In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 67, Original

STATE OF IDAHO, ex rel JOHN V. EVANS, Governor, DAVID H. LEROY, Attorney General; JOSEPH C. GREENLEY, Director, Department of Fish and Game,

Plaintiff,

vs.

STATES OF OREGON and WASHINGTON,

Defendants.

STATE OF OREGON'S RESPONSES TO PLAINTIFF'S EXCEPTIONS TO MASTER'S REPORT

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STATEMENT

On May 1, 1979, the State of Idaho filed Plaintiff's Exceptions to Report and Supplemental Report of the Special Master on the Affirmative Defenses of Oregon and Washington to the Complaint of Idaho (hereinafter "Plaintiff's Exceptions"). The State of Oregon respectfully submits the following response to those exceptions.

RESPONSES

I. THE SPECIAL MASTER WAS CORRECT IN HIS FINDING AND CONCLUSION THAT THE UNITED STATES IS AN INDISPENSABLE PARTY TO THIS SUIT.

In his report and supplemental report to this Court, the Special Master found the United States an indispensable party to this litigation and recommended that Idaho's complaint be dismissed because the United States could not be joined and refused to intervene. The Master's finding of indispensability was based on three factors. First, the United States, through the Corps of Engineers, controls the operation of eight dams over which anadromous fish produced in Idaho must pass on both their outward and return migrations. Second, the federal government exercises jurisdictional control over ocean fishing in the 200-mile zone, except for the three-mile territorial area of the coastal states. Third, the United States is trustee for the Indian tribes with treaty fishing rights in the Columbia River System. Master's Report, 17, 24.

A. The criteria of indispensability found in F.R.Civ.P. 19 were properly applied.

The State of Idaho contends in its exceptions that the United States is a dispensable party to this suit. Plaintiff's Exceptions, 19-28. Plaintiff argues that flexible application of F.R.Civ.P. 19 is required by Supreme Court Rule 9(2) and only the Master's unnecessarily rigid application of F.R.Civ.P. 19 led to the conclusion that the United States is an indispensable party.

It is the position of the State of Oregon that the

Special Master correctly applied the criteria listed in Rule 19(b), F.R.Civ.P. This Court very recently reaffirmed the principle that a suit in equity cannot be maintained without the joinder of indispensable parties. *California v. Arizona,* 59 LEd2d 144, 148 (1979). *California v. Arizona* was also a suit between states in the original jurisdiction of this Court. In footnote 3 the Court set out the F.R.Civ.P. 19 guidelines, as well as Supreme Court Rule 9(2), and concluded with the observation: "This Court has dismissed cases in its original jurisdiction for want of an indispensable party." *California v. Arizona,* 59 LEd 2d 144, 148-49, n. 3 (1979) (citations omitted).

The State of Idaho suggests that it has a constitutional right to an adjudication of its claim on the merits in this Court under "flexible procedural requirements" that ignore common concepts of indispensability. Plaintiff's Exceptions, 12, 16. F.R.Civ.P. 19 is not a technical rule, nor was it applied technically by the Special Master. The rule 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. Although application of the factors may yield different results in suits between quasi-sovereigns than in other types of litigation, basic principles of equity do not change. The Special Master concluded that Idaho's suit should not,

in equity and good conscience, proceed so long as the United States could not be made a party. This was the determination the Master was required to make; it was not a mechanical or technical application of the F.R.Civ.P. 19 factors.

B. This suit should not proceed in the absence of the United States as a party.

1. The United States is indispensable because of its status as a trustee for the Indians.

The United States is an indispensable party to this litigation, as found by the Special Master, in part because of its status as trustee for the Indians who have treaty-protected fishing rights in the Columbia River Basin. Plaintiff asserts that this finding rests on the erroneous assumption that if defendants are required to allow more fish to pass Bonneville Dam the Indians will "over-harvest" the increased runs "in violation of the settlement agreement reached in *Sohappy v. Smith,* and neither Oregon, Washington nor Idaho would or could enforce the agreement". Plaintiff's Exceptions, 25-26.

