 284.

And further

> "Under modern analysis, the question is simply whether the state has exercised its police power in conformity with the federal laws and constitution. 431 US at 284-285.

The Court affirmed the judgment of the District Court which struck down the statutes in question.

The cases cited above, although using broader language, involve facts concerning only the state's exercise of its power to regulate or stop fishing activity within its waters. The question this court has before it is the reverse and seems never to have been considered by any of the federal courts. However, it seems clear that the total effect of these decisions is to leave to each state the regulation and exploitation of its fisheries so long as that activity is not preempted by the exercise of Congress' Commerce Clause powers, and the preservation of the fisheries is insured. As indicated by the evidence, the federal government, the States of Oregon, Washington and plaintiff Idaho are managing the fishery resources to insure the preservation of upriver anadromous fish runs.

Another way in which the United States Supreme Court has characterized its jurisdictional decisions is in the question of whether Idaho has stated a claim against defendants upon which relief can be granted.

Of particular relevance is *Arizona v. California, supra,* discussed above. Questions such as those in *Arizona v. California* and the case at bar, are mixed questions of law and fact, the factual question being whether this subject matter is capable of division and when partitioned may be judicially protected. The legal question is whether Idaho has any legal rights in the unappropriated fish or fishery.

Factual questions involving the anadromous fisheries in the Columbia River have been before the United States District Court, District of Oregon for years. The actions of that court are contained in Exhibit 0-7 through 0-22.

> "In considering the problem of salmon and steelhead conservation in the Columbia River and its tributaries, it is necessary to consider the entire Columbia River system.
>
> "This court cannot prescribe in advance all of the details of appropriate and permissible regulation of the Indian fishery, nor do the plaintiffs ask it to. As the Government itself acknowledges, 'proper anadromous fishery management in a changing environment is not susceptible of rigid pre-determination . . . [T]he variables that must be weighed in each given instance make judicial *review* of state action, through retention of continuing jurisdiction, more appropriate than overly-detailed judicial predetermination.' The requirements of fishery regulation are such that many of the specific restrictions, particularly as to timing and length of seasons, cannot be made until the fish are actually passing through the fishing areas or shortly before such time. Continuing the jurisdiction of this court in the present cases may, as a practical matter, be the only way of assuring the parties an opportunity for timely and effective judicial review of such restrictions should such review become necessary." *U.S. v. Oregon,* 302 F Supp 899, 910-911 (DC Or 1969).

The consequences of the relief requested by Idaho are exactly the sort of situation which the court rejected in *Vermont v. New York, supra.* There the

parties reached a proposed settlement whereby the court would appoint a special South Lake Master to reslove matters of controversy after the parties had exhausted all administrative and other remedies except for judicial review. The Special Master's recommendations were to be filed with the Supreme Court and become the decision of that Court unless exceptions were filed within thirty days or the court disapproved. Citing three prior cases the United States Supreme Court condemned the use of a Special Master to execute a decree as inappropriate. The cases cited were *Wisconsin v. Illinois,* 289 US 710, (1933); *Wyoming v. Colorado,* 298 US 573, (1936); and *Nebraska v. Wyoming,* 325 US 589, (1945). In the *Vermont* case the court found the Special Master would be policing the execution of the settlement and passing on the resolution of contested issues. The court said:

> "Such a procedure would materially change the function of the Court in these interstate contests. Insofar as we would be supervising the execution of the consent decree, we would be acting more in an arbitral rather than a judicial manner. Our original jurisdiction heretofore has been deemed to extend to adjudications of controversies between States according to principles of law, some drawn from the international field, some expressing a 'common law' formulated over the decades by this Court.
>
> "The proposals submitted by the South Lake Master to this Court might be proposals having no

> relation to law. Like the present decree they might be mere settlements by the parties acting under compulsions and motives that have no relation to performance of our Art III functions. Article III speaks of the 'judicial power' of this Court, which embraces applications of principles of law or equity to facts, distilled by hearings or by stipulations. Nothing in the proposed decree nor in the mandate to be given the South Lake Master speaks in terms of 'judicial power'." 417 US at 277.

