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, DEFENDANTS

REPORT AND SUPPLEMENTAL REPORT OF SPECIAL MASTER ON THE AFFIRMATIVE DEFENSES OF OREGON AND WASHINGTON TO THE COMPLAINT OF IDAHO

Jean S. Breitenstein

Special Master
United States Courthouse
Denver, Colorado 80294

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DECISION OF SPECIAL MASTER ON AFFIRMATIVE DEFENSES OF OREGON AND WASHINGTON TO THE COMPLAINT OF IDAHO

FOR THE STATE OF IDAHO
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SUMMARY OF REPORT OF SPECIAL MASTER

The affirmative defenses of Oregon and Washington, and the Special Master's conclusion on each, are:

1 - **Bar of a pending federal district court case.**

Sohappy v. Smith, a case which relates to the anadromous fishery of the Columbia River System and to which the United States, Oregon, Washington and four Indian tribes, but not Idaho, are parties, is pending in the federal district court for the District of Oregon. The pendency of that suit is no bar to this action because Idaho has properly invoked the original and exclusive jurisdiction of the Supreme Court over a suit between States.

2 - **Sufficiency of the complaint.**

The Idaho complaint alleges that Oregon and Washington have deprived Idaho of its equitable share of the anadromous fishery of the System. A justiciable controversy is presented.

3 - **Nonjoinder of an indispensible party.**

The United States is the trustee of four Indian tribes which have treaty-protected fishing rights in the System. The United States has constructed, operates, and controls various facilities in the System which affect both the downstream and upstream passage of fish. The United States has not consented to suit. The rights and interests of the parties to this case, and of the United States, are so intertwined and related that it will be impossible to fashion a decree which will provide an adequate remedy. Hence, the action should not proceed.

Reccommendation.

The Special Master recommends that the action be dismissed because the United States is an indispensable party and cannot be joined without its consent.

I - BACKGROUND

The State of Idaho brought this original suit against the States of Oregon and Washington. In granting leave to file, the Court limited the issue to the equitable apportionment of

the upriver anadromous fishery of the Columbia River Basin, and left open the questions of (1) whether the complaint states a claim on which relief may be granted, and (2) whether the United States is an indispensable party. Idaho v. Oregon, 429 U.S. 163. The Court appointed a Special Master. Idaho v. Oregon, 431 U.S. 952. The answers of Oregon and Washington raised affirmative defenses on which evidence has been taken and arguments received. This report of the Special Master contains his conclusions and recommendations on the affirmative defenses.

The Columbia River flows from the mountains of Idaho through a portion of the Canadian province of British Columbia and then across the State of Washington. It becomes the boundary between Washington and Oregon for approximately 270 miles before entering the Pacific Ocean. The Snake River, a principal tributary of the Columbia, rises in Wyoming, flows across Idaho, becomes the boundary between Idaho and Oregon for approximately 165 miles, the boundary between Idaho and Washington for approximately 30 miles, enters Washington, and flows about 100 miles across Washington to its confluence with the Columbia.

The Columbia River System supports various species of anadromous fish. There are many kinds of anadromous fish. This suit is primarily concerned with spring and summer Chinook Salmon and with Steelhead Trout.

Controversy over the anadromous fishery of the Columbia River System has been going on for years. In 1855 the United States entered into a series of treaties with the Indian tribes of Oregon and Washington, including: (1) Yakima, 12 Stat. 951; (2) Tribes of Middle Oregon, 12 Stat. 963; (3) Umatilla, 12 Stat. 945; and (4) Nez Perce, 12 Stat. 957. The treaties recognize the right of the Indians to fish and have resulted in extensive litigation. See e.g. Sohappy v. Smith, D.C.Ore., 302 F.Supp. 899, affirmed and remanded, 9 Cir., 529 F.2d 570; United States v. Washington, 9 Cir., 520 F.2d 676, cert. denied 423 U.S. 1086; and Department of Game of Washington v. Puyallup Tribe, 414 U.S. 44. Sohappy v. Smith is pending on a five-year agreement made by the United States, Oregon, Washington,

and the four Indian Tribes for the management of the Columbia River fishery. Idaho was not a party to the agreement.

In 1918, with the consent of Congress, Oregon and Washington entered into the Oregon-Washington Columbia River Fish Compact. 40 Stat. 515. In substance the compact provides that the then existing laws and regulations of each State pertaining to Columbia River fish should not be changed, altered, and amended without the consent and approval of both States. Idaho was not a party to the compact and its efforts to become a party have failed. In its complaint Idaho charges that the operation of the compact has adversely affected the number of anadromous fish available for harvest in Idaho, and sought to compel the defendant States to admit Idaho to the compact. The Court eliminated this issue by taking jurisdiction only over the equitable apportionment claim.

II - THE FACTS

A comprehensive report on Columbia River Fisheries was prepared for Pacific Northwest Regional Commission in July, 1976, and was received in evidence as Exhibit W-4. It says, p. A-1:

> "The Columbia River System is one of the world's most famous watersheds for production of anadromous fish. Prior to modern man's influence, some 163,200 square miles of watershed contained habitat ideal for salmon and trout. Today, less than 72,800 square miles remain accessible to anadromous fish and much of that has been transformed to aquatic environment adverse to salmon and steelhead."

