

In the

# Supreme Court of the United States

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.

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

No. 67, Original

Washington, D.C.  
November 8, 1976

Pages 1 thru 53

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JOSEPH C. GREENLEY, Director, Department of :  
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v. :

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STATE OF OREGON, STATE OF WASHINGTON, :

Defendants. :

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Washington, D. C.,

Monday, November 8, 1976

The above-entitled matter came on for argument at  
10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WAYNE L. KIDWELL, Attorney General, State of Idaho;  
on behalf of the Plaintiff.

LEE JOHNSON, Attorney General of Oregon; on behalf  
of the defendants.

SLADE GORTON, Attorney General of Washington; on  
behalf of the defendants.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in No. 67, Original, the State of Idaho and others against the States of Oregon and Washington.

Mr. Attorney General, you may proceed whenever you're ready.

ORAL ARGUMENT OF WAYNE L. KIDWELL, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. KIDWELL: Mr. Chief Justice, and may it please the Court:

Attorney General Gorton, Attorney General Johnson, gentlemen:

We're asking this Court to grant our motion for leave to file our complaint under the provision of the Constitution granting original jurisdiction, because we are facing what we consider in the Northwest a problem of monumental importance, of nationwide importance.

We're talking about the anadromous fish runs, the anadromous fish, a migratory fish that is born in fresh water, eventually makes it way to the sea, living from one to four years in the sea, and then, if possible, returns to the place of its birth to spawn.

The problem is, that the nine hundred miles that these fish may travel has many hazards. We recognize there are other hazards than we're going to address ourselves to here today. Obviously, we have dams -- there are eight of



them over the part of the Columbia River basin that we're talking about today. They certainly take their toll. The nitrogen supersaturation, the slack water, the pollution, and there are some other factors: heavy sports fishing and commercial fishing.

The problem is that the anadromous fish, after they leave the ocean, go through two states, but over half of them spawn in the State of Idaho. And the anadromous fish are governed by a compact that was passed by the States of Oregon and Washington in 1915, ratified by the United States Congress in 1918, of which only the two states are members. Idaho has not had a voice. It's not because the State of Idaho has not attempted to have a voice.

As far back as 1937, the United States Fishery Commission recommended then that Idaho be made a member of the Columbia River Fish Compact. Negotiations were started. They continued for many, many years. As recently as 1968, the governors of the three states convened a meeting to discuss the anadromous fish in the Pacific Northwest. And the governors of these three states did recommend that Idaho become a member.

However, nearly forty years now have elapsed since the compact was first entered into, and Idaho is still not a member. The problem is, if Idaho were a member, we feel that the problem would not be as acute and critical as it

is. If we're allowed to file our complaint, we can show by competent evidence, and in many instances, the fish runs themselves have been depleted by as much as 80%.

This anadromous fish cycle is a unique --

QUESTION: Is there some reason why membership has not been achieved?

MR. KIDWELL: Your honor, I guess I would have to blame politics. Many of the leaders of the states have expressed their desire and willingness to have Idaho made a member, but the state legislatures have never gotten around to admitting the State of Idaho.

QUESTION: Mr. Attorney General, if you are admitted, is that the end of your problem?

MR. KIDWELL: No, sir, it is not. If we are admitted to the Columbia River Fish Compact, that's only step one. There would be three states, then. If we were given an equal voice, the problem would arise that Idaho would have interests that are somewhat different than Oregon and Washington, and there is certainly the danger of our being out-voted two to one, and we would maintain the status quo, and nothing would change.

So we are asking this Court to grant us admission to the Columbia River Fish Compact. Now, I recognize --

QUESTION: What authority do you have, Attorney General Kidwell, for this Court's power to grant you what you

want?

MR. KIDWELL: Justice Rehnquist, I was going to point out that I recognize that there has been no case, at least that we have been able to find, whereby this Court could say directly that we would be entitled to become a member.

However, there is considerable authority, your honor, that this Court is the final say so on the validity and operation and fairness of interstate compacts. So we would urge either that this Court take the unprecedented step of saying that Idaho should be a member, or achieve the same result by saying that those portions of the Compact that deny Idaho its fair share, its apportionment, of the anadromous fish be declared invalid so far as the operation of the Compact is concerned.

QUESTION: What authority do you rely on for this Court's power to review what you call the fairness of a compact that has been entered into by the two states and ratified by Congress?

MR. KIDWELL: Your honor, probably the most clear expression by this Court would be a fairly recent case, Nebraska v. Iowa at 406 U.S., your honor, where the Court then was not reviewing a fish compact, but it was a compact between two states concerning itself with the river boundary between the two states.

QUESTION: And had that been ratified by Congress, that compact?

MR. KIDWELL: Yes, your honor, it had been.

QUESTION: You're asserting right now no more right than you would assert if there had been no contract at all, namely, you suggest that this Court apportion the anadromous fish in the river among the states, just as though we were operating on a stream.

MR. KIDWELL: That's essentially correct, your honor.

QUESTION: And if you're right, if you're entitled to a portion of those fish runs, if Idaho is, an agreement between two other states isn't about to deprive you of it. That's your position, isn't it?

MR. KIDWELL: Yes, your honor. The problem is that the fish, when they're attempting to return to Idaho to spawn, are taken from the Columbia River through many other factors. But commercial fishing is one way that we feel if Idaho were in that we could attempt to cut back. What we're asking for is, one, to become a member of the Compact, and secondly, for this Court to apply -- for want of a better word I'll call it equitable apportionment -- recognizing that this Court has applied that in water cases, and applying it to --

QUESTION: Well, the second argument is independent

of the compact.

MR. KIDWELL: Yes, your honor, it is.

QUESTION: Well, I still don't understand your first one. Nebraska and Iowa, after all, held only that a compact could be construed by this Court.

MR. KIDWELL: Yes, your honor.

QUESTION: That's all. And that's not the issue on the -- you want to be -- you want to have Idaho made a party member to the compact. Is that it? But how can the -- that requires, I thought, the voluntary consent of the states and the approval by the Congress.

MR. KIDWELL: Justice Brennan, the reason I cited Nebraska v. Iowa is only to point out that this Court has said that they are the final arbiter, that you are -

QUESTION: As to the meaning of a compact.

MR. KIDWELL: As to the meaning of a compact. And if this compact, if it were determined by the proof, that the compact itself was depriving Idaho of substantive rights in this natural resource, then the Court could declare it invalid insofar as it takes these rights from the State of Idaho.

QUESTION: You don't -- as a remedy, you don't need anything more than a declaration of -- if you have it -- a declaration of your rights to this fish run.

