In the

Supreme Court of the United States

STATE OF IDAHO, EX REL. JOHN V. EVANS, GOVERNOR; DAVID H. LEROY, ATTORNEY GENERAL; JOSEPH C. GREENLEY, DIRECTOR, DEPARTMENT OF FISH AND GAME, Plaintiffs, --vs-- STATES OF OREGON AND WASHINGTON	Number: 67, ORIGINAL

Washington, D. C.
November 26, 1979

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STATE OF IDAHO, EX REL. JOHN V. EVANS, GOVERNOR; DAVID H. LEROY, ATTORNEY GENERAL; JOSEPH C. GREENLEY, DIRECTOR, DEPARTMENT OF FISH AND GAME, Plaintiffs, v. STATES OF OREGON AND WASHINGTON	:	No. 67, Original

Washington, D. C.

Monday, November 26, 1979

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:

DAVID H. LEROY, Attorney General of Idaho, Boise, Idaho; on behalf of the Plaintiffs

JAMES A. REDDEN, Attorney General of Oregon, Salem, Oregon, on behalf of the Defendants

SLADE GORDON, Attorney General of Washington, Olympia, Washington; on behalf of the Defendants

APPEARANCES (Cont.):

LOUIS F. CLAIBORNE, Office of the Solicitor General, Department of Justice, as amicus curiae.

C O N T E N T S

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P R O C E E D I N G S

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

Mr. Leroy, Mr. Attorney General, you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID H. LEROY, ESQ.,

ON BEHALF OF THE PLAINTIFFS

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

Idaho appears for the second time before the Court in its effort to seek a fair share of Idaho-raised and Idaho-returning anadromous fish runs. This Court's opinion earlier this year in July in Washington v. United States made the Court again familiar with the general nature of these fish and the general issues regarding allocation. However, the Idaho case is very different. We are dealing here with the Columbia River system only. There is an existing District Court and Ninth Circuit-affirmed allocation order and management plan which already equitably divides up the treaty and non-treaty shares of fish between the Indians so entitled in the States of Oregon and Washington, and that equitable division is not contested. Idaho makes no claim in this case against Indian Treaty fishery. Rather, it seeks only a further equitable distribution of the already established non-treaty shares to include Idaho.

Nevertheless, we appear this morning at grave procedural disadvantage. If this Court accepts the recommendation of its distinguished Master it will dismiss Idaho's case before we reach the obvious merits which that same Master finds in the matter.

The facts are these:

The Columbia River for the last 300 miles of its course to the Pacific Ocean becomes the boundary line dividing Oregon and Washington. The Snake River flows through Idaho and then into Washington to join the Columbia, becoming its principal tributary. In Idaho there are over 3,000 miles of spawning habitat for anadromous fish, freshwater fish which after a two-year life cycle migrate to the ocean to share a similar cycle there, then return to their native waters to spawn and propagate the species.

In 1918 Washington and Oregon with the blessing of Congress created a Columbia River Compact to administer the non-treaty fishery rights and to cooperate with Indian rights under 1855 treaties. For 40 to 60 years last past Idaho has sought membership unsuccessfully in this Compact by entreaties to Oregon and to Washington.

In 1969 disputes between the Indian and non-Indian fishery on the Columbia River resulted in two pieces of litigation being consolidated and being decided in the District Court of Oregon, Sohappy v. Smith and The United States v. Oregon regarding

Oregon's regulation scheme of the Indian fish and its impact on the Indian fishery.

The United States as tribal trustee in those District Court cases was a voluntary party and is accordingly bound by the decree.

In 1974 the District Court in Oregon amended the earlier decree to establish a 50-50 allocation between treaty and non-treaty rights of the anadromous fish which was affirmed in 1976 by the Ninth Circuit. And in 1977 the parties, including the United States and including Oregon and Washington, entered into a voluntary agreement which in some slight parts amended the prior decree and established a basic framework for the counting, distribution and allocation of those fish into the two shares and establishing zones of fishery, the non-treaty zone being established in the first 140 miles of the river from the ocean upstream to Bonneville Dam and the treaty Indian fishery zone being established as Zone 6 from Bonneville Dam 130 miles further up the Columbia River.

In 1975 Idaho sought leave of this Court to file a complaint seeking two things: first, membership in the compact; and secondly, an equitable apportionment of three of those anadromous fish runs, the spring chinook salmon, the summer chinook salmon and the summer steelhead trout. We urged in that litigation that where more than half of the returning adults which reentered the Columbia River had been raised in Idaho and

would return if unimpeded to Idaho, that current management practices of the defendants both denied Idaho a fair share of those fish and gravely threatened the propagation and continued existence of the species.

We were granted by this Court after oral argument, leave to file the complaint as to the equitable apportionment issue only. This Court appointed the Honorable Jean Breitenstein Master and in due course, on July 31, 1978, he issued an initial report with three conclusions: number one, that the complaint stated a justiceable controversy;and that the pendancy of U. S. v. Oregon was no bar to this action, to which findings both Oregon and Washington accepted; and third was that the U.S. did not consent to this suit, that it had a number of interrelated interests and that this decree without the presence of the United States in the litigation could not provide an adequate remedy.

QUESTION: I missed number two; you gave us number --

MR. LEROY: Yes, Your Honor, the second finding of the Court was the pendancy of the U. S. v. Oregon and Sohappy v. Smith's judgments.

QUESTION: They were no bar to this action.

MR. LEROY: Pardon me, sir.

QUESTION: But they were no bar to this action.

MR. LEROY: They were no bar to the action; yes, Your Honor.

QUESTION: Okay.

MR. LEROY: Thus the Master, concluding that the United States was a necessary party, recommended dismissal, to which Idaho accepted on four grounds: number one, that the Federal interest in this matter could be adequately represented by amicus-type status; secondly, that the finding of indefensibility by the Master was in error; third, that a determination by this Court of the matter would not unduly burden the Court; and fourth, that the alternative of mutual accommodation was not available.

QUESTION: In the final report, I ask you: Did the Special Master indicate that the case could go forward without infringing on Indian rights?

MR. LEROY: Yes, Your Honor, he did. His findings were, applying the test of Rule 19, that as to Parts 1 and 2 of that rule regarding the necessary nature, that the very narrow nature of this lawsuit addressing only the non-Indian share would in fact cause no loss of rights to the Federal Government.

QUESTION: Wasn't it the prospect of enforcing the decree against Indians that led him to, or at least help lead him to the conclusion that the United States was an indispensable party?

MR. LEROY: Yes, Your Honor, it was.

QUESTION: Well, how do those two jibe, anyway, if you -- if there is no real need of interfering with Indian rights; what enforcement against the Indians would have to take place?

MR. LEROY: Your Honor, the Master's basic concern was

that without party status there was no guarantee that Idaho's benefits from this lawsuit could be forced upstream if they were decreed through that Zone 6 Indian fishery.

QUESTION: Mr. Leroy, the term has been used "indispensable party," and as I read the 1966 amendments to the Federal Rules of Civil Procedure that term is not used in those rules.

MR. LEROY: Yes, Your Honor, in the sense that Rule 19 as it now stands talks of persons to be joined if feasible and persons where in Subpart B that must be present to give an adequacy to the judgment.

QUESTION: It suggests a somewhat laxer standard, doesn't it, than the old indispensable party?

MR. LEROY: Your Honor, we would urge that to the Court and we would urge that this type of approach need be particularly flexible in a case of original jurisdiction where a substantial detriment to a precious natural resource may occur.

QUESTION: Except for the delay, what is your chief concern or concerns about having the United States made a party?

MR. LEROY: Your Honor, in terms of Idaho's preference we would like to see the United States involved as a party. In fact we have lobbied the United States considerably to that objective.

But our point in urging to the Court that the Master was in error in ruling that they were a necessary party to give adequacy to a judgment in this litigation, is that the very delay

which that a dismissal may occasion or in fact at worst if we are barred from all access to this Court and other appropriate remedy, not only would our equitable rights be lost but so also well may be the runs of fish upon which we sued.