The fish are hatched in fresh water gravel bars throughout the Columbia Basin. After remaining about two years in the hatch area, the fish as "smolts" develop an instinctive urge to migrate to the ocean where they spend one to four years

growing and maturing. As adults, some weighing over 40 pounds, they school, return to the Columbia River, and migrate upstream to the waters of origin where they spawn and complete the life cycle.

In the course of migration to the ocean and return to the area of origin, the fish encounter eight dams of the United States Corps of Engineers. The dams, listed in upstream order are:

1 - Bonneville located about 130 miles above the mouth of the Columbia and constructed in 1938.

2 - The Dalles located about 46 miles above Bonneville and constructed in 1957.

3 - John Day located about 24 miles above The Dalles and constructed in 1968.

4 - McNary located about 76 miles above John Day and constructed in 1953. The confluence of the Columbia and Snake is about 32 miles above McNary.

5 - Ice Harbor located on the Snake about 10 miles above the confluence of the Columbia and Snake and constructed in 1961.

6 - Lower Monumental located about 32 miles above Ice Harbor and constructed in 1969.

7 - Little Goose located about 39 miles above Lower Monumental and constructed in 1970.

8 - Lower Granite located about 37 miles above Little Goose and constructed in 1975.

At each dam water is released either through spillways or through the turbines used to generate electric power. Spills reduce the amount of water available for power generaton. Storage of water at each dam is affected by natural precipitation in the upstream drainage and by the storage of water in

upstream projects, including dams of the Corps of Engineers, of the Bureau of Reclamation, and of utilities licensed by the Federal Power Commission, now the Federal Energy Regulatory Commission, see 42 U.S.C.§§7171 and 7172. Each of these agencies exercises control over water releases. Tr. 207-208.

Without provision for spill water, the migrating smolts must pass through the turbines with resulting high mortalities. Smolts escaping over the spillways are subject to substantial mortalities caused by nitrogen supersaturation. As the water plunges many feet to the base of the dam, it becomes saturated with nitrogen and produces in the fish a condition similar to the bends encountered by deep-sea divers. Tr. 119, and Ex. W-4, p. A-15.

Another cause of downstream loss is residualism. The smolts become disoriented in the slack water and lose the urge to migrate to the ocean. Tr. 243 and Ex. W-4, p. A-15. Water temperature is another adverse factor. Impoundment causes an increase in water temperature above the tolerance of some fish with resulting susceptibility to disease. Cooler temperatures may be obtained by releases from upstream impoundments which are largely under federal control.

The mortality of downstream migrants may reach 95% in low water years. See Columbia Basin Salmon and Steelhead Analysis, Ex. W-3, p. 6, and Ex. W-4, p. A-15.

To reduce juvenile mortality on downstream runs, the Corps of Engineers and the National Marine Fisheries Service have experimented with, and financed, a program for the collection of juveniles at Little Goose and Lower Granite Dams and transportation by truck and barge about 345 miles for release below Bonneville. See Ex. W-4, p. D-8, Ex. W-3, p. 41, and Tr. 140, 244. Success of the transportation technique has been demonstrated for summer Steelhead but not for spring or summer Chinook juveniles. Tr. 262.

The catch of anadromous fish during the one to four years that they spend in the ocean is controlled by the Fishery Conservation and Management Act of 1976. 16 U.S.C. § 1801

et seq. Under this Act, the federal government exercises jurisdictional control over ocean fishery in the 200-mile zone, except for the three-mile territorial area of the coastal states. The Act provides for regional fishery management councils which regulate the ocean catch and thereby affect the number of fish returning to the Columbia.

The adults returning to their Idaho spawning areas must pass the eight dams. Upstream migration is facilitated by fish ladders at each dam. These ladders are installed, maintained, and operated by the Corps of Engineers. Some fish ascending the ladders are lost by "fall-back" resulting from disorientation and downstream return over the spillways. Tr. 123. The loss of upstream migrants at each main stem dam has been estimated at 15%. Ex. W-3, p.6.

Idaho, although an inland state, has some 3,000 miles of quality fish habitat. In both Idaho and other parts of the Basin, the various water use projects have drastically reduced the spawning area. Artificial production now accounts for fifty percent of all fish returning to the Columbia River System. Ex. W-1, p. 2.

Access to two areas in Idaho is blocked by dams. The Hells Canyon Dam prevents fish from going further upstream on the Snake. The Dworshak Dam on the North Fork of the Clearwater, a tributary of the Snake, bars passage by fish. To mitigate the loss of spawning area because of the dams, Idaho has increased production from fish hatcheries. These hatcheries are financed by Idaho Power Company, a private utility which built and operates Hells Canyon Dam, by the Federal government and the Columbia River Basin Commission, and by Idaho from money derived from fishing permits. Tr. 267. The Rapid River Hatchery on Salmon River, a tributary of the Snake, is the most successful spring Chinook hatchery in the Pacific Northwest and produces 20-40 percent of the fish returning to the Snake River and its tributaries. Tr. 251-252. Some of the hatcheries are on the Snake above Hells Canyon Dam. The product of these hatcheries is taken by truck to the Salmon River drainage and there released.