MR. KIDWELL: Your honor, we feel that if this --

QUESTION: And enjoining anybody else who interferes



with it.

MR. KIDWELL: That's correct, your honor. That's correct.

QUESTION: Is there in the -- anywhere that would prevent you now, the State of Idaho, from bringing an original jurisdiction suit against the other states. Does the compact bar you?

MR. KIDWELL: No, your honor. The compact does not bar us. And at this point we felt that the most appropriate remedy -- and after much discussion -- would be to come to this Court with this type of original jurisdiction case.

QUESTION: What if Congress does not approve it? Where would you be?

MR. KIDWELL: Your honor, there's always that hazard. We do feel, however, that H.R. 200, which was passed by the Congress, which regulated the fishing three miles out out to two hundred miles out, specifically recognized the state of Idaho as having a voice. And the Congressional discussion then concerning anadromous fish indicated that if there were the question of ratification up now of the original compact, that it's very likely they would not approve it without Idaho being made a member, because of the danger of the extinction of these fish, of the anadromous fish themselves.

QUESTION: Now the -- Solicitor General has

represented that the State of Oregon has agreed to your joining the compact, and that the State of Washington was on its way to agreeing to it, one of its houses having enacted the necessary legislation, or passed the necessary resolutions, and then the term of the legislature ended. But that there's every possibility that the State of Washington will do so early next year. Is that -- do you agree with that? As a matter of fact?

MR. KIDWELL: Justice Stewart, if, in fact, the problem would become moot sometime in the future, Idaho would be first in line to ask to dismiss this case. But we've been looking at it for forty years. The State of Oregon, finally, through their legislature, did pass a version of a compact after we had filed this motion for leave to file our complaint. And even with this pending, the State of Washington was not able to pass both houses -- the compact itself.

So if both states would admit Idaho as a voting member of the compact, and if there were some way that the Compact would give Idaho a say so in the anadromous runs, or in the fish that are produced in our state, then the problem could become moot.

But the argument now has been going on in this view, your honor, for about forty years, and nothing has happened

QUESTION: Well, something has happened recently.

Oregon has acted, and one house of the Washington legislature has acted. And it's represented that there's every prospect that both houses of the Washington legislature will act soon after it convenes in January -- next January.

MR. KIDWELL: Your honor, there's an additional problem however. The compact, as passed by the State of Oregon, is not in the same form as proposed by the State of Washington, and would purport to regulate all fishing even on the headwaters in streams in the State of Idaho. My point being, is, that even now there is no agreement between the two states as to what form a new compact should state -- should take.

QUESTION: Incidentally, what has prompted this activity finally in Oregon and Washington? The filing of this complaint?

MR. KIDWELL: Your honor, I think it would be unfair to completely characterize it as that. But from my standpoint there was no compact passed by the legislature until after we had filed this motion, and after about forty years of discussion. It's almost ten years since the governors of the three states themselves agreed that Idaho should be made a member of this before anything has happened.

QUESTION: Attorney General Kidwell, as I understand it, you want two things. You want Idaho to be written in as a member of the compact, and to rewrite the compact.

And I assume, to compel Congress to approve it. You want to do that too?

MR. KIDWELL: Justice Marshall, obviously I recognize that we cannot compel Congress to approve it.

QUESTION: Well, is there any difference in compelling Congress and compelling the states? That's my problem. You say, this Court can compel a state, a sovereign state, to make a compact with you.

MR. KIDWELL: Your honor, that's -- Justice Marshall, that's why I pointed out that I believed that this Court could achieve that by invalidating that portion of the Columbia River compact that would deny Idaho its say so and --

QUESTION: Well, do we have to do that, or could we just have some type of action which would say that these two states cannot interfere with Idaho's fish.

MR. KIDWELL: Your honor, that, in effect, would do it. That's the second part, the --

QUESTION: But that's not what you asked for.

MR. KIDWELL: Your honor, we're asking for two things. One, to be made a member of the compact. Recognizing the difficulties there, the second part is what I have entitled equitable apportionment, or in other words, giving us a right to our fair share of the fish commensurate with the amount of fish produced in the State of Idaho.

QUESTION: May I ask one more question about the first part of the case, the compact part? Is there any assurance that if Oregon and Washington both pass legislation inviting you in, that you'll necessarily go in? Maybe the terms are not acceptable to you. I take it there's a variety of forms the compact would take.

MR. KIDWELL: Yes, your honor, and that certainly is a problem. We recognize it. That's why the second part of our prayer for relief is essential -- or the basic fairness or equitable apportionment as we called it -- if Idaho would be guaranteed a right to its share of the anadromous fish, that they would not interfere with the share of the fish, this, in effect, would -- we'd feel -- forcethe three states to sit down and agree.

QUESTION: Well, just to dispose of the first part of your case in my own mind if I may, first. Am I correct in concluding, you're not merely asking to be let in, but you're asking to be let in on the terms that you would specify?

MR. KIDWELL: Your honor, I think that would be putting it a little harsher than we would like to have it recognized. We're asking to have asay so in the anadromous fish runs, over 50% of which originate in the State of Idaho.

QUESTION: No, but you have to decide what kind of



say so, wouldn't you, in order to formulate a meaningful decree on the contract issue?

MR. KIDWELL: Your honor, we feel that if there was an order entered that Idaho was entitled to its share of the fish, that this would then force the states to agree.

QUESTION: Well, you're in effect saying all you need is a second branch of your argument.

MR. KIDWELL: Your honor, I'm saying if the second part of our argument were granted, if that relief were granted, it would take care of the first.

QUESTION: And the first part can't really do anything all by itself anyway without this Court, in effect, writing the compact for the three states.

MR. KIDWELL: Your honor, we feel that if even we had a voice or a say so in the compact, the first part, which would not give us our total relief, even having a say so as one third of the compact would be more than we've had for the last forty years. The second part is the essential part to what we're asking this Court.

QUESTION: Mr. Attorney General, I would suggest you get to the second part. And let's hope we don't question you further on the first.

MR. KIDWELL: Thank you, your honor.

QUESTION: Mr. Kidwell, may I ask you a question before you move on.

If, for example, we agreed with your basic proposition that Idaho is entitled to an equitable share, how would you determine that share, and if you determined it in some mathematical way, how would you get the fish to Idaho?

MR. KIDWELL: Your honor, it is --

QUESTION: In the face of the eight dams.