QUESTION: Well, the United States refuses to join, doesn't it?

MR. LEROY: The United States at this point in time, Your Honor, by a split Executive decision has determined that they would not waive sovereign immunity.

QUESTION: Is that really the question? The Executive agencies have no business waiving sovereign immunity, have they?

MR. LEROY: Well, Your Honor, --

QUESTION: Wouldn't they do it by just intervening, bringing a lawsuit --

MR. LEROY: Your Honor --

QUESTION: -- and stating a claim? That is the way they do it, isn't it?

MR. LEROY: We are well aware of the basic proposition that it is Congress that is empowered to waive sovereign immunity but, in fact, in this case the declination to be legally involved in this case by Justice offers the same kind of bar at the expense of sovereignty.

QUESTION: I agree. Their refusal to intervene is the same -- operates the same way.

MR. LEROY: Yes, Your Honor.

The Master entered a final report in this matter --

QUESTION: Does this Court have the power to make the United States a party if the Court should conclude that Judge Breitenstein was correct, that they are a necessary party?

MR. LEROY: Your Honor, we urge to the Court that in this case the Court might consider reviving the Florida v. Georgia reinstitution of special amicus-type status. As the Court will recall, in that matter the Attorney General of the United States wished to intervene in a boundary dispute between those two States. And to avoid technical dismissal and to avoid defeating jurisdiction in that original action, upon a theory that the Court could discount unnecessary technicalities, upon a theory that procedural devices were within the program of this Court to allow the continuance and acceptance of its constitutional mandate if in a special status allow the Attorney General of the United States without becoming a full party to participate in argument, to cross-examine witnesses, to produce evidence, we urged the Court as we have in our brief that especially now, given the complexity and pervasiveness of the Federal Government, given the fact that there is a much greater frequency of interchange between the States than there was in 1855 when that decision came out, that that concept of special amicus-style status to the extent that there are interests in this matter, is a concept ripe for reinstitution.

In addition --

QUESTION: Mr. Attorney General, if you have imacus status you can't get relief, nor can relief be granted against you.

MR. LEROY: Well, Your Honor, we urge that the Master's finding that there need be involvement of the United States is wrong. Our argument is simple and brief in that regard. We say that there was general agreement between the parties and the Master as we proceeded through the matter, that Supreme Court Rule 9 made Federal Rule of Civil Procedure 19 useful in measuring indispensability in this kind of case. Partly the Master found favorably to Idaho under Rule 19 because the narrow framing of the issue, he found that there would be no prejudice to the United States, that there would be no loss of U.S. rights; and, secondly, he found that Idaho would have no other -- no adequate remedy of law.

But the Master was concerned about the adequacy of the judgment on three factors: the operation of eight dams along the Snake and Columbia River by the Corps of Engineers; on the Indian trustee status relationship to fishing rights in general; and third, on the United States Government's control and management of the specific fishery.

QUESTION: You are willing to take your chances on all of those, aren't you? I take it your narrow focus is just to have a greater escapement above Bonneville.

MR. LEROY: Your Honor, we are willing to take our

chances --

QUESTION: There may be a lot of risks involved, but --

MR. LEROY: Your Honor, we think not as to the United States for these reasons.

QUESTION: Whatever the risks are, you are willing to take them.

MR. LEROY: We are, Your Honor, and we suggest that a large portion of those risks attributable to the United States are relatively fixed and are relatively calculable and can be equitably apportioned along with the fish between Idaho, Oregon and Washington.

QUESTION: Mr. Attorney General, I take it -- and perhaps I am wrong -- are you giving up any theory of waiver on the part of the United States?

MR. LEROY: No, Your Honor, we are not at all. We have argued in our brief and have argued this morning before the Court that the presence of the Administrative Procedure Act on the books of the United States Code and the combination of beginning and developing judicial precedent applying that Act to Acts of the United States, including operations of the --

QUESTION: Well, can you explain the way the language in Section 702 of the APA that refers to agency action?

MR. LEROY: Well, Your Honor, we can and we can't. The statute goes on to mention a number of other things and in some respects agency action, we would urge, includes all manner of

action by the officers, agents, employees of the United States Government.

But our basic concern in this matter --

QUESTION: Before you get on to that, supposing before the passage of the Federal Tort Claims Act in 1946 the Attorney General of the United States had been sued in a District Court for a tort incurred by the Act which later would have been covered by the Federal Tort Claims Act, he simply asserts sovereign immunity. He said whether we were negligent, grossly negligent or reckless, you can't sue the United States because Congress has not given its consent.

Are you suggesting that under the Administrative Procedure Act that could be reviewed by the Court?

MR. LEROY: We are suggesting that the Administrative Procedure Act by its very terms is limited to non-monetary damages and that in this case we have a classic action or failure to act in an official capacity if there be some threat to the anadromous fish by the operation of the dams, by something that is done off the Pacific Coast fishery.

QUESTION: So the Court could tell the United States even though the United States had said, we will not waive our sovereign immunity, a Court could say, yes, you must waive your sovereign immunity.

MR. LEROY: We would urge the fact that Justice cannot refuse or reserve what Congress has already waived.

QUESTION: If the United States intervened here and stated its own claim, it would not be a matter of waiving immunity?

MR. LEROY: Yes, Your Honor, I would think that --

QUESTION: Because it has -- the agencies have no power to waive immunity but they could have power to bring this lawsuit, or bring a lawsuit?

MR. LEROY: Yes, Your Honor. But what we argue from that is that even should this Court judge the United States a necessary party, that at worst Idaho should be allowed to amend its pleading because of that concept of sovereign immunity, which we urge it has been waived by Congress.

Frankly, we would also invite the attention of the Court to the method and the purpose of the attempted exercise of non-intervention by the Solicitor. In California v. Arizona the focus of that congressional waiver, or focus of that case was congressional waiver by statute. In this case, the same side of a similar coin, by split decision the Department of Justice chose not to be involved in the matter. Now, we don't suggest that Justice should not have that authority, but the preliminary policy determination by Justice, Exhibit C to the Idaho brief, shows that the rationale for that legal decision was to avoid short-term political inconvenience.

The Court, we suggest, should appropriately comment, perhaps use the Florida v. Georgia procedural device; but in any event, do what it can to avoid damaging this precious natural

resource by looking behind that legal tactic in a sense, for that legal tactic is not consistent with overall national public policy.

QUESTION: May I inquire a little more on the subject of indispensability you touched but not really covered exhaustively, as I understand it.

Supposing you got an order that said that Oregon and Washington shall take a smaller share of the fish before they reach the Bonneville dam. They say, well, maybe we will do that but then the Indians will take a larger share when they are passing through Zone 6 and no more fish will get to Idaho when everything is all done.

How in this case can the Court enter an order which would give Idaho more fish?

MR. LEROY: Your Honor, the Sohappy and U. S. v. Oregon decisions bind the Indians to a 50-percent treaty right share by decree. The voluntary agreement which I mentioned varies that figure from 40 to 60 percent, depending on the specific run of fish.

QUESTION: As a practical matter as they go through Zone 6 don't they assume 50 percent has been taken out by Oregon and Washington before the fish get there?

MR. LEROY: Your Honor, that 50 percent is projected under the voluntary agreement into a matrix of specific numbers of fish for the specific runs and a specific entitlement to each

fishery.

So we urge that the same way, that an escapement a minimum number for preservation of the species is allowed through Zone 6.

QUESTION: Just so I can understand it, when those numbers are fixed do they fix the numbers that the Indians can take when the fish go through Zone 6?

MR. LEROY: Yes, Your Honor, that is my understanding of the structure.

QUESTION: So, what you are saying is that basically they would reduce the Oregon and Washington numbers without affecting the Indian numbers and there would therefore be a margin left over that has still survived on over the dam?

MR. LEROY: Exactly. And to the extent that the Indians over-fished above those numbers they would be subjected to possible enforcement of and requirement that the benefits pass through by intervention of Idaho for the limited purpose of assuring that the benefits come to Idaho.