The contribution of Idaho to the total System fishery is substantial. The Idaho statement supporting its motion to file the complaint, p. 8, asserts that 9,330,300 spring Chinook, 330,037 summer Chinook, and nearly seven million Steelhead were planted in Idaho during 1974. No defense evidence controverts these figures. On the record presented, no year-by-year comparison may be made between Idaho production and harvest of fish. Ex. W-3, Table 5, p. 26, shows the Idaho catch of Chinook to have been 15,000 in 1954 and 1,500 in 1974, and of Steelhead to have been 12,000 in 1954 and 3,000 in 1974. Idaho produces many fish and receives few.

The downstream catch of fish is divided between the Indians and the non-Indians. Indians take fish for ceremonial, subsistence and commercial purposes. The non-Indians in Oregon and Washington take fish for sport and commerce. Non-Indian fishing is regulated by state law. Commercial fishing is currently permitted in two distinct zones. In a 130 mile stretch below Bonneville Dam fishing is allowed to licensees but in recent years, regulations of Oregon and Washington have drastically limited the catch. Above Bonneville commercial fishing has been permitted only for Indians since 1957. Ex. W-2, p. 2-4.

There has been no regular summer season for commercial catch of summer Chinook since 1964, Ex. W-2, p. 14, and no sport fishery during 1964-1976. Id. Commercial harvest for up-river spring Chinook was limited to 11 days from 1967 through 1973 with a one-day season in 1974 and none in 1975 or 1976. Id. at 9-10. The commercial catch of Steelhead has been limited for some time, see Ex. W-2, pp. 24-26, and W-3, pp. 17-18. In 1975 and 1976, the mainstream Columbia and Snake, and their tributaries, were closed to Steelhead recreational harvest to protect poor runs. Ex. W-2, p. 26.

The Indian catch of Salmon and Steelhead increased from a low of 39,700 pounds in 1959 to a high of nearly three million pounds in 1975 and 1976. Ex. W-2, p. 4, and Figure 2 on p. 5. The Idaho complaint alleges ¶ XX, pp. 19-20, that Idaho has no commercial fishing for anadromous fish but maintains a sports fishery for residents and tourists. The record

shows nothing to the contrary. To a substantial extent, Idaho is subsidizing the downstream fishery, both Indian and non-Indian.

The 1855 treaties with the tribes recognize that the Indians have "the right of taking fish at all usual and accustomed places in common with the citizens of the Territory * * *." See e.g. treaty with the Yakima Nation, 12 Stat. 951, 953. In considering a similar provision in the treaty with the Puyallup Tribe, the Court said, Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392, 398, that the right to fish "at all usual and accustomed" places may not be qualified by the State but "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." When the Puyallup case was again before the Court, it adhered to the quoted ruling. See 414 U.S. 44, 45.

III – PENDING DISTRICT COURT LITIGATION

This brings us to the pending litigation in the United States District Court for the District of Oregon. Sohappy v. Smith is a case brought in 1968 by members of the Yakima Tribe against Oregon officials for a definition of the Indian treaty rights. Shortly thereafter, the United States brought a similar suit against Oregon in the same court on behalf of various tribes. The Warm Springs Tribe which is one of the tribes of central Oregon, the Yakimas, the Umatillas, and the Nez Perce Tribe were permitted to intervene in United States v. Oregon and that case was consolidated with Sohappy v. Smith. After trial without jury, the court, in 1969, ruled that the state was limited in its power to regulate the exercise of the Indians' treaty rights in that the regulation must be necessary for the conservation of the fish, the state restrictions must not discriminate against the Indians, and must meet appropriate standards. Sohappy v. Smith, D.C.Ore., 302 F.Supp. 899, 910-911. The court retained continuing jurisdiction. In 1974, a dispute arose over the spring run of Chinook Salmon. The State of Washington was permitted to intervene. The

previously entered judgment was amended thus, see Sohappy v. Smith, 529 F.2d 570-572:

> "The Indian treaty fisherman are entitled to have the opportunity to take up to 50% of the harvest of the spring Chinook Salmon run destined to reach the tribes' usual and accustomed grounds and stations. Except insofar as amended here, the 1969 judgment remains in full force and effect."

On appeal the amendment was approved, Sohappy v. Smith, 9 Cir., 529 F.2d 570. The court noted:

> "the merit in the States' contention that they should have an opportunity to make a record concerning the propriety of the district court's apportionment of spring Chinook Salmon runs yet to occur." Id. at 573.

The case was remanded to give the States an opportunity to make the requested record. The State of Idaho was not a party to the Sohappy v. Smith litigation.

On February 28, 1977, the district court, in Sohappy v. Smith, approved "A Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Trubutaries above Bonneville Dam." The Plan was signed by representatives of the United States, Oregon, Washington, and each of the intervening Indian tribes. See Ex. 0-12A, pp. 44-57; a copy of the Plan is attached as Appendix A to Oregon's motion to dismiss. Idaho is not a party to the Plan.

The Plan announces controlling principles, creates a technical advisory committee, provides detailed management directions, establishes priorities, and after five years may be terminated by any party on 30 days written notice.