MR. KIDWELL: Your honor, it is capable of determining the amount of fish that are going into the headwaters with almost mathematical precision. Our fish and game department is prepared to show, as I say, with mathematical precision, the amount of fish that should be allowed to escape -- the figures they use -- into the state of Idaho. Over each of these dams, there's a counting process. One of these dams on the Columbia River -- the last dam before the fish go into Idaho is Ice Harbor Dam. And the count going over there, at this point, is so low that it can be determined with precision how much, or what efforts should be made down below to allow more escapement.

There are a couple of other factors that I want --

QUESTION: By the limitation of both sport fishing and commercial fishing?

MR. KIDWELL: Yes, your honor.

QUESTION: Primarily. The other problems you mentioned at the beginning of your argument cannot really be overcome. I mean the existence of the dams --

MR. KIDWELL: We do feel some efforts could be made ---

QUESTION: And the existence of some pollution, and so on, and nitrogen in the water.

MR. KIDWELL: Yes, your honor. We do feel that if Idaho had a say so in the compact, that additional efforts could be made in putting what they call certain types of lips on the dams to stop the supersaturation, the turbine damage, and some of these things.

QUESTION: Additional ladders, maybe, or --

MR. KIDWELL: Additional ladders. Improved ladders that will take care of the other varieties of --

QUESTION: What are we, are we talking about various varieties of salmon and also steelhead?

MR. KIDWELL: Salmon and steelhead, your honor, yes. Primarily the Spring Chinook salmon and the Steelhead.

As I pointed out, this is truly a unique phenomenon in nature, these fish returning to where they spawn. A couple of other points --

QUESTION: Do those fish generally die upstream after they spawn? Unlike the Atlantic salmon that go back out?

MR. KIDWELL: Your honor, the Chinook salmon automatically does die. It comes to the end of its life cycle after they spawn. The Steelhead theoretically can go back to the ocean. Figures and statistics of how many make it back are rather slight. But they do not automatically

die. They attempt to.

A couple of other points that I was going to bring out. Idaho, along with the other states, has attempted to minimize the impact of the loss of our anadromous fish by artificial spawning, planting of these fish.

I would point out, one problem that we have continually run into is that Idaho being a very small state we spend well over a million dollars a year in these efforts. But all of the fish that we transplant or artificially spawn in the State of Idaho, then to go to the ocean and come back, of course a portion of them are taken by the States of Oregon and Washington.

Oregon and Washington also spend considerable sums of money, but we do not have the same benefit from the money they spend, because the fish return to where they're put into the water, and do not pass through the state of Idaho.

QUESTION: Is there any fishing -- legal fishing -- when they're on their way out to the ocean?

MR. KIDWELL: No, your honor, there's no significant problem when they're on their way back other than the dams and the other --

QUESTION: Well, which way -- what are you talking about, back? Which is back?

MR. KIDWELL: When they're going back to the ocean.

QUESTION: Well, how about -- they've never been

to the ocean. But they've been born in fresh water, the little ones. And they're smolts.

MR. KIDWELL: Okay. Either one, either the steelhead going back, or the smolts going down. No, your honor, there's no problem--

QUESTION: Of fishing or poaching on the way down.

MR. KIDWELL: -- of fishing. There's a tremendous problem with turbine damage and the ladders and this type of thing. No problem with the fishing. It's only when they're on their way --

QUESTION: Going upstream?

MR. KIDWELL: --- up to spawn.

The equitable apportionment argument, I feel, although I can't cite this Court any actual case right in point, I feel that the water cases are analogous, the pollution cases; certainly this Court has demonstrated many times that under the right factual situation it can stop pollution above a state. If we can stop a state from putting something into the water before the water gets there, certainly it would seem obvious that the Court would have the same jurisdiction to stop them from taking something out of the water that was unique and a part of the natural ecological cycle.

I think it's also important to mention the reason we need this Court to invoke its original and exclusive juris-



diction. This is the only form that we have. As the Court is well aware under Title 28 of the United States Code, Section 1251(a)(1), on this type of dispute, between the two states -- and I would emphasize there is no reason for the United States to be a party to this. There is no problem with the Indian rights. We recognize that they have certain treaty-guaranteed rights. It's been adjudicated rather fully. This would not diminish or interfere with the treaty rights, or the rights that the Indians have been granted under existing case law.

We have no other place to go. We have attempted diplomacy, as this Court has pointed out in controversies of this kind. As the Court has said many times, there are three ways to settle disputes of this nature: diplomacy, war or by coming to this Court. Obviously, we feel very friendly toward Oregon and Washington. We don't advocate going to war with them. So we are asking this court to invoke its original jurisdiction. Let us put on clear and convincing evidence as to what's happening to the adadromous fish runs inthe Northwest.

If I might briefly refer to the briefs filed by the States of Washington and the State of Oregon.

QUESTION: Excuse me, Mr. Attorney. I think you said the United States had no interest? I notice thatthe Solicitor General, in the memorandum that he's submitted

as amicus, states that the United States is an indispensable party to this litigation.

MR. KIDWELL: Justice Brennan, what I was saying is, that we respectfully disagree with the position of the Solicitor General. And that there is no reason -- or no legal reason -- why the United States would have any interest or want to be involved in this lawsuit between these two states.

QUESTION: You said it would interfere with your rights, your claims, if they were a party in some way?

MR. KIDWELL: Your honor, I don't believe that it would. We recognize the treaty rights, and that there are some federal rights. We also recognize that this interstate stream could be federalized. But since that has not happened it is a dispute only between the two states, primarily --

QUESTION: Well, the stated position, however, is that it would be improper for the 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, suggesting indeed that there may be conflicts of interest between upstream and downstream Indian tribes.

MR. KIDWELL: Yes, your honor. And I'm aware that they --

QUESTION: But you disagree with it?

MR. KIDWELL: We disagree with that. The Solicitor

General brief --

QUESTION: You don't think the Solicitor General of the United States has any interest in dams on navigable rivers?

MR. KIDWELL: Your honor, I think they have a tremendous interest.

QUESTION: Well, doesn't -- won't this require changing dams on navigable rivers?

MR. KIDWELL: Not necessarily, your honor. Under --

QUESTION: I thought you said you had to do something with the flow of the dam and the ladder.

MR. KIDWELL: Your honor, I said that if Idaho --

QUESTION: Didn't you?

MR. KIDWELL: Yes, your honor. I said that if Idaho were admitted as a member of the compact, we feel that we could have some say so, I suppose as a lobbying group if nothing else, to the Congress urging them to make additional fish ladders and --

QUESTION: Well suppose that interferes against the interests of the United States in a navigable river?

MR. KIDWELL: Your honor, if that--

QUESTION: The United States has an interest.