The court then went on to suggest appropriate alternatives.

> "The parties have available other and perhaps more appropriate means of reaching the results desired under the proposed court decree. An interstate compact under Art I, §10, cl 3, is a possible solution of the conflict here. . . .
>
> "A settlement of this interstate dispute by agreement of the parties is another alternative." 417 US at 277.

Another obvious alternative is for plaintiff to intervene in *United States v. Oregon,* No. 68-513, United States District Court, District of Oregon. That court has extensive experience and knowledge of the problems with the Columbia River Basin fisheries. That court is retaining jurisdiction over the Indian fishing rights cases with the approval of the Ninth Circuit Court of Appeals, in *U.S. v. Oregon,* 529 F2d 570 (9th Cir 1976). Duplicative litigation is contrary to the policy expressed by the United States Supreme Court in *Colorado River Water Conservation District v.*

United States, 424 US 800, *reh den* 426 US 912, (1976). There the court said:

> "As between federal district courts, . . . though no precise rule has evolved, a general principle is to avoid duplicative litigation." 424 US at 817.

Further:

> ". . . a number of factors clearly counsel against concurrent federal proceedings. . .
>
> This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent." 424 US at 819.

The case before this court is clearly analogous. Idaho should have intervened in the fishing rights cases, as did Washington, so that all of the rights could have been adjudicated in one suit.

The facts of this case would support dismissal of Idaho's complaint on any of the jurisdictional arguments discussed above.

II

THE UNITED STATES OF AMERICA, ACTING BY AND THROUGH THE SECRETARY OF INTERIOR, BUREAU OF RECLAMATION, FISH AND WILDLIFE SERVICE, BUREAU OF IN-

DIAN AFFAIRS, BONNEVILLE POWER ADMINISTRATION, SECRETARY OF AGRICULTURE, UNITED STATES FOREST SERVICE, SECRETARY OF COMMERCE, NATIONAL MARINE FISHERIES SERVICE, PACIFIC FISHERY MANAGEMENT COUNCIL, SECRETARY OF THE ARMY AND THE ARMY CORPS OF ENGINEERS ARE INDISPENSABLE PARTIES.

Even if the Court concludes it should maintain jurisdiction of this matter and that Idaho has stated a claim against defendants upon which relief can be granted, the United States of America is a necessary party.

The tests and criteria for determining the indispensability of a party were set out and discussed exhaustively in *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 US 102 (1968) (hereinafter referred to as *Provident Tradesmens*). Although that case specifically discussed Rule 19 of the Federal Rules of Civil Procedure, which is not directly applicable to a case within the Supreme Court's original jurisdiction, the Rule sets forth an "equity and good conscience" test which should apply in any equitable proceeding in a federal court.

The Court in *Provident Tradesmens* drew from Rule 19(b) four "interests" to be examined in each case

to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled (or, in this case, without a party whose presence cannot be compelled). 390 US at 109. Those interests are: (1) the plaintiff's interest in having a forum; (2) the defendant's interest in avoiding multiple litigation, inconsistent relief, or sole responsibility for liability shared with another; (3) the interest of the outsider whom it would have been desirable to join; and (4) the interest of the courts and public in complete, consistent and efficient settlement of controversies. 390 US 109-111.

The factors for consideration as listed in Rule 19(b) are in somewhat different language than that used by the court in *Provident Tradesmens.* In some instances, the original phrasings are more helpful to a discussion of the problem in the case before this court. The first factor is "to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties." The second is "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided." The third factor is "whether a judgment rendered in the person's absence will be adequate." Fed R Civ P 19(b).

In this case, neither the plaintiff's, the defendants', the United States', nor the public's interest will be

served or protected by proceeding with this suit in the absence of the United States as a party.