QUESTION: Mr. Leroy, Judge Breitenstein has used the term "indispensable party," and I think you responded to an earlier question of mine that since the amendment of '66 that term is no longer used in the rules. Does that have any bearing on your case?

MR. LEROY: Your Honor, as I suggested in answer to your earlier question we feel that the Master's focus, regardless of

term, was the adequacy of the judgment. One of his problems was the problem that we just discussed that the Idaho benefit as to the Indian rights could not pass through. I have attempted to suggest that in fact it would be a pass through just as the escapement is and Idaho could enforce that by intervention if it so had to.

In addition, the operation of the dams by the United States in a specific fishery we suggest are factually irrelevant to the relief that we seek and so I would not follow the Court's reasoning in suggesting that the term be different but in fact the adequacy of the judgment can be preserved regardless of the term.

We argue also that the Master was incorrect in suggesting that the operation of the United States of dams -- eight dams on the Columbia River made them a party whose presence is required in this lawsuit. There are eight dams. Those dams each create reservoirs or pools, they create spills, they have fish ladders, they alter stream flows, and all of those factors kill fish. But in a sense of relevancy to this matter and interrelationship, that problem, the mortality of the fish, in that fashion is not relevant to the relief sought or the judgment requested in this case.

The focus here is the equitable apportionment between the three States of adult fish regardless of whatever supply that reenter the Columbia River at its mouth on their up turn, upstream migration. At the mouth of the Columbia River for the

first time these fish become the subject of commercial and sport fishery in the river; and for the first time they become subject to an actual count which can be apportioned between.

Thus, we urge that the Master's concern with the operations of the dam as to downstream migration is irrelevant. It may affect the total supply but it does not relate to the right of a portion of those adult fish reentering which we seek.

As to the upstream migration, three factors make that factually irrelevant as well. The apportionment occurs at and before the first dam, thus U.S. operations are not in a position to affect the calculation of the basic equities and numbers between the States. Secondly, the upstream losses are certain, are capable of calculation and thus can be factored into a scheme of equitable apportionment, much as this Court has done in some water loss and water passage cases. And third, the Federal statutes as judicially interpreted require a sensitivity by the United States Government, particularly the Anadromous Fish Act, and subject the United States to waiver so that any inappropriate activity cutting off, in effect, a share of benefit that should be passed to Idaho in the upstream dam we urge can be attacked in the courts and prevented as a loss to Idaho.

And the third point upon which we suggest the Master was not correct in his ruling is that the ocean management and

the ocean fishery management made the United States in some way indispensable. The ocean catch occurs exclusively between 3 and 200 miles under the authority of the Secretary of Commerce, it is regulated. Idaho sits on a specific regional fishery management council as a full voting member along with Oregon and Washington. And neither the Secretary nor the council has any authority in the river itself.

Where we are concerned with,only after river entry of adults and only as to those adults does Idaho make any equitable claim. Thus the ocean fishery and the ocean regulation may again affect the total supply available but it is not relevant to the allocation of the adults that have already returned to the river.

Thus, we would urge that an adequate judgment can be had and the United States' interests are not so linked to the relief sought that the Master's conclusion has compelled.

In addition, we would urge to the Court that complexity is not a problem in this case. This is akin and actually simpler than many of the water apportionment cases which this Court has heard. It is an established legal proposition of this Court in original jurisdiction cases where efforts to settle have failed, where a genuine controversy exists and where the gravity and importance of the case are evident, complexity is not a proper justification to refuse to exercise the constitutional function.

QUESTION: Mr. Leroy, are you suggesting that the United States simply be left out as a party involuntarily and that your case proceed against Idaho and Washington?

MR. LEROY: Yes, Your Honor, that would be our first prayer for relief and, in addition, we would say there are procedural devices available to involve the United States as amicus or that in any event the case ought to be allowed for a number of reasons.

The decree sought in this case is a final judicial judgment of three components:

Number one, a declaration of Idaho's entitlement to an equitable apportionment in certain fish;

Secondly, an establishment of an approximate percentage based on scientific evidence of each species; and

Third, the projection of those percentages into a set of figures and structures decreeing basic numbers of fish, depending on size of the run under two conditions: poor passage where many of the fish will not get upstream, and under good passage where most of the fish in relative terms will get upstream.

We would also urge the Court that continuing jurisdiction is no problem. The Court has retained its jurisdiction where necessary for modifications or amendments in equitable apportionment cases. But this Court has avoided involving itself in active, daily supervision and nonjudicial style

functions. There is nothing about this as the basic apportionment case or from the type of decree sought that would require this Court's active daily supervision. In fact, as I have suggested, the Columbia River compact exists though Idaho has for 60 years attempted to become a member of that compact unsuccessfully. That compact has to this day and does now serve as between Oregon and Washington the source of expert administration, mutual accommodation.

A decision by this Court establishing Idaho's equitable apportionment will for the first time in those 60 years remove the political disincentives of Oregon and Washington and likely a three-member compact -- should an invitation to Idaho be forthcoming may never be back in this Court again for any kind of administration.

QUESTION: I take it you feel that Idaho has been pushed around by these two larger States?

MR. LEROY: Your Honor, we do, and it is in that spirit of frustration and for that simple purpose,because there is no mutual accommodation otherwise available, that Idaho in 1975 filed this action.

In conclusion we would suggest to the Court that this is a novel and important case regarding a precious resource of migratory fish which have an instinct to return upstream to the waters of their adolescence to bear young.

Idaho has no means of achieving through the political

system what it seeks through the courts in this matter. The Federal Government has no authority to apportion fishery in the Columbia River and asserts none and need not be a full party. Washington and Oregon alone at this point have regulated the non-treaty bound anadromous fishery where fish are coming and hope to come to Idaho. The inequitable results of the defendants' activity in regulating and managing that fishery have caused Idaho to seek both equity and justice before this Court in the forum provided by Article 3, Clause 2, Section 2 of the Constitution.

QUESTION: Are there any other interior States in which there are anadromous fish that return to spawn, such as Wyoming?

MR. LEROY: Your Honor, this Columbia River system would not, though it flows through States, including Montana and Wyoming, would not --

QUESTION: I mean the Snake rises in Wyoming, I think.

MR. LEROY: Yes, but the Snake to the Wyoming access and the Columbia into Montana are blocked by dams and no longer available for anadromous fish.

QUESTION: The answer is "No."

MR. LEROY: No, sir.

QUESTION: Idaho is the only one.

MR. LEROY: Yes, Your Honor.

Thank you, Your Honor.

QUESTION: Mr. Leroy, before you stop is it possible -- and maybe this is unrealistic question -- to give me some indication of what percentage of the run Idaho is now getting and what percentage of the run it hopes to get if it is totally successful in this litigation?

MR. LEROY: Your Honor, the pleading alleges that we produce for two of those specific runs between 50 and 60 percent of the fish and that we receive back in the neighborhood of 20 percent.

As I suggested and as the Master has heard, some of the merits to this point simply because of the interrelationship of Federal rights, we have not fully explored at this point on the record the kinds of relief and the kinds of numbers that Idaho would seek to establish by expert testimony.

QUESTION: This 20 percent figure, that is the percent of the fish that originate in Idaho and return to Idaho, that is not the percent that are caught by your fishermen, is it?

MR. LEROY: Your Honor, I am sorry; would you restate the question?

QUESTION: What does the 20 percent refer to? Is that the percent that actually get back to Idaho or is that the percent of the run that are caught by fishermen in Idaho?

MR. LEROY: No, Your Honor, it would be the percent that return. The Idaho fishery is not of a commercial nature

and in no way as in the case in Oregon and Washington, takes the kinds of large numbers. We have sport fishery only and that has been extremely limited.

QUESTION: What I was really asking, the 20-percent figure I don't think responds to my question.

What percent of the run do Idaho fishermen now catch? Do we know?

MR. LEROY: Your Honor, to my knowledge that has not been established at any point in the record nor has it subject to my knowledge, outside the record.