MR. KIDWELL: Yes, your honor. If that did happen. But under the relief we have asked, we respectfully urge that there is no reason for the United States to have an interest

in the compact.

QUESTION: Well, I don't know, but can you change a dam without the permission of the United States? I don't believe you can change a dam on a navigable river without their permission from the Corps of Engineers.

MR. KIDWELL: Your honor, other than through the Congress. The Congress, I believe, could make additional appropriations for monies for fish ladders or the various remedies that are available through them.

QUESTION: And would Congress call on the United States to give them their views? Of course they would.

MR. KIDWELL: Yes, your honor.

QUESTION: Well, why can't we?

MR. KIDWELL: Your honor, certainly you can. I'm just saying that we don't feel that they are an essential party to the action.

QUESTION: Why do you resist the making the United States a party? The Indian tribes have independent rights, fishing rights, in these rivers. That is, under the cases of this Court, the states are wholly -- they couldn't possibly totally deny. They might be able to regulate, but they couldn't deny them.

MR. KIDWELL: I well recognize that, your honor.

QUESTION: Well, why do you resist the United States becoming -- of being a party?

QUESTION: Well, are you free to join the United States? You aren't, are you?

MR. KIDWELL: No, sir. They have asked to come into the case. And we don't strenuously say they should not be here. We just didn't feel that they're necessary to resolve this dispute.

QUESTION: Why can't you move to join them as a party defendant?

MR. KIDWELL: Your honor, we could. We just didn't feel that there was any interest paramount of the United States that would call for that.

QUESTION: I put a question to you first, General Kidwell. Was there any barrier to your bringing a traditional, original jurisdiction case, making a claim that you would with reference to pollution of the stream or whatever, which is really what you have embraced within paragraph number 2 of your prayer for relief, I would take it? Is that not so?

MR. KIDWELL: Yes, your honor, although --

QUESTION: That ignores -- if you had asked for that relief alone, would the existence of the compact be a barrier to the Court's granting that relief alone?

MR. KIDWELL: Your honor, the compact would rear its head in that, and would be headlong in conflict with our asking for this remedy. Therefore it was my decision



early -- maybe erroneously -- to ask that this Court give us a say so in the compact, because of the forty year history that we have --

QUESTION: Well, if you -- I don't understand why you think that if Idaho has the right you claim, that an agreement between two other states can really eliminate it. I don't understand that.

MR. KIDWELL: I do not feel it can. And that is the equitable apportionment --

QUESTION: Well, then, why do you need any remedy against the compact? I mean, as such?

MR. KIDWELL: Your honor, we do not, per se, have to have the remedy of the compact. Since the compact has existed since the turn of the century, since the early days of statehood, we did feel that if the Court would grant that order, it would minimize the difficulty of relations with the other states. But the significant remedy is the equitable apportionment part of our complaint.

MR. CHIEF JUSTICE BURGER: Very well.

General Johnson.

ORAL ARGUMENT OF LEE JOHNSON, ESQ.,

ON BEHALF OF THE DEFENDANTS.

MR. JOHNSON: Mr. Chief Justice, and may it please the Court:

I think, very simply, the State of Oregon's

position in this case is that the complaint, or the motion to file a complaint, should be dismissed because the complaint fails to state any claim upon which legal relief can be granted.

In other words, it fails to state a justiciable controversy.

QUESTION: What if the State of Idaho had come in to pursue the question I just put to your friend, and asked for nothing except essentially what they pray for in paragraph 2? And do you think the compact bars this Court's jurisdiction to grant relief in that limited area?

MR. JOHNSON: No, I do not. But I think that is definitely not what the State of Idaho is requesting.

QUESTION: Well, isn't it true that sometimes when people ask for 5 or 7 paragraphs of relief, the Court grants one or two?

MR. JOHNSON: No, I -- well, my point is, Mr. Chief Justice, is that is not what the State of Idaho is asking. Indeed, that is the last thing the State of Idaho wants. And I think maybe I can explain this. And simply first maybe describing the regulatory scheme that exists in Oregon and Washington, and pointing out that what Idaho wants -- it doesn't want to strike down that regulatory scheme. They just don't like the way we're doing it.

That regulatory scheme is a -- provides, both

states have similar statutes, provides for a regulatory commission. The commission sets the time of fishing, sets the manner of fishing, and sets the place of fishing. The commission -- and this is strictly in the area of commercial fishing that we're talking about today, according to Idaho's complaint.

Now, the Commission -- one, there is an established area for commercial fishing. It is from the mouth of the Columbia River up to approximately 140 miles just short of Bonneville Dam, which is the first major dam on the Columbia.

The fishing days, or the season, is open on the basis of an escapement level. That is the rationale or the terminology that is used in this regulatory scheme. And the escapement level, basically, is to get enough fish over this commercial fishing area -- and understand there is a second commercial fishery above Bonneville, which is the Indian commercial fishery regulated by the treaties. There is, of course, a game fishery that goes all the way through Oregon and Washington, and on into Idaho. The escapement level is, prime most, to try to use the existing spawning bed, to fully utilize those existing spawning beds that exist throughout the Columbia and its tributaries, both in Oregon, Washington and Idaho. There is a limitation on those spawning beds, because of the industrialization that

has occurred. But it is to utilize those beds, to preserve the run. And once that escapement -- and it is estimated by taking the number of fish that come, and also they have to allow for how many fish are going to be taken by the Indians, and how many are going to be taken by game fishermen in all three states and still get the proper spawning level -- once that escapement is accomplished, then we open that fishing up for commercial fishing. The season is open. And until that escapement is accomplished, the season is closed.

And what Idaho is contending -- and this is one of things, one of their analogies, one of their arguments; they rely on the case of Pennsylvania v. West Virginia. But the whole problem Idaho has in this case is that the only effect of the State of Oregon and the State of Washington's regulation has got to be positive as far as the State of Idaho is concerned, because every day that that fishing is closed means that fish do get to Idaho. If the states had chosen not to regulate it, or if this Court should declare that statute, for example, as an undue interference with interstate commerce, Idaho would be left terribly out in the cold, as well as would our state, because what would happen would be the destruction of the fishery.

QUESTION: I'm not sure I follow that, Mr. Attorney General. I'll go back to my prior question: What if the relief asked for in this original jurisdiction complaint

were just paragraphs 1 and 2, what would be your position here now?

MR. JOHNSON: I've got to -- one, as I recall --

QUESTION: One is, that we take jurisdiction, the formal prayer. And the second is that we declare -- we determine the equitable proportion of the upriver fishing that is due to Idaho.

MR. JOHNSON: Well, all right.

QUESTION: Nothing else but that in the case.