Idaho seeks, among other things, a declaration that it is entitled to an equitable portion of the upriver anadromous fishery of the Columbia River Basin, and a determination of that equitable portion. Idaho bases its claim to an equitable apportionment on its production of anadromous fish in the Columbia River Basin. (Complaint, Paragraph X). The evidence shows the United States is deeply involved in anadromous fish production in all three states. The equities of production, upon which an apportionment would be based, cannot be determined in the absence of the United States as a party.

Even if an apportionment could be made without the United States, adequate relief could not be given to Idaho because the United States controls so many of the factors which determine how many anadromous fish will survive both the outward and return migrations, regardless of fisheries management practices in Oregon and Washington.

This situation is analogous to that in *Arizona v. California,* 298 US 558, *rev den* 299 US 618, (1936). That case involved a petition for leave to file a complaint seeking judicial apportionment among the states in the Colorado River Basin of the unappropriated water in the river. The Court held that such an

adjudication would be impossible without the United States as a party, saying:

> "Every right which Arizona asserts is so subordinate to and dependent upon the rights and the exercise of an authority asserted by the United States that no final determination of the one can be made without a determination of the extent of the other."

Precisely the same situation exists with respect to the rights which Idaho is asserting in the upriver anadromous fishery of the Columbia River Basin. In *United States v. State of Washington,* 520 F2d 676, 685 (9th Cir 1975), *cert den* 423 US 1086, *reh den* 424 US 970, the court indicated the federal government could, through the exercise of Congress' power under the Commerce Clause, authorize construction of hydroelectric facilities, even though a dam would totally destroy existing runs of fish in the river in violation of the public policy of the state and the desires expressed by a majority of its enfranchised citizens. This power exists and can be exercised, as has been demonstrated abundantly by the evidence.

The United States has another interest in the subject matter to be apportioned: it stands as trustee for the Indians who have an adjudicated interest in the upriver anadromous fish. Plaintiff's Complaint prays for an apportionment of the entire upriver anadromous fishery, without exception for that portion already allocated to Indian harvest rights under

treaty. Any apportionment of the entire upriver anadromous fishery requires the presence of the United States as a party so that Indian treaty fishing rights and interests can be adequately represented and calculated.

An analogous situation is found in the litigation between Texas and New Mexico where specific enforcement of an interstate water rights compact was sought. Defendants urged that Texas' bill of complaint be dismissed because the United States was an indispensable party and had not consented to be joined. A Special Master was appointed in the case and instructed to deal first with the question of indispensability. *Texas v. New Mexico,* 344 US 906, (1952). The report of the Special Master was reported received and ordered filed in *Texas v. New Mexico,* 347 US 925 (1954).

Defendants in *Texas v. New Mexico* rested their assertion of the indispensability of the United States on fifteen different grounds. *Texas v. New Mexico,* Report of Special Master, February 28, 1954, p. 10. The first fourteen grounds were found insufficient to support a characterization of the United States as an indispensable party. The fifteenth interest of the United States alleged by defendants was the right of the Pueblo Indians, for whom the United States stood as trustee, to certain water use priorities. The Indians

had been using water in the Rio Grande Basin for irrigation purposes for more than 900 years. As trustee, the United States had filed earlier declarations of water rights for the Indians. As to some of the Indian Pueblos the Special Master found that the relief sought by Texas would not sufficiently impinge upon them to make the United States indispensable. As to the other Pueblos, however, the Master found otherwise:

> "It is true that neither the United States nor the Indians would be bound by such a determination. But a decree . . . would necessarily affect adversely and immediatley the United States, whose remedy would seem to be by suit against one or more of these defendants, for their compliance with the decree. I conclude that the United States is an indispensable party because of its interest in the rights of the Indians with respect to storage of water in El Vado for the 8847 acres." Report of Special Master, *supra* at 41.

Although the Special Master recommended that Texas be granted leave to amend in his report received and ordered filed in *Texas v. New Mexico,* 348 US 946, (1955), after further hearings the Supreme Court dismissed the bill of complaint "because of absence of the United States as an indispensable party." *Texas v. New Mexico,* 352 US 991, (1957). The same result should be reached in this case, and for the same reason.