Plaintiff misapprehends the Master's findings regarding the relationship of treaty fishing rights and the *Sohappy* agreement to an equitable apportionment of the non-treaty fishery. The *Sohappy* agreement, attached to Plaintiff's Exceptions as Appendix A, shows that for all species except Spring Chinook the

sharing formulas do not take into account any non-commercial fishery in tributaries or in the mainstem Columbia River above McNary Dam. The settlement agreement in *Sohappy* attempts to allot between treaty and non-treaty fishermen the opportunity to harvest those anadromous fish destined to pass Bonneville Dam. The non-treaty commercial fishery has been restricted to the area below Bonneville Dam since 1957. Master's Report, 10. As a practical matter, then, non-treaty commercial fishing is restricted below Bonneville Dam in order to allow the tribes the opportunity to take their share of the harvestable fish destined for usual and accustomed tribal fishing stations. Treaty and non-treaty commercial fishermen are not competing for their respective shares in the same area of the Columbia River. Once the harvest is reduced below Bonneville Dam, there is simply a larger amount of fish available for the treaty fisheries, beyond the level of escapement all parties are required to allow. Oregon and Washington have no interest in restricting the treaty Indian harvest above Bonneville Dam except to protect spawning escapement. This is the only "over-harvest" in violation of the *Sohappy* agreement that is practically possible.

The Special Master concluded, correctly, that nothing in *Sohappy* would prevent treaty fishermen from harvesting any increased number of fish allowed by

defendants to pass Bonneville Dam, so long as the minimum spawning escapement is preserved. Recent history has shown this is precisely what has happened as non-Indian commercial fishing has declined. Master's Report, 20. Idaho cannot, therefore, be assured of receiving any adjudicated share of the anadromous fishery unless the Indian commercial catch is restricted. Such a restriction is impossible unless the United States, in its capacity as trustee for the Indians, is a party to this suit. Unless the United States is party, to be bound by any decree entered by this Court, adequate relief cannot be given to the plaintiff. It would be inequitable to require defendants to forego a valuable economic opportunity without any assurance that the sacrifice would produce an enhanced fishery for Idaho.

The United States in its capacity as trustee for the Indians is an indispensable party to this litigation for yet another reason. Plaintiff claims it seeks an apportionment only of the non-treaty fishery. Nevertheless, because of the geographic distribution of the fisheries and the locations of the principal treaty and non-treaty commercial harvesting areas, plaintiff is, in effect, asking for an allocation of the anadromous fish that are not only destined to, but *do* pass Bonneville Dam. Such an allocation necessarily involves the interest of those Indian tribes with adjudicated treaty

fishing rights. This is analogous to the situation in *Texas v. New Mexico,* 352 U. S. 991 (1957) cited by the Special Master.

Indian treaty fishing rights present further obstacles to the relief sought by plaintiff. The Shoshone-Bannock Tribes have asserted treaty rights in the additional fishery sought by Idaho. The United States stands as trustee for these tribes. Master's Report, 27. The apportionment Idaho demands thus directly involves the rights of those Indians and the United States must be present as a party to protect their interest. Furthermore, a conflict exists between the four lower tribes who are parties to *Sohappy* and the Shoshone-Bannocks. Any attempt to redistribute the opportunities to harvest anadromous fish in the Columbia River System will implicate the concurrent and conflicting rights of these Indian tribes to such an extent that the United States must be present as a party.

The United States, in its capacity as trustee for the Indians, is therefore an indispensable party to this litigation for two reasons. If the tribes cannot be bound by a decree of this Court requiring them to allow a certain number of fish to pass on to Idaho, adequate relief cannot be given in this case. The tribes also have treaty rights in the subject matter of which Idaho seeks an apportionment.

2. The United States is indispensable because of its control over eight dams on the Columbia River System, and the ocean fishery.

Plaintiff asserts that the United States is not an indispensable party to this litigation because of the activities of its agencies in controlling the regimen of the Columbia River System. Plaintiff's Exceptions, 22-25. Defendant State of Oregon responds that the Special Master was correct in his finding. The United States is an indispensable party because of the control it exercises in determining passage conditions for the fish Idaho seeks to have apportioned, and because of its role in establishing the equities of production on which Idaho bases its claim.

Just as it would be unjust and inequitable to enter a decree requiring defendants to forego a valuable opportunity to harvest anadromous fish on their return migration without assurance that those fish would not be caught by treaty fishermen instead of reaching Idaho, so it would be unjust and inequitable to enter such a decree without any assurance that the uncaught fish would not be lost because of inadequate passage conditions and facilities at the eight dams to be passed between the Pacific Ocean and fishing grounds in Idaho. Any apportionment would depend on the will of a non-party for its effectiveness. Such relief is not adequate within the meaning of the

F.R.Civ.P. 19(b) equity and good conscience guidelines.