MR. JOHNSON: If you want to go to the equitable proportionment argument, I think our answer is -- our question, we still think, is the main issue in this case, is that the State of Idaho has got to state some basis on which -- for which they're going to get equitable relief. There's got to be some legal basis for it.

QUESTION: Well, they stated -- at least they represent that they spawn the fish originally.

MR. JOHNSON: I don't think that gives them any -- I don't see how that gives them any right whatsoever. What difference would that be? Because this is what Idaho is asking. As if somebody in Idaho raises a bird, and he releases that bird out into the sky. Now, presumably this bird is a bird that does migrate all over the world. Does that mean that this Court is then to order each state in the United States to adopt regulations to protect that



particular bird, because Idaho wants to protect that bird?

QUESTION: You're now going to the remedy. Perhaps it would be correct that the Court would find what you suggest. But would the Court have jurisdiction if that was the only relief sought?

MR. JOHNSON: Well, I don't see how the Court can take jurisdiction unless there is some legal interest that Idaho alleges that's being violated.

QUESTION: Well, that's one of the questions in the case.

MR. JOHNSON: All right. The only cases that Idaho cites to support this proposition -- Idaho concedes there is no authority for this whatsoever. The only cases they cite for it are those cases in which this Court has exercised jurisdiction adjudicating water rights between states. What is that based upon? That is based upon long-established common law riparian rights to water. Everyone of those cases rests on that common law premises.

QUESTION: Well, suppose --

MR. JOHNSON: There is no comparable -- pardon me.

QUESTION: Suppose that the lower states simply established a barrier in the river and let no fish through whatsoever into Idaho. They just -- that was just -- they just decided to take them all. Just announce one day that we are now taking all the fish, not letting any of them

escape into Idaho. You would have the same answer, that Idaho would have no remedy, no right, to any of those fish.

MR. JOHNSON: No, I would disagree there.

QUESTION: Well, what right would they have? What right would they have?

MR. JOHNSON: On the grounds -- on the grounds there -- there, I think, if the state's regulatory scheme -- if the state did nothing, that's another question. But if the state's regulatory scheme -- basically, that was the effect of the State's regulatory scheme, then I think Idaho has a contention -- would have a very legitimate contention -- that the state --

QUESTION: Where do you find that right?

MR. JOHNSON: Interstate commerce. Undue interference with interstate commerce. But that's the whole point.

QUESTION: Idaho asserts that the other state is interfering with interstate commerce in fish?

MR. JOHNSON: Yes. If the State of Oregon passed a law that said that no fish will pass through the State of Oregon into Idaho, I think that law would be -- at least it certainly is very arguable that that is an undue interference with interstate commerce.

QUESTION: Well, in any event, whatever the source of the right, you would concede Idaho would have a right?

MR. JOHNSON: Yes, premised on the constitution.

But Idaho in this case, on the face of its complaint, cannot make that contention about the Oregon-Washington regulatory scheme. Because the only possible effect of that scheme is to guarantee that fish do get to Idaho.

QUESTION: It's not enough, they say.

MR. JOHNSON: Not enough. I mean, what Idaho is asking this Court -- this is the whole point. Idaho is asking this Court --it's not asking this Court for a judicial decree that our statutory and regulatory scheme is unconstitutional. It is asking that you not give judicial review to that, but that you would administer it. It's asking you to become the fish master --

QUESTION: You concede that Idaho is entitled to an equitable proportion of the fish. And you just say you're giving them an equitable portion. That seems to be what you're saying here.

MR. JOHNSON: No. I think we go back and forth. I think -- there are two arguments by analogy that Idaho uses. One is resting on a constitutional argument, a contention of interstate commerce. And my point is there, there is no undue interference with interstate commerce on the face of it. The only effect the regulatory scheme can have is a positive effect on interstate commerce. It guarantees that some fish, at least, get up the river.

And let me say, we do not agree --

QUESTION: Well, where do you draw the line? You've conceded that if you bumped them all off, that this could not be done. But if you let one out of ten million go up, this is all right?

MR. JOHNSON: No, I'm not saying that, your honor.

QUESTION: The thing is, as I understand it, Mr. Attorney General, that if there were no compact between Washington and Oregon, and if indeed the states, either in cooperation with each other, or individually, did nothing, then no fish would get to Idaho.

MR. JOHNSON: Right, right. What he is saying here -- this is the most extraordinary remedy -- what he is saying, he wants the states -- he does not like the way we regulate. He doesn't disagree with the theory of our regulation --

QUESTION: Because if you had none, no fish would get up to the state river.

MR. JOHNSON: And I should also point out one thing, because this is how they turn the -- when you get to the question of irreparable injury -- and I know Mr. Gorton is going to point out this -- the regulations, the existing regulations today, for one thing, they talk about steelhead. The states said, well, Oregon and Washington have prohibited commercial fishing of steelhead for years. Two, they talk about the salmon: the states of Oregon and Washington

for the last two years have prohibited any fishing on the upriver stock of salmon. These are the salmon that go to the Idaho streams. We have not prohibited on the fish that goes into a lot of the Oregon streams. And the reason is, is strictly a conservation point. The runs going to Idaho are in dangerous shape from a conservation viewpoint. And as a consequence, the states have had to regulate them.

So any idea of irreparable injury here is ridiculous, because the fact is, that for the last two years the States of Oregon and Washington have not prohibited -- or have not permitted any commercial fishing over those fish.

QUESTION: If it were physically feasible -- and I have no idea whether it is -- could Oregon put -- could Idaho put nets up at its border and keep all these fish in Idaho, and never let them get out? Without --

MR. JOHNSON: I think they can.

QUESTION: And they would die.

MR. JOHNSON: Or, the only question there, is, whether they are, in effect, by their state action, unduly interfering with interstate commerce. And that would be the only contention we could lean on.

QUESTION: You said it would be an interference if that happened on the upstream side. Why wouldn't it be on the downstream side?

MR. JOHNSON: Well, I would have to say this, is,



I would need a very, very strong argument that that's an undue interference with interstate commerce. And I think you've got to get this distinction, though, that the regulatory schemes as they exist in these two states --

QUESTION: General Johnson, let me test your distinction. You say -- the main point as I understand your argument in response to Justice Stewart's question is, that to the extent that your state regulates, Idaho benefits.

MR. JOHNSON: Right.

QUESTION: And Idaho is basically asking you to impose additional regulation, and they have no standing to do that. Isn't that the basic argument?

MR. JOHNSON: Yes. Let me say -- I mean, I'm saying that as a matter of law. I do not think that that is stating a justiciable controversy.