The Plan sets various escapement goals which relate the

runs at Bonneville and at Lower Granite. The goals must be converted into actual allocations. Determination of both goals and allocations is difficult because of the many variables. Prediction of runs must be made before they occur. Among the basis for predictions are downstream runs of a particular group of fish and a count of jack fish, which are precocious males that return one year before their age group. Tr. 143. After the runs begin, the fish are counted in facilities connected with the fish ladders. Tr. 134-135. On the basis of catch information, run size, and river conditions, management decisions are made from day to day. Tr. 190-191. Flexibility to make immediate decisions is important. Tr. 192.

The Plan gives first priority to Treaty ceremonial and subsistence catch. The Plan makes various allocations to both Indian and non-Indian fishermen. The Indians agree to forego a target commercial fishery for Steelhead. Because of precariously low runs, the catch of summer Chinook is severly limited. The catch of spring Chinook is governed by a complex formula. See Ex. 0-12A, pp. 52-54, and Tr. 168-169. In sum, the Plan is complicated in its details and can succeed only with continued, cooperative and expert administration. The record does not show either the past or future impact of the Plan on Idaho; and Idaho, a non-party, may not compel adherence to the Plan.

IV - JURISDICTION

The defendant States contend that the Supreme Court should not take jurisdiction because of the previously commenced, and still pending, Sohappy v. Smith case in the federal district court. The Supreme Court has original and exclusive jurisdiction over all controversies between two or more States, 28 U.S.C. § 1251(a) (1), and a responsibility to exercise that jurisdiction when it is properly invoked. See Cohens v. Virginia, 6 Wheat, 19 U.S. 264, 404; Massachusetts v. Missouri, 308 U.S. 1, 19-20.

United States v. Oregon, consolidated with Sohappy v. Smith, is not within the Court's original and exclusive jurisdiction but within the concurrent jurisdiction of the Supreme Court and the district court. See 28 U.S.C. § 1251(b) (2),

and Case v. Bowles, 327 U.S. 92, 97. Permission for the instant case to go forward will result in duplicate litigation to some extent. Sohappy presents allocation of fish among the United States, Oregon, Washington, and the four Indian tribes. Any decision in Sohappy will not bind Idaho. The case at bar relates to allocation of fish among Idaho, Oregon, and Washington. Any decision of the case at bar, in its present posture, will not bind the United States or the Indians.

Colorado River Water Conservation District v. United States, 424 U.S. 800, and Will v. Calvert Life Insurance Co., ____U.S.____, decided June 23, 1978, are not in point because they involved duplicate litigation in federal and state courts. Each of those decisions recognized "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." 424 U.S. at 817 and in Will v. Calvert slip opinion, pp. 7-8.

The Court, in its discretion, may decline to exercise its original jurisdiction. See Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 497-499. In the situation presented, no other suitable forum is available. Cf. Massachusetts v. Missouri, 308 U.S. at 10. The question is whether the jurisdiction of the Court is properly invoked. The answer requires consideration of Idaho's complaint.

V - SUFFICIENCY OF COMPLAINT

Oregon and Washington argue that the Idaho complaint fails to state a claim upon which relief may be granted. The gist of the complaint is that the defendant States have deprived Idaho of its equitable share of the anadromous fishery of the Columbia River System. The defendants say that the fish are migratory ferae naturae, not subject to ownership until reduced to possession. The lack of a property right is said to foreclose justiciability. See e.g. Georgia v. Stanton, 73 U.S. 50, 76. The argument is that, without a property right in the fish, loss of fishing opportunity is not an actual injury of serious magnitude justifying invocation of the Court's original jurisdiction. See New York v. New Jersey, 256 U.S. 296, 309, and Missouri v. Illinois, 200 U.S. 496, 521.

In Missouri v. Holland, 252 U.S. 416, the Court rejected the claim of Missouri that the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., unconstitutionally deprived Missouri of its authority over migratory birds temporarily within the State.

The Court said that "as between a State and its inhabitants the State may regulate the killing and sale of such [migratory] birds," Id. at 534, and held that the authority is subject to the supremacy of valid treaties and federal statutes. Id. at 534-535. Defendants argue that recognition of a State's limited authority over a migratory resource within it forecloses another state from asserting an extraterritorial claim to the migrating anadromous fish. No supremacy claim is presented in the instant case. Idaho does not deny the authority of Oregon and Washington to regulate fishery within their borders but says that the exercise of that authority has deprived Idaho of its rightful share of the fish.

In Missouri v. Holland, the Court commented, 252 U.S. at 434, that "[w]ild birds are not in the possession of anyone; and possession is the beginning of ownership." In Douglas v. Sea Coast Products, Inc., 431 U.S. 265, the Court invalidated state statutes limiting fishing rights of aliens and non-residents because of the supremacy of federal statutes. Id. at 286-287. The Court commented, Id. at 284:

> "Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. [citation] The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' "

The question is not ownership or regulation but power of

the lower States to prevent Idaho from receiving its share of a natural resource. The Court has held that a State does not have power to forbid the exportation of natural gas produced and needed in the State. Pennsylvania v. West Virginia, 262 U.S. 553, 593. The Court said that the State law was an impermissible interference with interstate commerce. Id. The question of whether fish migrating from State to State are a commodity moving in interstate commerce, c.f. Philadelphia v. New Jersey, ____U.S.____, decided June 23, 1978, need not be decided. "[T]he states are not separable economic units."Hood & Sons v. Du Mond, 336 U.S. 525, 537-538. "[O]ne state in its dealing with another may not place itself in a position of economic isolation." Baldwin v. Seelig, 294 U.S. 511, 527.