QUESTION: What you really seeking to do is to increase that figure to a higher figure.

MR. LEROY: Your Honor, what we are seeking in this matter is two things:

First of all and foremost of all, to have a large enough escape come up the river to preserve the species.

And second, and only secondly, a reasonably limited sport fishery in Idaho.

QUESTION: Pardon me. And, secondly, to increase the sport fishery in Idaho?

MR. LEROY: Yes, to a reasonably limited extent.

QUESTION: Reasonable availability, basically.

MR. LEROY: Yes, Your Honor.

QUESTION: I suppose it would be possible to lose those runs even though -- under the present system -- even

though there is some provision for escapement to maintain the runs, it would still be possible to lose them because of what happens between escapement and Idaho.

MR. LEROY: Well, Your Honor, the runs have been in recent years depleted despite Idaho's best efforts to attempt an allocation in a number of fashions to preserve the run.

QUESTION: Well, there must be --

MR. LEROY: They are affected, yes, by what goes on.

QUESTION: I know, but that could be -- that just means that the escapement -- permitted escapement or required escapement is inadequate.

MR. LEROY: Yes, Your Honor, in some sense that is the case which we face at this time. There are however equities of apportionment in addition to that escapement.

QUESTION: Yes.

MR. LEROY: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General Redden.

ORAL ARGUMENT OF JAMES A. REDDEN, ESQ.,

ON BEHALF OF THE DEFENDANTS

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

The State of Idaho argues essentially that the States of Washington and Oregon in their non-Indian, non-fee commercial

fishery in the lower Columbia River are imperiling the fish that otherwise and should otherwise go to the Snake River in the State of Oregon. The State of Idaho today referred to the sports fishery but as the Master's report finds there is no evidence in the record that the sports fishery has any real impact. It is in terms of numbers an ineffective fishery on the Columbia River. So we are talking essentially about the commercial fishery, by Idaho's own argument, not the Indian commercial fishery but the non-Indian, non-treaty commercial fishery which takes place in one area in the entire Columbia River Basin, and that is the 130 river-miles between the mouth of the Columbia River and Bonneville Dam, the first of the eight obstacles between the ocean and the eighth dam on the Snake River.

QUESTION: As I understand it, in that area the Indians don't have any treaty rights.

MR. REDDEN: That is correct, Your Honor. The Indians do not fish in that area.

QUESTION: Up to Bonneville Dam.

MR. REDDEN: That is correct, although there is litigation now with the Yakimas attempting to assert their rights to fish in the lower river, but that is --

QUESTION: But as of now the Indians --

MR. REDDEN: They have no such rights declared.

QUESTION: You said that is 130 miles.

MR. REDDEN: One hundred and thirty miles.

QUESTION: And that is where the non-treaty commercial fishery takes place.

MR. REDDEN: The non-treaty commercial fishery, that fishery is not a fishery upon the stocks of which Idaho seeks an apportionment. The fact of the matter is that the fishery in the lower Columbia River is a commercial target fishery and fish which are destined for the lower Columbia River and tributaries in the lower Columbia River.

QUESTION: And that fishery, that is in both States, Oregon and Washington?

MR. REDDEN: That is in both States, in Oregon and Washington. And we share seasons and rules and regulations.

QUESTION: Is that stretch of the river the boundary between the two States?

MR. REDDEN: Yes, it is, Your Honor; it is the boundary between both States.

QUESTION: What is it that prevents those fish from ever getting to Idaho?

MR. REDDEN: Well, because by the nature of the fish itself they are spawned or hatched in the lower Columbia River and that is the area to which they return. Anadromous fish will not return to an area other than that area where it was hatched. These fish, which our commercial fishermen fish in the lower Columbia River, were hatched or spawned in the

lower Columbia River or its tributaries, and hence do not seek nor would they be able to know how to go across Bonneville Dam or the other dams.

QUESTION: You are arguing the merits of --

QUESTION: That is the merit.

QUESTION: Whether this complaint states a cause of action. I guess you are arguing your exceptions to this Special Master, aren't you?

MR. REDDEN: Well, Your Honor, I think that it has to be brought into perspective because of Idaho's argument that what they seek is a reasonable and fair and equitable apportionment of this share of fish which are not destined for Idaho's waters in the first place.

QUESTION: That isn't what the Special Master says.

MR. REDDEN: The Special Master in his report does point out that the non-treaty commercial fishery is limited to the lower Columbia River and that the Indian commercial fishery, a substantial and significant fishery, is in that area above Bonneville Dam. But this litigation, as the Master points out deals with three specific runs of anadromous fish and those three specific runs are the summer chinook salmon, the up-river spring chinook salmon and the summer steelhead, the prime game fish. Idaho claims then that our fishery, our rules and regulations or maintenance of that fishery is such that they are done out of their fair and equitable share.

On Summer chinook salmon, there has not been a non-treaty commercial fishery on summer chinook salmon for 16 years, none.

QUESTION: But that doesn't prove that there couldn't. That is a question of fact. I mean that is not a jurisdictional question to be discussed in a motion here, I wouldn't think.

MR. REDDEN: But, Your Honor, the contention of Idaho is that we -- and the reason we are here before this Court is that Idaho is claiming that we as a jurisdictional matter, that they have a right to fish, that we are over-fishing and destroying in the lower river.

QUESTION: But are the nine members of this Court sufficiently expert in the habits of anadromous fish to know whether or not these particular fish you are talking about would or would not return to Idaho or go back to Idaho?

MR. REDDEN: Well, Your Honor, in the complaint in the brief filed by the State of Idaho it is these three runs which they say, to which they claim their apportionment, their entitlement, and their rights.

QUESTION: If the case went forward these matters would certainly be litigated, there is no question about that. And you seem to be arguing here that we should just dismiss the case, not because of indispensability but just because Idaho hasn't got any claim on, that it can really have any profit in.

MR. REDDEN: Yes, Your Honor. Then I will argue or urge that this Court adopt the Master's report, that as a matter of fact the United States is indispensable, a term used by this Court this year in the 1979 case of Arizona v. California. But we urge the United States is indispensable really on three specific grounds. One is their role as proprietor --

QUESTION: Mr. Attorney General, there seem to be some hint that there is a difference between necessary parties and indispensable parties. Do you see a difference or are they essentially synonymous?

MR. REDDEN: Acutally, I think they are; I think they are, Your Honor.

QUESTION: If they are necessary, they are indispensable; and if they are indispensable, they are necessary. That is my point.

MR. REDDEN: That is my contention.

QUESTION: How can you say that after the '66 amendments which prior to 1966 definitely classified parties. One class was necessary, another class was indispensable, and their characteristics were quite different. In the 1966 amendments you come along and dispense with word "indispensable" entirely.

MR. REDDEN: Well, Your Honor, if the United States is not an indispensable party, which is the term used by the

Master in this case, then under that rule they are necessary. Under Part 3, where it says that a party is in fact necessary if the decree in order to be adequate must bind that party.

QUESTION: Well, you may well be right on that. All I am suggesting is that even in pre-1966 terminology there was a great deal of difference between a necessary party and a indispensable party.

MR. REDDEN: But we cannot see how a decree can be framed in any way to be adequate in terms of equity and good conscience without that decree binding the United States as its role as proprietor of the dams, its guardian of the Indians or its sovereign over the ocean fishery. There is simply no way, and the Master as a matter of fact does allude to this and points this out in his report. Although he first says that because Idaho does not claim a share of the Indian fishery, that the Indians do not be parties, the Master does in his arguments and comments regarding what he terms indispensability, does refer to the necessity of apportioning a share of the Indian fishery simply in order to keep that check.

QUESTION: But Idaho says, well, sure, the United States may run these dams so that the relief we get, if we get any relief, might not be as good as it might otherwise be and sure, the Indians may fish for more fish than they are entitled to under the decree entered in another case. But

that is no reason, it is argued, saying the United States is either necessary or indispensable. Idaho is willing to take that risk.