QUESTION: Well, why is that different than -- supposing that Idaho had no -- water flows toward the ocean, I assume. And assume Idaho had absolutely no pollution control whatsoever, and let industry dump anything it wanted to in the river. And could you then have standing to bring an action against Idaho to compel Idaho to impose some regulation on what was dumped into the river?

MR. JOHNSON: On water rights, I think there is a law -- common law --

QUESTION: Well, then, what's the difference?

MR. JOHNSON: I do not think we can on fish. Because the common law pretty well establishes, those fish, the state does not have any proprietary right to those fish.

QUESTION: But you conceded they'd have a right on fish if it were interference rather than a lack of adequate regulation?

MR. JOHNSON: Well, first, I was answering you on the common law. And secondly, I think there is a question under interstate commerce. But let me say: if Idaho was interfering, doing --

QUESTION: Failure to do anything, was my question. If they failed to do anything.

MR. JOHNSON: Oh, right. I feel that our remedy -- we do not have a right to go and join the state of Idaho to regulate its fishery.

QUESTION: No, I'm talking -- you would agree that you could if it were water, though.

MR. JOHNSON: On water, I think there is a possible contention. We can certainly to the point that it's destroying our riparian rights.

QUESTION: But you'd have a remedy, even though what you sought was an order compelling them to impose additional regulation they didn't now impose. And I don't -- then, it seems to me, if you admit that --

MR. JOHNSON: Well, I think it gets -- and this

Court, in those water right cases, it has accepted jurisdiction in a number of them. And most of them, as I recall from reading them, the Court has backed off because of this very problem.

The appropriate place for the State of Oregon to go to solve that problem, and my point here, the appropriate place for Idaho, is, one, to try to work out a compact. And Idaho -- I think this should be made clear to the Court -- what Idaho -- they say, well, there's differences of opinion over the compact. Yes, we want to regulate the streams in Idaho. Idaho doesn't want to come into the compact on those terms. WE said, you know, if we're going to regulate the Oregon and Washington, how about let's also regulating the tributaries of the Columbia that are in Idaho. That's where the two -- the argument -- that's why we haven't been able to get finally together. I'm confident the two states, the three states, are going to.

But, secondly, where their real remedy is, is in Congress.

MR. CHIEF JUSTICE BURGER: You're now into your colleague's time, General.

MR. JOHNSON: Thank you. It's our feeling that the case should be dismissed.

MR. CHIEF JUSTICE BURGER: General Gorton.

## ORAL ARGUMENT OF SLADE GORTON, ESQ.,

## ON BEHALF OF THE DEFENDANTS

MR. GORTON: Mr. Chief Justice, and may it please the Court:

Mr. Chief Justice, you asked the question as to whether or not absent of attempt to get into the compact, this Court would have jurisdiction. My answer to that question is, that it clearly would.

The question is, whether or not you should exercise that jurisdiction, given the burden and standards of proof, for you to take an original jurisdiction case; or whether or not there are not other forms of governmental entities which are better able to handle the questions.

Mr. Chief Justice Marshall was entirely correct -- excuse me, Mr. Justice Marshall -- was entirely correct in saying that the United States is clearly an indispensable party in this case, not only from the point of view of its protection of the Indians, but -- and not only from the point of view of the requirement that Congress ratify any compact -- but because there are eight dams on the Columbia River between its mouth along the Columbia and the Snake, before one reaches the State of Idaho, everyone of which --

QUESTION: Was the United States a party in Arizona against California?

MR. GORTON: It was, the first Arizona v. California

case was dismissed because the United States was not joined as a defendant.

QUESTION: How about the second ruling?

MR. GORTON: In the second one it was a party.

QUESTION: What are you asking, that he start all over again and name the United States?

MR. GORTON: From the point of view of his asking to be in the compact, it seems to me he clearly has to be. I think from the point of view of his request for other relief, he must do so as well. Because those eight dams --

QUESTION: Then we'd be up here in a few more months. All over again.

MR. GORTON: WE might well be. And we'll argue -- what I'm going to argue --

QUESTION: What you've gained by this point when the Solicitor General certainly could move to intervene if he wanted to.

MR. GORTON: By the time that happened, Idaho would probably have been offered membership in the compact. But my point to the Chief Justice is, that I do not believe that you should exercise your jurisdiction, which is discretionary in any event in a case of this sort. If you do, let me assure you that you will be involved in it forever. The United States District Courts in Oregon and Washington have been effectively managing the fish from the point of view of



Indian fisheries for the past decade. And there is no possible end in sight.

To represent to you that a simple mathematical division will reach the goal of the State of Idaho is completely erroneous. Those 8 dams, which are controlled completely by the United States, over the most -- the two most recent, the two upstream dams -- we are presently engaged in litigation against the United States demanding that they be redesigned better to facilitate the passage of fish. The State of Idaho has

QUESTION: What about the High Mountain Sheep Dam?

Isn't that on the same river?

MR. GORTON: No, that's --

QUESTION: Is that on the same river? The High Mountain Sheep Dam?

MR. GORTON: That's on the Snake, in --

QUESTION: That's what I thought.

MR. GORTON: -- in Idaho.

QUESTION: Are you suggesting, General Gorton, that this case be put on the back burner, and let these diplomatic processes that your friend from Idaho talked about proceed?

MR. GORTON: Exactly, Mr. Chief Justice, exactly as you did in New York v. New Jersey and Vermont v. New York. There is no instant urgency in this case. Public -- not only the regulations which are matters of public record of which

you can take judicial notice, the publications in the production of which the State of Idaho has joined in the last couple of months will show you the following facts: there's been no commercial fishery for upriver Spring Chinook salmon since 1974, and exactly one day in that year; there has been no commercial fishery for upriver summer Chinook salmon since 1964; there has been no commercial fishery for steelhead by Washingtonians since the 1940's -- for 40 years; there has been no commercial fishery for steelhead by Oregonians since the people of Oregon passed an initiative on that subject in 1974.

QUESTION: And this has been because Washington and Oregon have prohibited commercial fishing?

MR. GORTON: Have prohibited commercial fishing for those fish which go to Idaho. We are taking none of them, Mr. Justice Brennan. Zero.

QUESTION: How about the Indians? How about Indian fishing?

MR. GORTON: The Indian fisheries have gone on longer than that, but the Indian fisheries -- which, of course, are not controlled by our states or by the compact -- were stopped on a commercial basis in the terrible year of 1975 on many of these. Even the Indians cooperated in this respect and banned their commercial fisheries.

QUESTION: All of one year ago?

MR. GORTON: Pardon?