Anadromous fish migrate from state to state and while in each state are an important resource. For one state to exercise plenary control over migratory fish is comparable to the exercise of such control over flowing water by an upper state to the detriment of a downstream state. The Court has taken jurisdiction over, and decided, a number of interstate suits for the equitable apportionment of water. See e.g. Kansas v. Colorado, 206 U.S. 46, Nebraska v. Wyoming, 325 U.S. 589, and Arizona v. California, 373 U.S. 546. In Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110, the Court said:

> "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."

The federal common law mentioned in Hinderlider should be as applicable to migratory fish as it is to flowing water.

The sufficiency of the complaint must be "considered in the untechnical spirit proper for dealing with a quasi-international controversy." Virginia v. West Virginia, 220 U.S. 1, 27. See also Kansas v. Colorado, 185 U.S. 125, 145. In original actions the Court "has always been liberal in allowing full

development of the facts." United States v. Texas, 339 U.S. 707, 715. The question of whether a state may maintain an original action for the apportionment of migratory fish is one of first impression and should be decided after trial on the merits, not on the pleadings. The complaint states a justiciable controversy proper for the Court to consider and determine in the exercise of its original jurisdiction.

VI - INDISPENSABILITY

By its December 7, 1976, order the Court took jurisdiction of this case on a limited issue and left "open the question of the indispensability of the United States as a party for decision after evidence, in the event that the United States does not enter its appearance in the case." 429 U.S. 163, 164.

When the case was pending on Idaho's motion for leave to file the complaint, the Solicitor General, at the invitation of the Court, filed a memorandum saying that the United States is an indispensable party to the litigation and pointing out that the United States is trustee for the Indians who have treaty protected fishing rights in the basin. At a June 29, 1977 hearing before the Special Master, the United States had present a representative as an observer. He said that the United States had not decided whether to intervene. Tr. 23-26. No one was present for the United States at the January 9-10, 1978, hearing on the affirmative defenses. On April 10, 1978, the Master received and filed a memorandum for the United States as amicus curiae. Therein, the United States asserts that it is an indispensable party because of (1) the Indians' treaty rights, (2) the operation by the Corps of Engineers of eight dams on the Columbia and Snake, and (3) the management by the United States of the off-shore fishery.

The Indians are wards of the United States and subject to its plenary control. See United States v. Sandoval, 231 U.S. 28, 45, and United States v. Candelaria, 271 U.S. 432, 443. An unconsented suit may not be brought against the United States, see United States v. Sherwood, 312 U.S. 584, 586, or against an Indian Tribe, see Turner v. United States, 248 U.S. 354, 358. The rule applies to suits by States. See Kansas v. United

States, 204 U.S. 331, 342; Arizona v. California, 298 U.S. 558, 568; and Minnesota v. United States, 305 U.S. 382, 386-388.

Shields v. Barrow, 17 How., 58 U.S. 130, 139, defines indispensable parties thus:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

See also Barney V. Baltimore City, 6 Wall. 280, 284-285. In Niles-Bement Co. v. Iron Moulders Union, 254 U.S. 77, 80, the Court observed that "[t]here is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not, * * *."

Rule 19(b), F.R.Civ.P., lists four factors for consideration in determining whether in equity and good conscience a case should proceed or be dismissed for nonjoinder of an interested party. Application of the Rule is appropriate and its provisions may be taken as a guide to procedure in original actions. See Supreme Court Rule 9(2). Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 116, rejected the argument that Rule 19 is an ineffective change of the substantive rights created in Shields v. Barrow and said that it is "on the contrary, a valid statement of the criteria for determining whether to proceed or dismiss in the forced absence of an interested person." 390 U.S. at 125. The four factors are, (1) prejudice to a non-party, (2) decrease or avoidance of that prejudice by protective provisions in the judgment, (3) adequacy of the judgment in the absence of the non-joined party, and (4) adequacy of plaintiff's remedy if the action is dismissed for nonjoinder.

With regard to factors (1) and (2), Idaho says that it seeks an equitable apportionment of those fish which remain after satisfaction of the Indian rights and, hence, there is no prejudice

to the Indians or to the United States as their trustee, and no need to consider protective provisions in the judgment.

Puyallup recognizes the right of the states to provide nondiscriminatory and appropriate regulations "in the interest of conservation." 414 U.S. at 45. The 1969 decision in Sohappy held, 302 F.Supp. at 911, that the Indians "are entitled to a fair share of the fish produced by the Columbia River System" but did not define that share. The 1974 amendment to the decree established a 50-50 division of fishing opportunity for spring Chinook. 529 F.2d at 572-573.

Idaho accepts these decisions and makes no complaint against the operation by the United States of the dams which affect both the downstream and upstream runs of fish. In the circumstances, the rights of the United States will not be prejudiced if the action proceeds, and no protective provisions in the decree will be required. The position taken by Idaho may eliminate factors (1) and (2), but does not dispose of the problem.