The United States is, therefore, an indispensable party to any adjudication of rights in upriver Columbia Basin anadromous fish. Furthermore, any relief given to Idaho in a judgment by which the United States is not bound would be inadequate and futile because of the control exerted by agencies of the United States over the fate of all upriver anadromous fish. Proceeding to such a judgment would be inequitable and could not be done in good conscience.

It is here the interest of plaintiff in classifying the United States as an indispensable party overlaps that of the defendants. Oregon and Washington have a great interest in having the assurance that reduction of their anadromous fish harvests will not simply lead to wastage of the fish allowed to pass upriver because of the intervening actions of federal agencies controlling water levels, amount of spill, and maintenance of fish passage facilities. If the United States is not bound by a judgment to assure minimum escapement levels, then requiring defendants to do so would be of uncertain value to plaintiff Idaho and would place an inequitable burden upon Oregon and Washington. A judgment rendered in the absence of the United States would be inadequate for and prejudicial to those already parties.

The interest of the United States in the subject matter of the litigation must also be weighed in this

determination of indispensability. The direct interest which the United States has in upriver anadromous fish in the Columbia River Basin is that of the treaty Indians, which the United States, as trustee, is bound to protect. The record in *United States v. Oregon, supra* shows the vast proportions of that interest. The judgment in that case was founded upon equities not including those now asserted by Idaho. If a new apportionment of upriver anadromous fish is to be made, the United States must be present to protect the Indian interest.

The fourth interest listed in *Provident Tradesmens* as a factor to be examined in the indispensability of a party is the interest of the courts and the public in complete, consistent and efficient settlement of controversies. 390 US at 111. This interest also would be served only by classification of the United States as an indispensable party. There is a very high probability, should this suit proceed to judgment without the United States, that lengthy, expensive and complex litigation would follow in an effort to secure the cooperation of the United States in minimum passage programs, stable and equitable production programs and to resecure an equitable portion of the fishery for the treaty Indians.

Only one of the factors listed in *Provident Tradesmens,* i.e., the interest of the plaintiff in having a

forum, weighs against characterizing the United States as an indispensable party. This objection is not insurmountable; plaintiff would have a forum if the United States consented to be made a party. Unlike the diversity jurisdiction cases in which this question is frequently raised, here the problem is not that the absence of a party is compelled, but rather that its presence cannot be compelled. Moreover, this is an interest which is far less weighty at the very outset of litigation than it would be after judgment has been secured. *Provident Tradesmens, supra,* 390 US at 112.

Even the United States takes the position it is an indispensable party.

> "There are Indian tribes in Washington and Oregon which have treaty protected fishing rights (citations omitted) . . . the tribes in Oregon and Washington which have such rights on the Columbia River include the Confederated Tribes of Warm Springs Reservation of Oregon, the Confederated Tribes and Band of the Yakima Indian Nation; the Nez Perce Tribe of Idaho has similar rights. (Citations omitted)."
>
> "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. 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. . . . Thus, as 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 indispensable party." Memorandum for the United States as Amicus Curiae on Motion for Leave to File a Complaint at page 4.

Whether a party is "indispensable" can only be determined in the context of particular litigation. *Provident Tradesmens, supra,* 390 US at 118. The decision whether to dismiss "must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Provident Tradesmens, supra,* 390 US at 119. In this extremely complex case the presence of the United States as a party is essential to the protection of its own interests, those of defendants, those of the court and public; and it is essential to insure for plaintiff Idaho that an adequate judgment can be rendered. This suit should not proceed in the absence of the United States as a party.

CONCLUSION

Facts before this court, which were not before the Court when it granted leave for Idaho to file its complaint, demonstrate that Idaho's complaint should be dismissed for lack of jurisdiction and failure to state a claim against defendants upon which relief can be granted.

If the Court should decide to maintain jurisdiction, this suit should not proceed in the absence of the United States as a party.

Respectfully submitted,
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