The Special Master correctly found "any apportionment to Idaho requires some arrangement so that a sufficient number of upstream migrants get over Bonneville and the seven other dams, and through the Indian reservations, to Idaho in the required numbers." Master's Report, 28. Such an arranagement cannot be made unless the United States is a party to this suit, bound by any decree entered by this Court.

Plaintiff argues that federal control over the rate of mortality to anadromous fish on their downstream or outward migration is immaterial in this litigation. This argument is based on the premise that Idaho is claiming only an equitable portion of adult fish on their return migration. Plaintiff's Exceptions, 22-23. Such a contention is inconsistent with the theory upon which Idaho founded this litigation: it is entitled to a share of the anadromous fish in the Columbia River Basin based on the equities of *production.* Complaint, Paragraph X.

The equities of adult anadromous fish production, upon which an apportionment would be based, cannot be determined in the absence of the United States as a party. The number of anadromous fish that *will* return to any given area is dictated by many factors. These include: ocean harvests; the level of federally funded

or controlled hatchery production; water level, quality and temperature—determined in part by diversion of water for irrigation or other purposes and the management of timber and range land in spawning areas; construction design or modification of spillways and ladders in the dams over which fish must pass; and the amount of water allowed to flow over dam spillways instead of through turbines—determined in large measure by demand for and commitment to supply electric power. All of these factors are controlled predominantly by agencies of the United States.

Plaintiff's reliance on the case of *Florida v. Georgia,* 17 How. 478 (1855) is misplaced. In *Florida* the United States Attorney General was *seeking* to be heard, without becoming a party, in a suit between states in which there was no need for the United States to be bound by a judgment. In the case presently before this Court the United States is indispensable because it must be bound by any judgment for that judgment to be adequate. Furthermore, here the United States is not seeking to be heard without becoming a party, but has urged that this suit be dismissed because of its indispensability. Memorandum for the United States as Amicus Curiae (April, 1979).

There is no procedural substitute for the joinder of the United States as a party that will satisfy those

concerns that make the United States indispensable to this litigation. Since the United States cannot be joined without its consent and has refused to intervene, the Master was correct in his conclusion that the complaint should be dismissed.

II. THE UNITED STATES HAS NOT WAIVED ITS SOVEREIGN IMMUNITY FROM SUIT IN THIS LITIGATION.

A. The Doctrine of Sovereign Immunity Applies.

Plaintiff argues that even if the United States is a necessary party to this litigation, it can be made a party because it has waived its sovereign immunity. Plaintiff's Exceptions, 28-38. This contention is new in this suit and unsupported by the law.

Idaho urges this Court to "retreat from the last bastion of sovereign immunity" and not permit the United States to "thwart meritorious litigation". Plaintiff's Exceptions, 29-30. The doctrine of sovereign immunity cannot so easily be abolished. As this Court stated very recently, in a case between states in its original and exclusive jurisdiction: "It is settled that the United States must give its consent to be sued even when one of the States invokes this Court's original jurisdiction." *California v. Arizona,* 59 LEd2d 144, 148 (1979). It is immaterial that the United States has chosen a course not supported by all of the officials or agencies involved. Neither is it

material that Idaho may be forced to a political settlement instead of judicial resolution if this Court dismisses its complaint.

> "It is clear, of course, that Congress could refuse to waive the Nation's sovereign immunity in all cases or only in some cases but in all courts. Either action would bind this Court even in the exercise of its original jurisdiction." *California v. Arizona,* 59 LEd2d 144, 150 (1979).

B. The United States has not waived its Sovereign Immunity.

Plaintiff contends Congress has waived the sovereign immunity of the United States by amendments to the Administrative Procedures Act, 5 U.S.C. §§ 551, et seq., specifically § 702. Plaintiff omitted in its brief the first sentence of § 702, which immediately precedes the portion quoted.

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

This statute is not a general waiver of sovereign immunity. If it were, the problem faced by this Court in *California v. Arizona,* 59 LEd2d 144 (1979) would never have arisen. The amendment eliminated sovereign immunity as a bar to actions brought by an *aggrieved* person for judicial *review* of agency action or inaction. This suit is not an action for review of federal agency action or inaction. Furthermore, plaintiff has

maintained throughout this litigation that it is not aggrieved by any action or inaction of the United States except its refusal to intervene in this suit. "[T]he United States has taken no harmful action and Idaho has no cause of action against the United States or its trustees at this time . . . ." Plaintiff's Exceptions, 17. The sovereign immunity of the United States from joinder in this case in not waived by 5 U.S.C. § 702.