Factor (3) pertains to the adequacy of the judgment in the absence of the nonjoined party. The word "adequate" as used in the Rule means that the judgement must determine effectively the issues presented. The issue is the division of the non-Indian share of the fish among Idaho, Oregon, and Washington. The right of each state depends on the number of fish left after satisfaction of the Indian share.

The Indian right is variable, fluctuating from year to year and dependent on many conditions, both natural and man-made. The vagaries of climate determine the quantity of water flowing in the System. The size of the fish runs is affected by the dams of the Corps of Engineers. The ocean catch is controlled by a federal statute. The non-Indian commercial catch occurs below Bonneville and is controlled by Oregon and Washington.

Apportionment to Idaho requires some downstream limitation on the harvest of fish by Oregon, Washington, and the Indian tribes. The treaty rights of the Indians to ceremonial and

subsistence fishing have top priority. Sport fishing on the main stem of the Columbia and on the Snake between its confluence with the Columbia and entry into Idaho may be restricted but on the record presented, the fish which might become available to Idaho as a result of decreased sport fishing is uncertain. Indian commercial fishing takes substantial and increasing quantities of fish. The non-Indian commercial catch has decreased in recent years because of restrictions imposed by Oregon and Washington. Restrictions on commercial catch may be needed to allow the escapement of fish to Idaho in satisfaction of whatever apportionment is given it.

Increased escapement at Bonneville will not assure that an increased number of fish will reach Idaho. More fish will be available for Indian harvest and, in the absence of the United States and the Tribes, no control may be exercised over the Indian harvest. The benefit to Idaho is uncertain but the detriment to non-Indian commercial fishing below Bonneville is apparent. An adequate decree should recognize, assure, and protect all interrelated rights. It cannot do so unless all affected parties are bound.

In Sohappy the amended decree gives the Indians "the opportunity" to take fifty percent of the harvest of the spring Chinook destined to reach the tribes' usual grounds. 529 F.2d at 570-572. The Sohappy five-year managment plan provides that the run size is determined by the number of fish *"entering* the Columbia River *destined* to pass Bonneville Dam." Entitlement to fish is in fixed numbers dependent on the run size which varies from year to year and depends on many factors. Any decreed apportionment will require predictions and day-to-day supervision because of the many variables.

The necessity of continuing district court supervision was recognized in United States v. Washington. See the concurring opinion of District Judge Burns who refers to the role of the judge as a "perpetual fish-master." 520 F.2d at 693. The Court has been reluctant to appoint a special master to supervise obedience of a Court judgment. In Vermont v. New York, 417 U.S. 270, the Special Master appointed by the Court recommended approval of a consent decree calling for the appoint-

ment of another Special Master to police execution of the decree. After reviewing its pertinent decisions, Id. at 274-276, the Court rejected the appointment of the Special Master to police the settlement and pass on to the Court his proposed resolution of contested issues saying, 417 U.S. at 277:

> "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."

Any decree in this case for an apportionment will require constant supervision and the exercise of continuing jurisdiction. The decisions of the "fish-master" will relate to facts, not to law, and will have nothing to do with the Court's performance of its Article III judicial functions. Id. at 277.

The district court decision in Sohappy v. Smith summarizes the situation thus, 302 F.Supp. at 910-911:

> "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 * * *. As the Government itself acknowledges, 'proper anadromous fishery management in a changing environment is not susceptible of rigid pre-determination. * * * the 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 pre-determination.' "

An adequate apportionment decree requires (1) a recognition of the interrelated rights of all parties with a division on a basis which is necessarily variable and (2) continuing administration to assure compliance with the division. Such a decree is impossible because of the absence of the United States and of the undesirability, if not impropriety, of the Court undertaking continued regulation of the Columbia River fishery.

Factor (4) of Rule 19(b) relates to the adequacy of a remedy for the plaintiff if the action is dismissed for nonjoinder. Oregon and Washington argue that Idaho could intervene in the Sohappy litigation to which the United States, Oregon, Washington and the Indian tribes are parties. The litigation is now ten years old and has gone once to the court of appeals. An attempt by Idaho to intervene now would be subject to the objection of untimeliness. If the intervention sought determination of the relative rights of all parties, the objection may be made of an impermissible enlargement of the issues. Also, intervention by Idaho in Sohappy would, at the least, inject in that suit a controversy between two or more states and beyond district court jurisdiction, and, at the most, present an unconsented suit against the United States. Intervention by Idaho in Sohappy does not present an adequate remedy. The parties suggest no other remedy. In short, the immunity of the United States presents an insurmountable barrier to a legal remedy.

A balancing of the Rule 19(b) factors shows on one side of the scale that the nonjoinder will result in no prejudice to the absent party and that Idaho has no adequate legal remedy. On the other side, the absence of the United States makes the entry of an adequate judgment impossible and tips the scales in favor of the conclusion that the United States is an indispensable party without which the action may not proceed. The result accords with the principles announced in Shields v. Barrow and with actions taken in other interstate controversies.

In the instant case the rights, duties, and responsibilities

of the United States and its agencies are as great as those present in Arizona v. California, 298 U.S. 558, where the Court denied permission to file a complaint because of the absence of the United States as a party. Idaho relies on the decision in Nebraska v. Wyoming, 295 U.S. 40, 43, which held that the Secretary of the Interior, whose rights as an appropriator were subject to Wyoming law and who would be bound by an adjudication of Wyoming's rights, was not an indispensable party. The United States was later permitted to intervene in that litigation. In the case under consideration, the United States has rights not subject to state law and is not bound by a decree in a case to which it is not a party.