QUESTION: All of one year ago?

MR. GORTON: Well, that's because 1975 was a terrible year, your honor. If you'll look at these figures -- and I'll get to why it was a terrible year in just a moment.

QUESTION: But General Gorton, when you ask us to look at these figures, aren't you asking us to look at the evidence that would be before the try of the fact? How can do this on deciding whether to file a complaint or not?

MR. GORTON: You're entitled, it seems to me, to take a judicial notice of matters which are -- which are published, and particularly --

QUESTION: But aren't these the precise factual issues that would be involved in a trial if a complaint were to be filed?

MR. GORTON: They are some of the facts which would be so involved.

QUESTION: And you're in essence saying they can't prove what they've alleged.

MR. GORTON: That's exactly right, your honor. And it seems to me that you should consider whether or not this is a case in which you can fashion appropriate judicial relief. If you're dealing, as you were in Vermont v. New York, with only one tiny aspect of the problem, which also involves irrigation, use of water which hurts fish, which also

involves Indian rights, which also involves dams constructed by the Congress of the United States, there simply isn't any way in which you can provide for the relief that they ask for. And there are alternative sources for their reaching those rights. And those are exactly the grounds on which you have declined to exercise your original jurisdiction in cases like Vermont v. New York and New Jersey v. Pennsylvania.

QUESTION: Is the United States subject to suit in this action against its consent?

MR. GORTON: I believe it is not, your honor. I think it has to simply agree whether or not to intervene.

QUESTION: And although I take it -- I take it, appropriate officials of the United States might be subject to suit in this very action.

MR. GORTON: I believe so. And I believe that a District Court action, for example, that it's very likely, at least, that the fish commissions of the respective states could be sued if we were to start at a District Court level.

There hasn't --

QUESTION: Who administers those dams?

MR. GORTON: Pardon?

QUESTION: Who administers those dams?

MR. GORTON: The United States, the Corps of Engineers.

QUESTION: Corps of Engineers.

MR. GORTON: We have no control of them. We --

825 QUESTION: I know, but in terms of a suit against the United States, I take it to the extent those dams are significant in this litigation, the Corps of Engineers or the Generals could be made parties.

MR. GORTON: Exactly, it could be. We are in lawsuits against the Corps of Engineers right now on two of the dams on the Snake demanding greater fish escapement. Idaho hasn't bothered to join that litigation. They come here to sue the wrong parties for the wrong reasons for something we're not doing. We haven't even permitted recreational fisheries in the Columbia River on steelhead since 1974. On recreational -- on upriver Chinook since 1973 -- upriver summer Chinook since '73.

QUESTION: What about your territorial waters? On the ocean side?

MR. GORTON: Those are not under the compact. There is, of course, a very --

QUESTION: Well, I don't know whether they're under the compact or not -- what about your commercial fishing at the mouth of the rivers?

MR. GORTON: There is a very considerable commercial fishery not at the mouth of the rivers, but on the open ocean which involves Alaska, British Columbia, Washington, Oregon and California fishermen.



QUESTION: Any foreign nations?

MR. GORTON: Pardon?

QUESTION: Any foreign nations?

MR. GORTON: Well, until the two -- under the new 200 mile limit law, to which my -- General Kidwell referred, there is now a commission to work on that 200 mile limit area of which Idaho is a member. It is the only member on any one of those commissions in the entire United States which is not an ocean front state. But the reason for the loss of these fish is not commercial fishing. It's not recreational fishing. It's dams. Every one of those dams destroys 15% of the fish which try to get over it. So 100 fish below Bonneville become 27 fish at the border of Idaho.

QUESTION: You don't think more fish would come upstream if there was no commercial fishing on the ocean side at all?

MR. GORTON: If there were no commercial fishing on the ocean side at all, which isn't under the -- which is not totally under the jurisdiction of these states --

QUESTION: I understand.

MR. GORTON: More fish would get up there. Now you'll get to the point, Mr. Justice White --

QUESTION: But there is some commercial fishing in the ocean that is subject to your jurisdiction?

MR. GORTON: There is. But that has not been a

subject of this complaint. This complaint is talking about river fishing under the compact. That's the way he brought the complaint. That ocean fishery is not under the compact.

Now, there is, of course, also escapement beyond which you gain nothing. There is a maximum form of escapement. For example, in one of these groups of fish, it's 40,000 above the last dam in Washington.

But Idaho has shown no great interest in this area. The Hell's Canyon dam, which is a privately owned dam by the Idaho Power Company, cuts off fish entirely. In half of the entire original spawning area of the Snake River. And that's cut off -- the lower states of course, as well as what goes on in Idaho above that point. Idaho has shown no interest in joining with us in litigation over the dams, which have caused their own losses. They simply demand to be put into a compact -- which your own questions have indicated is entirely without precedent -- or to get you into a fish management program which is simply impossible for you to administer, when there is not only the compact itself, but a Pacific Northwest Regional Commission, which incidentally has said that the compact is the third best method of administering these fish; a new commission for ocean fisheries under the 200 mile limit; the negotiations which are going on at the present time. This case -- you do have jurisdiction. There is no question in my mind but that leaving aside the

compact portion of this case, you have jurisdiction to take this case. It's by one state against another. It falls within that constitutional prohibition. But if you take it, you're going to be in that morass for years to come. You are probably not -- you're not going to have everyone subject to your jurisdiction --

QUESTION: General Gorton, is that really a basis on which we can decline an original jurisdiction case, that it's going to get us into a morass?

MR. GORTON: It's a way -- it's one on which you have historically declined such. You've said in New York v. New Jersey that you were convinced after looking at it that a problem which was the problem of both of those states would be solved, in fact, by the work of those two states. In Vermont v. New York, you --

QUESTION: We've had some of these original cases here for a long time, General Gorton.

MR. GORTON: Pardon?

QUESTION: I say, we've had some of these original cases here for a long time.

MR. GORTON: I understand that. And --

QUESTION: Let me ask this: have you had some unpleasantness on the river recently, some shootings and --

MR. GORTON: That was on Puget Sound. That's not a part of the --

QUESTION: Puget Sound, not on the river.

MR. GORTON: No. That has to do with the Indian fishery, but it has to do with the Indian fishery on Puget Sound, which is totally unrelated to this case. No Puget Sound salmon ever go to Idaho.

To return to -- simply to return to the final point that I was making: in Vermont v. New York, this Court refused to enter a consent decree to which both states agreed, because it would involve the Court in the continuing supervision over a matter relating to waters not totally dissimilar to this.