MR. REDDEN: Well, Your Honor, we submit that the decree to which Idaho would risk being entered in this case in the instance of the dams is one example, if it did not bind the United States Government it would not provide an additional apportionment. So the risk they are willing to take is --

QUESTION: Spell that out for me.

MR. REDDEN: All right. If we take an example of 100 anadromous fish which are in fact headed for the upper river. And let's for the purpose of this example, let us say that there is no fishery -- commercial, non-commercial, Indian, sport -- of any kind on those 100 fish, only 85 of those fish are going to survive Bonneville Dam on the way up; and only 72 at the Dalles Dam; 61, John Day Dam; 52, McNary Dam --

QUESTION: Yes.

MR. REDDEN: -- and of the remaining 52, 20 will not even go up the Snake River. Of those 22 that go up the Snake, 20 will survive Vice Harbor; 17, Lower Monumental; 14, Little Bruce Dam; and 12, Lower Granite Dam, the last dam on the Snake River.

QUESTION: That is the merit.

MR. REDDEN: But, Your Honor, coming back down the figures are even more devastating and unless the Court can enter

a decree, can bind the United States on its control of the dams, whether to use the spillway or the turbines, whether to create power for the Northwest --

QUESTION: Mr. Attorney General, the Idaho says now -- I don't know whether this is a fact or not, but the Attorney General said that 20 percent of the fish that originate in Idaho get back to Idaho. So some fish get there. And they just think that more should be released. If you release 200 instead of 100, you are going to have more fish reach Idaho.

MR. REDDEN: Well, Your Honor, if the desire of the State of Idaho is to increase or enhance the release of smelt in the Snake River solely because that will automatically in some fashion result in an increase in the fishery, I suggest to this Court that we do not need a decree of this Court to provide for that. What we need is cooperation which now goes on between the Federal Government and the three States. The Federal Government as a matter of fact takes a majority of the cost of the plant.

QUESTION: But we waited for four years for Oregon and Washington to include Idaho in the interstate compact, and they never did.

MR. REDDEN: May it please the Court, I think the history of the interstate compact might be helpful here. The State of Oregon did as a matter of fact pass a compact bringing

Idaho into that compact several sessions ago. The State of Idaho did not pass it; they rejected it on the grounds that they would have but one vote of three and that if they did not have a super vote -- that is a disproportionately heavy vote -- their participation would be useless because there would be one sport versus two commercial. It is also true the State of Washington did not pass the compact in that year. The State of Oregon has introduced legislation for a compact in subsequent sessions. This lawsuit --

QUESTION: Doesn't that indicate that a combination is impossible?

MR. REDDEN: I do not think a combination is impossible, Your Honor; and I don't think that there--

QUESTION: It is possible on your terms.

MR. REDDEN: No, Your Honor, it is possible on a cooperative basis. And we have as a matter of fact been working with the State of Idaho and the State of Washington and the Federal Government on this matter.

QUESTION: But neither Washington nor Idaho agrees with the terms that you want?

MR. REDDEN: Idaho did not agree with the terms of the compact that we passed the last time --

QUESTION: And Washington didn't agree either.

MR. REDDEN: Washington did not --

QUESTION: I am interested in your answer to Mr.

Justice Rehnquist's question.

MR. REDDEN: Idaho --

QUESTION: You haven't mentioned Washington.

MR. REDDEN: The State of Washington did not pass the compact bill the year we did pass it. And that was the same year it was rejected also by the State of Idaho.

QUESTION: But you still say a combination is possible.

MR. REDDEN: A combination is possible and a combination is occurring in the agreement in the United States v. the State of Oregon case, incidentally, in which Idaho petitioned to intervene a few weeks ago on a limited basis. In that case that agreement, which is part of this record, reflects that the States of Oregon and Washington have taken into consideration -- prime consideration -- the sports fishery and escapement into the Snake River in Idaho.

The States of Washington and Oregon share 200 miles of the Snake River with Idaho as border. The fishermen, sports fishermen in the States of Oregon and Washington fish the Snake River. We are vitally concerned not only with the sports fishery for our sports fishermen and Idaho's but also are concerned vitally with the necessity for the escapement for the propagation of the runs of anadromous fish. And it is the position of and the workings of both the States of Oregon and Washington to enhance and increase that fishery, and it has

been for many years. It is true that they are not a member of the compact. They do attend the compact meeting. Under, again, the plan in United States v. Oregon our order, our settlement agreement in that case the State of Idaho is appointed to the Technical Advisory Commission. The three States are represented in the order of the District Court in United States v. Oregon which is the --

QUESTION: Which District Court was that?

MR. REDDEN: That is the District Court for Oregon.

QUESTION: Attorney General, may I go back to the question of indispensability for a minute.

As I understand Idaho's story, they say we don't get enough fish because some fish are lost over the dams, there is some over-fishing by Indians, and there is some over-fishing in Oregon and Washington. So we can't do anything about the first two items because of the sovereign immunity. But we can do something about over-fishing in Oregon and Washington. Just let us get that much.

Why is the United States indispensable under that part of their claim?

MR. REDDEN: Because, Your Honor, the fish runs upon which Oregon and Washington fish, those runs on which Oregon -- or Idaho insists that Oregon and Washington over-fish are runs not destined to the State of Idaho.

QUESTION: If we accept the allegations of the

complaint, because the case hasn't been tried yet, we can't accept your statement, because they have alleged to the contrary on that. They have alleged that there are runs that originate in Idaho and, being anadromous return to Idaho, which are over-fished in Oregon and Washington.

Don't we have to accept that as true for the purpose of the decision today?

MR. REDDEN: I think, Your Honor, when --

QUESTION: And the Master said there is an inequity here, too.

MR. REDDEN: I think, Your Honor, when this matter was argued before the state of the record was such that would necessarily have to be accepted. I think that the state of the record today, there is --

QUESTION: Is there a finding that you could point to in the master's report that supports what you have said?

MR. REDDEN: Yes, Your Honor, there is. All of the facts and information that I provided this Court today come from the Master's report.

QUESTION: But that isn't the same thing as to pointing to a particular factual finding in the Master's report as requested by Justice Stevens that squarely hits the nail on the head.

MR. REDDEN: The Master's report does speak of the mortality rate of the fish going up river. It does

speak of the mortality rate coming down river. It does speak of the significance of the Indian fishery and the Master does say in his report, express the opinion that an adequate apportionment cannot be made without taking into consideration the Indians. Because as the share, as the Master points out in that report, the fishery of the Indians has increased from 39,000 pounds in 1959 to 3 million pounds.

QUESTION: Mr. Attorney General, suppose the United States had moved to intervene before the Special Master and the Special Master allowed it and we didn't object to it, I take it the Special Master would have said the case should now go forward and be tried.

MR. REDDEN: Yes, Your Honor, from the Master's report; that is exactly correct.

QUESTION: So that there is -- he did think there was something to try out in this case except for the fact that the United States wasn't there.

MR. REDDEN: According to his report that is correct.

QUESTION: And there is only a problem about remedy with respect to that.

MR. REDDEN: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Attorney 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. Justice White, you are of course correct in the posture of this case as it appears before us. Now, the question is whether or not the United States is indispensable and in that respect basically whether or not a decree can be fashioned which is fair to the litigants who are now in the case other than the United States, which of course is not in the case itself.

The factual statements about this however is not in the same posture as it was when we were here four years ago, because the Special Master has found quite precisely a set of facts about the three runs which are the subject of Idaho's complaint.

It is important to have a little bit more in the way of factual background about the Columbia River to understand those three runs. And --

QUESTION: Do you agree with the answer of your colleague to my last question to him?

MR. GORTON: Except if the United States had come in would the Special Master have gone forward with this case.

QUESTION: He would have gone forward with this case, I agree with that part of Mr. Redden's answer, but not with the

answer that the only question before him was a remedy. There was a question before him as to whether there was a right.

QUESTION: You are going to argue that the Special Master would have found for Oregon and Washington or --

MR. GORTON: No.

QUESTION: -- on the merits.

MR. GORTON: There is no point in my arguing that to you now.