In Texas v. New Mexico, 352 U.S. 991, the complaint was dismissed because of the absence of the United States as an indispensable party. The suit was concerned with the claim of Texas that New Mexico had violated the Rio Grande Compact. The Report of the Special Master is partially reproduced as an Appendix to the brief of Washington on its affirmative defenses. The Master concluded, App., p. 17, that the United States was indispensable because of its interest in the rights of the Indians to certain storage water. The treaty rights of the Indians to fish are of equal importance.

In Colorado v. Kansas, 320 U.S. 383, an original interstate suit relating to the apportionment of the water of the Arkansas River, the Court said, Id. at 392:

> "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-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by 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 mutual accomodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power." (Footnotes omitted.)

The preservation and apportionment of the anadromous fishery of the Columbia River System present complex and interrelated environmental, social, economic, legal, political and philosophical conflicts not solvable by judicial action. To mention but one problem, the downstream migration of the smolts is aided by provision for spill water so that the smolts do not have to pass through the turbines. Water which spills is unavailable for power generaton. Hence, a direct conflict arises between the ever-increasing demand for electrical energy and the preservation of the anadromous fish. Agencies of the United States control the spills. The States do not; they can only request.

Any determination of the rights of the three states fails to resolve the entire problem. The rights and obligations of the United States, both as trustee of the Indians and as proprietor of the facilities utilizing the waters of the System, must be considered. The duties of the United States as trustee may conflict with its interests in developing and using the water for economic purposes which are incompatible with preservation of the fish runs. As noted by the United States in its Memorandum as Amicus Curiae on Idaho's motion to file a complaint, p. 4, n. 3, a conflict may exist between uptream and downstream tribes. The answer to all the conflicts presented is mutual accomodation and expert administration, not litigation.

VII - RECOMMENDATION

The Special Master recommends that the action be dismissed because the United States is an indispensable party which may not be joined without its consent.

Denver, Colorado
July 31, 1978

Jean S. Breitenstein
Room C-446 U.S. Courthouse
1929 Stout Street
Denver, Colorado 80294
Special Master

SUPPLEMENTAL REPORT
RULINGS OF SPECIAL MASTER ON EXCEPTIONS AND OBJECTIONS TO HIS REPORT

Each of the parties has filed exceptions and objections to the Report of the Special Master. At the request of Idaho, and with the consent of Oregon and Washington, the Master extended time for objections and exceptions to his July 31 Report on the Affirmative Defenses until October 16. All three States filed objections and exceptions which were set for argument on November 8.

On October 16, the Master wrote Mr. Steven B. Carroll, attorney in the Department of Justice, who had previously appeared at the hearings as an observor, and requested information whether the United States had changed its decision not to intervene in the case. On November 3 the Master received Idaho's "Motion to Reschedule Oral Argument." On November 7 the Master received a letter from Solicitor General McCree which appears in the record at Tr. 380-380A. The letter said, among other things:

> "* * * we have only just been requested by the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in Idaho to consider advancing their treaty fishing rights in this case.
>
> * * * *
>
> "We are advised that the State of Idaho will be moving for a postponment of the hearing [on objections and exceptions to the Master's Report]. In the circumstances, we suggest that the request is appropriate. Since the status quo is preserved, it does not appear that any party would be prejudiced by such a delay. Perhaps, in order to assure you, however, that no further postpone-

ment is required, the hearing should be rescheduled no sooner than February 1, 1979."

On November 7 the Master also received a Motion of the Shoshone-Bannock Tribes for leave to file an amicus curiae brief supporting the Idaho request for a rescheduling of the hearing on the objections and exceptions to the Master's Report. The Shoshone-Bannock Tribes asserted their location in Idaho, their treaty rights, and their request that the United States as their Trustee protect those rights.

At the November 8 hearing, representatives of each State were present along with Mr. Carroll as an observor for the United States, and attorneys representing the Shoshone-Bannock Tribes. In the circumstances presented the Master allowed the filing of the amicus curiae brief. Tr. 391. The Master denied the requested continuance. Tr. 408.

The Master heard the arguments on the objections and exceptions to his Report. At the conclusion of the arguments, and over the objections of Oregon and Washington, the Master stated that in the circumstances presented, the Report would not be filed with the Court until after February 1. See Tr. 440-441 and 448. The Master further said that no further requests for additional time would be favorably received. Tr. 449. The Solicitor General in a January 30,1979, letter to the Special Master said that the United States adhered to its decision not to intervene in this case and suggested that a dismissal of the action because of the indispensability of the United States should be without prejudice.