Federal statutes committing the United States to the protection and maintenance of wildlife resources do not waive sovereign immunity in this suit. While *violation* of those statutes *might* create a cause of action, an adequate judicial remedy in this litigation requires more than that the United States follow a statutory policy of protecting anadromous fish. In order for an allocation of a portion of the fishery to Idaho to be effective, and therefore adequate, the United States must be bound to a decree enjoining specific acts and practices not prescribed by any statute. Preservation and enhancement of anadromous fish runs does not necessarily require maintenance of a sport or commercial fishery for the State of Idaho; nor do any of the statutes cited by plaintiff require the United States to administer its programs to ensure an equitable distribution of fish between the states. There is no statute by which Congress has

waived the sovereign immunity of the United States from joinder in this suit. The statute recently construed by this Court in *California v. Arizona,* 59 LEd2d 144 (1979) was a specific waiver of sovereign immunity. This is, perhaps, the type of legislation Idaho should seek to allow judicial resolution of alleged inadequacies in fishery allocation, but no such statute exists at this time.

Plaintiff contends that the United States in its role as trustee for the Indian tribes waived its sovereign immunity by its participation as a party in *Sohappy v. Smith,* 302 F Supp 899 (D.Or. 1969). This contention must fall for the same reasons the Special Master found the United States an indispensable party because of its trustee status. The litigation in *Sohappy* was based on treaty rights, not equities of production. Furthermore, there was no adjudication of any rights of Idaho to any portion of the anadromous fishery and no party assumed any of the duties that an adequate decree of allocation in this suit would impose. As noted above, the sharing formulas set out in the management plan reached in settlement of *Sohappy* specifically refer only to fish caught below McNary Dam, except for spring Chinook. The litigation of Indian fishing rights in *Sohappy v. Smith* did not and does not waive the sovereign immunity of the United States in this suit.

III. EQUITABLE APPORTIONMENT OF THE FISHERY IS NOT SUSCEPTIBLE OF JUDICIAL DETERMINATION, AND ENFORCEMENT AND WOULD BE UNDULY BURDENSOME TO THIS COURT.

The Special Master found that "[t]he 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." Master's Report, 24. Idaho excepts to that finding and asks for an opportunity to present its evidence on the merits. Plaintiff's Exceptions, 39, 41. The Master took evidence on the complexity of fishery management and allocation and made detailed factual findings. Master's Report, 6-11. These problems cannot be simplified by the presentation of additional facts.

The anadromous fish that Idaho seeks to have apportioned are dependent on good water quality, sufficient water levels and flows, adequate passage conditions and restrictions on harvesting for their survival. Water quality, levels and flows are subject to many variables, some natural and some man-made. Timber and range land management, demand for irrigation water, energy requirements and the weather all play a role in determining the conditions in the Columbia River System. All except the weather are

affected by several environmental, social, legal, political and philosophical factors. The fishery itself, both in the ocean and in the river, is subject to a variety of influences, including considerations of international relations. The problem is not that such complexity would make judicial determination and enforcement somewhat difficult, rather, it makes such judicial resolution impossible.

If the innumerable conflicts presented by plaintiff's complaint could somehow be judicially resolved to reach an approtionment decree, such a decree would require for its enforcement a form of constant and close supervision inappropriate for this Court. Master's Report, 22. Contrary to plaintiff's contention, this finding does not presuppose bad faith on anyone's part. The equities upon which any allocation would be based are subject to change from day to day. The same is true of the specific acts that would be required of each party to ensure that allocated percentages are realized. The execution of a decree in this case would require day-to-day decision-making according to ever-changing facts, not principles of law. A decree requiring this type of execution was found inappropriate in *Vermont v. New York,* 417 U.S. 270 (1970). It would be equally inappropriate in this suit, and would require supervision not within the Article III powers of this Court.

IV. CONCLUSION

The State of Oregon urges this Court to adopt the recommendations of the Special Master. The United States is an indispensable party that cannot be joined without its consent. The sovereign immunity of the United States has not been waived.

The relief sought by the State of Idaho in this case involves numerous conflicts not susceptible of judicial resolution. Any attempted apportionment would require for its enforcement a type of continual supervision inappropriate for this Court.

Plaintiff should return to the conference table where a reasonable solution to the problems it has posed may be found. This action should be dismissed.

Respectfully submitted,
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