QUESTION: There certainly isn't.

MR. GORTON: And there isn't that now.

So the question before the Special Master would have been not only whether or not there is a remedy but whether or not there is a right in the State of Idaho.

QUESTION: Exactly. Exactly. And is that what you want to argue, whether there is a right?

MR. GORTON: No, I do not wish to argue that question because it is not before you. I wish to argue that the United States is indispensable in this litigation in even that preliminary question of whether or not there is a right, much less a remedy. And in order to understand the indispensability of the United States one must understand something at least about the way in which anadromous fish operate, both going downstream on the Columbia River and upstream on the Columbia.

QUESTION: Mr. Justice White's question is wholly irrelevant in the sense that if the United States had not

raised an objection as being an indispensable party, the Master would have gone ahead and tried the case.

MR. GORTON: Of course he would and we wouldn't be here to that. We might have been here at some later time but we wouldn't be here now. We are here because we don't feel that justice can be done to us even in the determination of a right, much less a remedy, whatever that determination may be, in the absence of the United States; and that for a very good and sufficient reason. Part of that reason has to do with the fact that there are many runs of fish in the Columbia River. Some of them never would never go above Bonneville Dam in any event and are subject to a major Oregon and Washington commercial fishery. Some which go above the Bonneville Dam, and at this point they are pretty much mixed together, aren't going up the Snake River. They go up the main stream of the Columbia River and stay in the State of Washington, would never leave it, leave it under any circumstances. They have already crossed four dams by the time they get to the confluence of the Snake and the Columbia. And some of course continue up the Snake at which point they would eventually, if nothing else happened to them, get back to the border of Idaho and Oregon and Washington and go on up to some other point higher on the Snake River.

The point is that the reason that these fish do not get back to Idaho is hardly within the control of the State

of Washington. And by the findings of this Special Master the States of Oregon and Washington for all practical purposes are not and have not for years fished on those runs.

Now, the Special Master has found that there hasn't been a summer season for commercial summer chinook -- one of these three things -- since 1964. You need a lawsuit over summer chinook? We just haven't been fishing them.

QUESTION: Well, you are just saying you are bound to in your suit before the Special Master.

MR. GORTON: No, I am not, Your Honor. If you will give me a moment, Mr. Justice White, I will tell you why it is that the United States is indispensable and this is an element of it. The United States is indispensable for summer chinook because that run has been destroyed or almost destroyed not by any action of the State of Washington but by actions of the United States Government.

QUESTION: But the Special Master could come out differently with respect to Indian rights than some of the previous decisions since 1964.

MR. GORTON: He might very well. And if he does, the Indians certainly ought to be represented in the litigation in which he comes out with that kind of judgment.

If there is a right in the State of Idaho, if there is a right at all, the right that they are alleging here, that right can only come out of fish to which something else is

happening at the present time.

QUESTION: Well, the United States can sue.

MR. GORTON: One would think, Mr. Justice Rehnquist, that the right would come relatively equally out of the Indian and non-Indian right.

Normally, Idaho would have sued to have an allocation which comes out of the entire run of fish coming up the Columbia River. Now, under those circumstances obviously the United States would be indispensable.

QUESTION: Well, if the United States doesn't like what it gets, it can sue.

MR. GORTON: That is not the test of indispensability. If the United States has a right, it represents the Indians and has a right to be in the case and chooses to exercise its sovereign immunity not to get in the case, there can be no decree.

But so what Idaho has done is to say, well, the United States really isn't indispensable at all because we are only asking a decree that affects Oregon and Washington's non-Indian shares of this resource. That is the way that they attempt to avoid the indispensability of the United States in this case.

But under the agreement which Oregon and Washington and the United States and the Indians have made in this case, if there is not just an absolutely fixed percentage allocation,

so much of a percentage to the Indians and so much a percentage to the non-Indians, there is a great deal of language -- as a matter of fact, the basis of that agreement in one sense anticipates your decision last summer in U.S. v. Washington.

QUESTION: Why should that agreement between four parties bind a fifth party who is not a party to it?

MR. GORTON: We don't believe that it binds the fifth party, which is not a party to it at all. At one point -- as recently as last summer -- Idaho attempted to intervene in that case and then got back out of it. We intervened in the case, the Stat of Washington did.

The point that I am trying to make, because it is the only point in front of you, is that the United States is indispensable in order that Washington and Oregon as well as Idaho get justice in this case.

If a decree were entered that said that Idaho has the right to an allocation and the right to that allocation can be enforced only against Oregon and Washington, no justice is done to us under those circumstances. We have lost the fair share of various fishing runs which we agreed with the United States in other litigation -- in U.S. v. Oregon -- that we were entitled to. That gives us the right to go back into the District Court in Oregon and say under the terms --

QUESTION: Isn't the question, Attorney General Gorton, as to whether Oregon and Washington really were entitled

to all those non-treaty fish. They certainly had a right superior to the Indians as to -- let's take it as half. Maybe that isn't fair. I understand you were going to explain that and didn't quite get to it.

But say that the non-treaty fishermen have a right to half of the fish and you, in effect, have got a decree that says we can take half of the fish. But some of those fish maybe belong to Idaho, the non-treaty fishermen in Idaho. And do you have a right to preempt their access to those fish?

MR. GORTON: No, Mr. Justice Stevens. The agreement entered in U.S. v. Oregon was that each party is entitled to a fair share of the fish.

QUESTION: But Idaho wasn't a party.

MR. GORTON: I understand that, Mr. Justice Rehnquist. That fair share of the fish assuming the particular division which was included in that agreement which, incidentally, included in it exactly the escapement which Idaho asked us to include in it in these matters. The escapement figures in that agreement were submitted effectively to us by Idaho as long ago as the early 1970's and are included in the agreement.

But based on that fisheries plan we entered into an agreement, we in Oregon, with the United States and the Indian tribes, for a percentage division of the rest. That

percentage division was to create a fair share which turned out to be your test, U.S. v. Washington.

If a portion of Oregon and Washington's share is taken away, their share is no longer fair as against the Indians themselves, we go back into court, ask the court to lower the Indians' share.

QUESTION: Just a moment right there.

Assume that a portion of the share now going to Oregon and Washington was reduced and assume there were means to insure that that would arrive in Idaho. It would still be fair then, wouldn't it?

MR. GORTON: No, it would not because the definition of the fair share entered into in the Oregon v. Washington plan was based on certain numbers, reduced percentages. If the non-Indian share is reduced, vis-a-vis the non-Indian Oregon and Washington share is reduced vis-a-vis the Indian share, we have the clear right under that plan to go back into the District Court and ask that the Indian share be reduced proportionately.

QUESTION: Then you do have a remedy in the event. I don't understand it. You seem to be arguing the other side of the case now.

MR. GORTON: In the plan in the United States v. Oregon, Oregon and Washington have agreed to a particular percentage of certain runs of fish. The Indians get a certain

percentage.

QUESTION: Do the sum of those two percentages equal 100?

MR. GORTON: The sum of those two percentages equals something less than 100, because there is in addition to that an escapement for Idaho, the escapement which Idaho asked.

QUESTION: And supposing that the Master tried this case and decided that that percentage escapement for Idaho should be different. Couldn't the decree in Washington be modified to take into account that difference?

MR. GORTON: It certainly could and if it were, it would reduce the Indian share proportionately with the non-Indian share, which is the reason --

QUESTION: But they won't be heard until that happens. They will not be heard until that happens and they would be represented in the proceeding in which that happened.

MR. GORTON: But that --

QUESTION: I don't understand why this can't proceed in two stages. If the Master says instead of an escapement of 20 percent or it should be 25 percent, that reduces the amount available. And in this proceeding that cuts back on Washington and Oregon and now it is up to Washington and Oregon to file an appropriate motion in the Court in the other case and get relief against the Indians.

MR. GORTON: It seems to me, Mr. Justice Stevens, in phrasing that question you have phrased the answer as to why the United States is indispensable in this litigation.