Exceptions of Idaho

Idaho's exceptions I and IV to the Master's Report say in effect that the original jurisdiction of the Supreme Court, Const. Art. III, § 2, cl.2, and 28 U.S.C. § 1251(a), must be exercised to secure domestic tranquility. Idaho emphasizes that it has no other remedy than suit. The makers of the Constitution did not provide that the United States may be joined without its consent when one State invokes original Supreme Court jurisdiction in a controversy with another

State. Congress has not given its consent to suit by Idaho for apportionment of the Columbia River anadromous fishery. The Executive has not sought leave to intervene. The problem is solvable by obtaining the consent of Congress to suit or by voluntary application of the Executive branch for leave to intervene. The determination of an interstate controversy is important to domestic tranquility, but the Court cannot act for either the Legislative or the Executive branch. The procedural flexibility given and intended by Supreme Court Rule No. 9 does not change the substantive law. Without the United States as a party, in both its proprietary and trustee capacities, any decision in the instant case would be advisory, not conclusive.

Idaho's Exception II attacks the Master's holding that the United States is indispensable because of (1) the activities of its agencies and (2) its status as trustee of the Indians. The dams built, or licensed, by federal agencies control the regimen of the river. The Indians have treaty rights to fish and, as trustee, the United States has the duty to protect those rights. From a practical standpoint any apportionment to Idaho requires some arrangement so that a sufficient number of upstream migrants get over Bonneville Dam and the seven other dams, and through the Indian reservations, to Idaho in the required numbers. Limitations may be placed on sport and commercial fishing below Bonneville. Those limitations will have to be enforced by Oregon and Washington. The trouble is that getting the fish above Bonneville does not solve the problem. Some fish will return to upstream spawning grounds on the Columbia and its tributaries other than the Snake. Those fish cannot be sorted out below Bonneville. The fish ladders necessary to upstream passage are controlled by the United States. Indian fishing may not be controlled by a decree in the instant case because neither the United States nor the Indians are parties. A judgment which depends on the actions of non-parties for enforcement is not adequate. The Master adheres to his application of the principles contained in Rule 19, F.R.Civ.P.

Idaho's Exception III says that (1) an apportionment decree will be susceptible to judicial determination and en-

forcement, and (2) not unduly burdensome to the Court. An apportionment among the Indians and non-Indians was provided by the Plan approved in the Sohappy v. Smith case. The Master can add nothing to his discussion of that Plan in his Report. The Plan shows the need for constant supervision during the fish runs. Any provision for future modification of the decree does not dispense with the need for continuing administration.

The Master overrules each and all of the exceptions and objections of Idaho.

Exceptions and Objections made by both Oregon and Washington.

To preserve their record, Oregon and Washington each except and object to the rulings of the Special Master that (1) jurisdiction is not barred by the pending Sohappy v. Smith litigation and (2) the Idaho complaint does not state a justiciable controversy. The Master adheres to the rulings stated in his Report.

Exceptions and Objections of Washington

Washington calls attention to several clerical errors, all of which have been corrected.

The Master noted the hatchery fish production in Idaho. Washington objects that the Idaho production should be placed in proper perspective to the total hatchery production in the Columbia and Snake Basins. Ex. W-3, p. 9, shows a 1974 production of 151.8 million Salmon and Steelhead smolts in the Columbia Basin, plus a minor number from ten unnamed hatcheries. Ex. W-4, Table 4, p.m-17, shows that in 1974 the pounds of Salmon and Steelhead smolts planted in the Columbia Basin were: Snake, Salmon, and Clearwater Rivers (in Idaho) 988,490, Columbia above Snake, 566, 438, and Columbia below Snake, 4,228,177.

Witness Holubetz testified, Tr. 267, that none of the money associated with the operation of Idaho hatcheries "comes from tax funded money to the State of Idaho." Ex. W-3, p. 9, says:

> "The federal government (federal taxpayers and water project beneficiaries) and public and private utilities (ratepayers) paid for approximately 90% of this [hatchery] production as partial compensation for destruction of salmon and steelhead habitat. The states (state taxpayers and fishing licenses) paid 10%."

RECENT SUPREME COURT ACTIONS

On October 16, 1978, the Supreme Court granted certiorari in the following cases:

77-983 — For review of decisions of Supreme Court of Washington in Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, 89 Wn2d 276, 571 P.2d 1373, and Puget Sound Gillnetters Association v. Moos, 88 Wn2d 677, 565 P.2d 1151.

77-119) — For review of decisions of Ninth Circuit Court of Appeals in United States v. State of Washington, 573 F.2d 1118, and Puget Sound Gillnetters Association v. United States District Court for the Western District of Washington ,573 F.2d 1123.
78-139)

All of the cases are concerned with allocation of fish among Indians and non-Indians in Washington. None are concerned with the allocation of fish to Idaho or in Oregon. The treaty provisions relating to Indian fishing rights appear to be the same as those pertinent to the instant suit. It may be that action on the cases in which certiorari has been granted will determine the respective fishing rights of the Indians and non-Indians in the State of Washington. Because of the absence of Oregon and Idaho as parties, no determination seems possible of the relative rights of Washington, Oregon, Idaho, and the Indians. That determination will have to await either (1) litiga-

tion in which the three States and the United States are parties or (2) a non-judicial solution.

AMENDED RECOMMENDATION

The Special Master recommends that the action be dismissed because the United States is an indispensable party which may not be joined without its consent. The Master further recommends that the dismissal be without prejudice to the right of Idaho to refile at some later date if Idaho is wholly unable to obtain a remedy through agreement.

Denver, Colorado
February 2, 1979

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Special Master