Unlike your cases involving the rivers in the western part of the country, where you had an order that could be specifically entered as to how much water had to pass the border between Colorado and Kansas, for example, after which state regulation was perfectly appropriate.

In this case, the disputes as to the proper number of fish to be let go simply for replenishment purposes, as to a proper division between sportsmen in Idaho and commercial fishermen in Oregon and Washington, are literally unending. Every single season is different from every single one of its predecessors. In fact, the reason for this lawsuit is that we are in a period of very low runs which coincide with the runs which could not get over the newest of these dams. Several of these dams have been completed just in the last three or four years. And they have simply

decimated the Idaho fish runs going down, at the point where they're not fished by anyone at all.

And so, consequently, in these years they are not able to come back up. And this has created a problem for the State of Idaho which it did not envisage when it refused to fight against the dams, or fight for better escapement over those dams. And we end up being victimized.

QUESTION: They decimated the smolts going out to sea?

MR. GORTON: Ninety five percent of the 1973 smolts going downstream were killed by the dams.

QUESTION: And this is what, in your view, in your submission, basically accounted for the gross deterioration of the fishery in 1975?

MR. GORTON: Exactly. And why we were unable -- and why had simply to ban any commercial or recreational fishing at all on fish going to Idaho. Because we agree with them that too few fish are going back there for any one to have a season, and for the fish to reproduce themselves. But we haven't created for them an emergency which requires you to deal with it right now. The emergency was created by the dam. We are at least as interested in it as Idaho is. We spend much more money on it than Idaho does.

QUESTION: You said there was litigation over the operation of the dams that Oregon and Washington presently



has pending against the Corps of Engineers?

MR. GORTON: Washington does. Those two dams are on the Snake, in Washington.

QUESTION: What -- oh, of course, you don't have, I gather, any suit pending on the Hell's Canyon dam?

MR. GORTON: No, we do not, your honor.

QUESTION: That's private.

MR. GORTON: That was privately built. It was authorized by the Federal Power Commission. It provided for no escapement --

QUESTION: I suppose if you were a party to this case, you could file a cross-claim again, join that private outfit.

MR. GORTON: We might well. Of course, while those fish came down and benefitted our citizens when that dam was built, or actually, its predecessor really first cut --

QUESTION: But that dam hurt you as much as anyone?

MR. GORTON: Yes. It hurts us as much as anyone.

QUESTION: As far as fish are concerned?

MR. GORTON: Exactly. The fishery has been destroyed by a large combination of events, the most significant of which is dams. Irrigation water, the possibility of diversions to California, Indian fishery, and commercial and sports fisheries. You are asked to take

jurisdiction over one tiny aspect of that problem, which you simply can't solve by taking that portion of it.

QUESTION: Well, this might be a forum, and perhaps maybe the only forum where all the interested parties could be.

MR. GORTON: They may well be. But they can probably solve the problems better themselves now that we have a Congress which is much more interested in giving money for fish escapement than it ever was in the 1930's, 1940's and 1950's when these --

QUESTION: I understand from the Solicitor General's memorandum that you contemplate that your legislature is going to adopt the necessary enabling legislation to bring Idaho into the compact?

MR. GORTON: Now, Mr. Justice Brennan, obviously I can't stand here and promise you that my legislature will act favorably in January. Moreover, I perfectly agree with him that the fact of this lawsuit has certainly helped in something we've wanted for a long time.

I believe, however, that by March we will have made such an offer. The point is, they aren't satisfied with memberships. They want a veto right.

MR. CHIEF JUSTICE BURGER: Thank you, General Gorton.

QUESTION: Maybe counsel will keep the Court notified of any legislative advance.

MR. GORTON: We certainly will, your honor.

MR. CHIEF JUSTICE BURGER: Mr. Kidwell.

REBUTTAL ARGUMENT OF WAYNE L. KIDWELL, ESQ.,  
ON BEHALF OF THE PLAINTIFF.

MR. KIDWELL: Mr. Chief Justice, in the very brief time I have left:

The Court asked -- Justice White asked -- earlier about our priorities. And if you can look at the complaint, or when you do, in the complaint I would point out that after our recital that the Court accept and assume jurisdiction, the second point is the equitable apportionment part. That stands supreme, paramount. The fair share concept.

QUESTION: Is it true that no salmon or steelhead can pass either way on the Hell's Canyon dam?

MR. KIDWELL: Yes, your honor, unfortunately it is true. And I dislike that as much as the -- I'm sure the other --

QUESTION: And where is the Hell's Canyon dam? You say, in Hell's Canyon. But where is it in relation to where the Snake and the Salmon river join?

MR. KIDWELL: Your honor, it's on another tributary. It's not in what we're arguing about. And I agree, it's a travesty, I think. My own opinion is that the states made a mistake when that dam was built. But yes, that --

QUESTION: The state made a mistake. How about the --

the Federal Power Commission, was it in there?

MR. KIDWELL: Well, at least I feel they did not take all of the factors into consideration. Yes, your honor, I would feel that ---

QUESTION: Is it on a tributary -- is it on a tributary of the Snake River?

MR. KIDWELL: It's on the Snake River itself, your honor.

QUESTION: Where?

MR. KIDWELL: Well, it's on the border between Oregon and --

QUESTION: And Washington?

MR. KIDWELL: --- and Washington --- and Idaho.

QUESTION: So that no fish can come upstream from there?

MR. KIDWELL: Up this branch.

QUESTION: Up this branch.

MR. KIDWELL: Up this branch of the river, that's right, your honor.

Your honor, very briefly, does this -- the instant urgency that counsel refers to is here. The reason commercial fishing has been held back, the reason that there is no commercial fishing going on at the present time, is because of the 30 year history of the Columbia River Compact. We recognize that the dams are a contributing factor. But so

are commercial fishings, the size of the nets, the gill netting that's being allowed on the river.

Your honor, evidently I used up my time before. So I will --

952 QUESTION: Well, let's just assume that you have a minute or two of --

MR. KIDWELL: Oh, I see. All right, your honor.

A couple of points then, very briefly. The State of Oregon in its brief cites several cases as to why this Court should not consider the complexity and should not take jurisdiction.

I would point out respectfully that these cases, the whole list of citation, in the brief of Oregon. refer to cases where the Court would have original and exclusive jurisdiction. We're bringing this action under the (a) (1) provision of 1251, where the Court has exclusive jurisdiction.

This is our only forum, this is our only way that we can get some relief. I realize this is not going to entirely solve the problem. But it's a step that should have been made many decades ago. For forty years we have been trying the negotiation, and they have not worked.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:07 o'clock, a.m., the case in the above-entitled matter was submitted.]