QUESTION: To whom is it indispensable, that is what I don't understand. You say it is indispensable to you. But the only reason it is indispensable to you is you may need their help in cutting back on the Indians.

MR. GORTON: It is indispensable to us, of course. It is indispensable in the phraseology of indispensable parties now in order to prove the adequacy of the judgment in the absence of a non-joined party. A judgment which comes out against the State of Washington and Oregon alone and which does not affect the Indians is certainly not adequate as to Washington and Oregon. We must have Washington, we must have the United States in this same proceeding so that if a right to an Idaho allocation is found by the Court, that right can be adequately and with justice distributed between Washington, Oregon and the Indians.

Moreover, the adequacy of that judgment depends on what the United States does to allow fish to get into the Columbia River in the first place --

QUESTION: I understand that.

MR. GORTON: -- in its ocean fishery. The adequacy of that judgment also depends on whether or not the United States can be required in the operation of these dams to allow

fish to get up to Idaho in any event.

In a case entitled Washington v. Oregon in 1936 this Court, dealing with what was then an inequitable claim by Washington to water going down the Walla Walla River, found that if Oregon irrigators were cut off very little of that water would get to Washington anyway. It would disappear in the bed of the river. And that it would be inequitable to give Washington a small amount of water in exchange for the loss of a great amount of water to Oregon.

The facts as this Master has found them, the effect of dams managed exclusively by the United States means that an allocation of Washington and Oregon fish to Idaho would take a huge number of fish out of the Washington and Oregon fisheries and produce very little. By the findings in this case it may be one percent, maybe less than that. But in order to see to it that Idaho has either a right or can enforce that right, the United States must be in this litigation. The issue is whether or not the United States is an indispensable party. Without the United States being involved in the determination of the right in the first place, Idaho can't get more than a very tiny percentage of what is taken away from us, and that goes to the existence of the right.

QUESTION: Attorney General Gorton, may I ask one other question: Is your colleague Attorney General Redden

correct in saying that the only three runs are the three that he has identified, two salmon runs and one steelhead run?

MR. GORTON: Absolutely.

QUESTION: And that this case, no matter how it is decided, won't affect the commercial fisheries in Washington and Oregon?

MR. GORTON: It certainly will, Your Honor.

QUESTION: You don't fish these runs.

QUESTION: I thought you said there were -- he said there were no commercial fisheries involved. Maybe that is just in Oregon.

MR. GORTON: Idaho has no commercial fisheries. Washington and Oregon have commercial fisheries but they do not have commercial fisheries on these three runs except for a very -- an extremely short one on one of the spring chinook a few years ago.

QUESTION: Well, what happens to these runs, then?

MR. GORTON: Pardon?

What happens to these runs is they are destroyed -- to the extent they are going back to Idaho, they are destroyed by the dams of the Snake which are relatively new dams and which are run by the United States. That is why we have had to cut off our fishery in the lower river. Before those

dams Idaho wasn't here because we allowed plenty of fish to get back up there. We weren't here, in any event. But Oregon

QUESTION: But if commercial fisheries don't fish these three runs, you certainly are not going to have to alter your commercial fishing.

MR. GORTON: Well, Idaho has also asked that some of the commercial fishing runs on Washington-origin fish be cut off or be restricted because there is an incidental part of some of some of these runs in them. The runs slightly overlap. They would have us, among other things, maybe lose a hundred fish so that one fish could get back up to Idaho because a few strays from one of these runs might still be fit,swimming up the river at the same time of various other runs. That does go to the merits.

But the point is that the United States is an indispensable party because in the state of this case with only the States in it and not the United States which controls the fisheries, the dams and of course is trustee for the Indians, there is no possibility of a judgment of a right or a remedy, either, which will do justice to us. We will simply end up losing all kinds of fish while Idaho gains nothing.

If the United States is in the litigation -- and why it is not is for Mr. Claiborne to tell you -- if the

United States is in the litigation, then any decree which the Court came out with would be enforced against everyone who impacts the fishery. And we might very well claim a right to fish in the ocean which you are returning to Oregon and Washington, which the United States ignores at the present time. We would be happy to litigate that with the United States. We can't litigate it without the United States in it. Therefore we can't be done justice in this case without the United States in the case. It is an indispensable party.

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

Mr. Claiborne

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE DEPARTMENT OF JUSTICE

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

QUESTION: You are going to tell us at some point why the United States isn't in, or why it doesn't want to be in, or whether it does want to be in, I take it? At least, I hope you will.

MR. CLAIBORNE: I will.

QUESTION: I would like to hear, Mr. Claiborne, any additional authorities you have to cite in addition to those of your memorandum of April 26, 1979 that indicate why

the United States as trustee for the Indians is an indispensable party. The cases you cited simply show the United States as operators of reclamation projects, and so forth, are indispensable parties.

MR. CLAIBORNE: Mr. Justice Rehnquist, I believe Texas v. New Mexico involved the indispensability of the United States in its role as trustee for Indian water rights.

QUESTION: Texas v. New Mexico was a one-paragraph per curiam decided February 25, 1957 no purported reasoning whatever, simply a statement of a result.

MR. CLAIBORNE: But that result Mr. Justice Rehnquist, was based on the report of the Special Master which had been reproduced for the convenience of the Court, and the papers now before the Court to indicate precisely because one couldn't judge it from the single-line per curiam.

QUESTION: What about Arizona v. California?

MR. CLAIBORNE: Arizona v. California is indeed based on the role of the United States as manager of the water, both dams, reclamation projects. And I believe the Secretary of the Interior dispensed the water and controlled its every stage, it was viewed as impossible to have [illegible] it not run against him and, indeed, the ultimate decree runs entirely against the Secretary of the Interior as to what dispensements of water it shall make, indicates the present

effective rights to the respective States and other parties.

Let me address the question asked by the Chief Justice. The United States, as the Court is no doubt aware in light of the documents published by Idaho, hesitated, considered, reconsidered the question whether it should hold its sovereign immunity as a bar to this lawsuit, feeling some sympathy with the claim of Idaho. At the end of the day it was determined that the United States ought not intervene and allow the proceeding to go forward, partly because it was our judgment, rightly or not, that the opportunities for an amicable accommodation of this lawsuit had not been exhausted.

The four years that have passed since this Court last dealt with the suit have unfortunately not been occupied in very useful negotiations between the States and the United States.

We also took the view, perhaps wrongly, that although Idaho would say we don't want to disturb the Indian rights, we don't want to disturb the operation of the dams, we don't want to in any way control the management of the ocean fishery. The defendant States might be fully entitled to say those methods affect what may be a fair apportionment of the resource because the size of the pie has much to do with how you fairly divide it. And, indeed, the plan in the District Court depends on the size of the pie as to what

shares go to the Indians, what share goes to the commercial fisheries in Washington and Oregon, and what share escapes to Idaho.

No one has suggested that a one-third, one-third, one-third division, no matter what the run, is appropriate. It does depend on how large that run is and of course the size of the run depends on the operation of the dams and depends on how many fish are allowed into the --

QUESTION: I would certainly think that the case might be very different and the decree might be very different if the United States were a party; there would be other things that might happen. But without it, it may be that Oregon will just end up with no relief at all or it is just impossible. They may just lose on the merits. But I don't understand why whatever there is, however small the pie is, why Oregon isn't entitled to litigate whether it is getting its fair share of that pie. I mean Idaho.

MR. CLAIBORNE: Justice White, by that test perhaps no party would ever be indispensable. If a party with a major interest in the resource need not be joined, if the party who has control over the -- that resource, its existence, the destruction, is not a necessary party, it is hard to imagine a case in which a party is indispensable. Idaho is perfectly willing, so it tells the Court, to say, we will assume all those risks.

I am not clear that Oregon and Washington are required to take a like stance. They may be entitled to say, if we are going to deprive ourselves of a portion of the fishery we presently take, the Indians must bear a part of the burden.

QUESTION: Well, what would be the matter with that?

MR. CLAIBORNE: With the United States as the trustee for the tribes, all the tribes themselves must be a party to defend themselves against that -- suggestions from the defendant States.

If sovereign immunity has any continuing force, it is the that a party who is indispensable and who is sovereign need not be put to that --

QUESTION: The Indian tribes don't have sovereign immunity.

MR. CLAIBORNE: This Court has held that they do and they could now be joined in this lawsuit and could the United States.

QUESTION: But Idaho doesn't want the United -- hasn't asked for any relief against the United States.

MR. CLAIBORNE: That is so.

QUESTION: And nor have any Indian tribes. So it is quite willing to take its lumps if the United States wants to keep its head in the sand in this case.

MR. CLAIBORNE: The question, Mr. Justice White, is whether that manner of focus which Idaho insists upon is binding on the defendant States.

Now, there is another complication in this case. There is an outstanding decree of the District Court. In my judgment if one looks at that decree, which is reproduced at the back of Idaho's exceptions, that decree cannot survive this Court's taking jurisdiction of the case. Because that decree provides for a forum which is premised on accepting escapement into Idaho. If that is disturbed, the premises of the decree are undermined. And therefore the degree to which there is a settlement between the tribes, Idaho and Oregon -- not Idaho, Washington and Oregon -- a provision however adequate or inadequate for some escapement into Idaho falls apart. And that it seemed to us was a major consideration in not inviting a new lawsuit putting everything open. That decree, though the Master held it no bar to this proceeding, no doubt correctly, cannot survive this proceeding.

It seems to us that the Court --

QUESTION: Mr. Claiborne, on that argument assume there is an inequity in the escapement figure we have now. Should that decree survive, then? If the premise of the whole lawsuit is that the escapement figure is inequitable, your argument of inequity is there is something magic about preserving an inequity, as I understand the argument.

MR. CLAIBORNE: Mr. Justice Stevens, I entirely agree that if there is an inequity that decree cannot --

QUESTION: If the Master is capable of determining in this proceeding whether or not there is an inequity, why should not this case go forward to answer that question?

MR. CLAIBORNE: Mr. Justice Stevens, my only counter suggestion is that that lawsuit in which all the parties except Idaho are already before the Court and already bound to some extent as between each other is the proper forum and not this Court in which to make an adjustment in favor of Idaho.

The efforts of the United States have been toward amending the decree.

QUESTION: How can Idaho assert in that case any claim against two States?

MR. CLAIBORNE: It could not jurisdictionally, Mr. Justice White. I am suggesting that if --

QUESTION: That is what it wants to do.

MR. CLAIBORNE: I appreciate that.

But if the door to this Court is closed or half closed, Idaho may be, and the defendant States because it is only half closed, may be more inclined to sit down --

QUESTION: You want to keep the door closed completely until you are ready to intervene in some lawsuit.

MR. CLAIBORNE: If -- what we have, in effect, said

is that if Idaho finds the door of all courthouses closed after making a bona fide effort to seek an accommodated settlement in this matter, the United States will not indefinitely continue to block the lawsuit.

QUESTION: Quite right. If Idaho finds the door of this Court open, the Indians and the United States may be a lot more tractable about their reaction to the suit in the United States District Court and about the suit in this Court.

MR. CLAIBORNE: Mr. Justice Rehnquist, the United States and the tribes, both of whom are independent parties in the District Court -- I can't speak for the tribes because some of them have indicated their unwillingness to change the allocation to them -- the United States has indicated that in its view there is an appropriate adjustment to be made to the benefit of Idaho. And that position could lead either to consenting to the suit in this Court or, what seems to us, that in the District Court case with a judgment already entered a possibility of amending it there and more appropriate supervision of all the adjustments that are required. In that District Court litigation, it is the proper forum. We are not intent on depriving Idaho of --

QUESTION: A decree could not be entered in favor of Idaho against the other two States.

MR. CLAIBORNE: It could if Idaho were party by

agreement, just as Washington and Oregon are only both before the same District Court because they agreed on a judgment. Idaho could likewise agree on a judgment and the jurisdiction of the Court would not therefore be asked.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Attorney General?

REBUTTAL ARGUMENT OF DAVID H. LEROY, ESQ.,

ON BEHALF OF THE PLAINTIFFS

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

I would emphasize only four points.

First, this is a narrowly drafted pleading focused on the apportionment sought. As the adult fish reentering the mouth of the Columbia River, for the first time at that point, and for the first time only, do they become subject as adults to fishery in the Columbia River and for the first time they are subject of relatively precise calculation in number. That is the right place to determine the equities. Therefore, it is irrelevant as to what the passage losses down are and, picking up the Solicitor's analogy, it is also irrelevant what the losses are because in the case of the pie the actual weight and the actual volume of the pie may vary because of the size. But the basic equities of apportionment as between those three partners will not vary, depending on the size of the pie.

Secondly, we would claim only as to upstream fish which will go over Bonneville Dam and return to Idaho. The Master's report specifically at page 10 found that Idaho produces many fish and receives few. The number of those fish that go to Idaho and the number by the same token that stay in Oregon and Washington are subject to calculation and can be distributed into that equitable formula.

Third, Indian rights are not affected or attacked in this litigation. Idaho seeks distribution only from the Oregon and Washington share. We have no quarrel with the 50-percent Indian share. Washington argues that Idaho should perhaps take some of its share from both.

QUESTION: Mr. Attorney General, is it possible in the management of the commercial and sports fishery below Bonneville to effect a greater escapement of fish that would go to Idaho without affecting an escapement of a greater number of fish that would go elsewhere?

MR. LEROY: Yes, Your Honor, we urge that it is so possible in the short run.

QUESTION: The Attorney General of the State of Washington seemed to be arguing that there would have to be an escapement of a great many other fish that were never destined for Idaho.

MR. LEROY: We are not certain on the merits, once we hear the evidence that that would be so, Your Honor.

But in any event, --

QUESTION: That is part of the merit.

MR. LEROY: Yes.

In any event, should the Court so conclude a part of that equitable apportionment in the short range, a part of that additional escapement could possibly be made up out of the Idaho-Oregon-Washington share. The Sohappy litigation in the State of Oregon adjudicated not just the Indian rights as against Oregon and Washington and its residents but as against all non-Indian, non-treaty persons regardless of their domicile. Thus it is our contention that the Idaho share should properly be taken out of the Oregon and Washington share alone.

And fourth, I would direct the Court's attention to --

QUESTION: How are these three runs reduced by the commercial or sports fishery below Bonneville?

MR. LEROY: There is an extremely complex set of figures.

QUESTION: I take it that the commercial fishery doesn't affect these three runs. At least that is not the major focus of the commercial fishery.

MR. LEROY: Your Honor, it would be our contention that the commercial fishery does affect these three runs.

QUESTION: How else are the runs affected by fish-

ing?

MR. LEROY: And, in addition, the record will show that there is substantial sports fishery in that first five zones coming in from the Columbia River as well under the exclusive regulation of Oregon and Washington. So we would urge that both the propositions, sports fishery which is even less selective in some respects than the commercial fishery are threats to Idaho and threats that need to be addressed in this litigation.

QUESTION: Of course it may turn out that Washington and Oregon, either commercially or sportswise, aren't really affecting your three runs substantially?

MR. LEROY: Your Honor, we are more than willing to explore that should the Court give us the opportunity.

Our fourth and final point would be this, that the wasted philosophy discussed by Oregon, the sense that if Oregon and Washington let them go by, that commercial fishery zone some will die and some will not go to Idaho and therefore they are wasted, is precisely the kind of short-term, short-sighted over-harvest in the name of waste that brings us to this Court. Gentlemen of the Court, there is no possibility of mutual accommodation on that basis. There is no possibility of mutual accommodation in this matter without a judgment of this Court, and this is the last courthouse and the last courthouse door.

We would urge the Court to avoid a needless and unfortunate technical dismissal in this original jurisdictional matter. We would earnestly petition the Court to allow this case to proceed to the merits so that no man on the Columbia River will ever say that his net has caught the last living steelhead.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:21 o'clock a.m., the case in the above-entitled matter was submitted.)

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