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Anadromous Fish Law Memo

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ODD MAN OUT WINS A PRELIMINARY VICTORY: AN ANALYSIS OF THE SUPREME COURT'S DECISION IN IDAHO v. OREGON and WASHINGTON

On January 21, 1980, for the sixth time in the past dozen years,[1] the United States Supreme Court was confronted with the thorny problem of dividing dwindling numbers of Pacific Northwest anadromous fish among competing interests. In Idaho v. Oregon and Washington[2] the Court ruled that Idaho's attempt to obtain a judicial allocation of the non-treaty share of upriver anadromous fish runs among the three states could proceed to a trial on the merits.

This Memo examines the Idaho decision and offers an analysis of the potential impacts of the still pending proceedings on the already intractable problem of allocating the steadily declining salmon and steelhead runs of the Columbia Basin between competing user groups.

I. BACKGROUND

Idaho's 3,000 miles of high quality fish habitat, ideal for spawning and rearing anadromous fish, traditionally have supported an economically viable sports fishery. In recent years, however, despite increasingly intensive artificial propagation programs, the number of adult fish returning to Idaho has dropped dramatically, with a predictable negative impact on the state's sport fishing industry.

As a result, in the early part of the last decade Idaho attempted to become a member of the Columbia River Fish Compact[3] -- which is essentially a Congressionally approved contract between Oregon and Washington requiring the

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consent of both states before devising regulations controlling the harvest of anadromous fish in the lower Columbia River. The Compact enables Oregon and Washington to allocate the non-treaty share of the resource among themselves. Since some of the allocated fish are bound for Idaho spawning grounds, Idaho's interests in becoming a member of the Compact are obvious. Its efforts, however, have failed repeatedly.[4]

Frustrated at this failure, in 1975 Idaho sued Oregon and Washington in the United States Supreme Court[5] seeking an "equitable apportionment" of the fishing rights for spring and summer chinook salmon and summer steelhead. As is typical in this type of lawsuit, the Court assigned a Special Master to take evidence, hear arguments, and make a recommendation to the Court.

On February 2, 1979 the Special Master recommended that Idaho's case be dismissed.

II. The Special Master's Report

In the proceedings before the Special Master, Oregon and Washington opposed Idaho's suit on three grounds: (1) the pendency of Sohappy v. Smith[6] in the United States District Court of Oregon barred Idaho's claim; (2) Idaho's grievance did not merit the Court's attention; and (3) Idaho's failure to join the United States in the lawsuit required dismissal of the suit.

Regarding the first argument, the Special Master concluded that, although Oregon and Washington remain subject to the continuing jurisdiction of the Sohappy court, the pendency of this litigation did not bar Idaho's action because Idaho was not a party to the Sohappy litigation, and was unlikely to be allowed to intervene in the District Court proceedings at this late date. The Special Master also noted that since Idaho was seeking an apportionment of non-treaty upriver anadromous fish, no treaty rights recognized by the Sohappy court would be affected.

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1. For a summary of the Court's 1979 ruling upholding the "Boldt" decision, Washington v. Washington Commercial Passenger Fishing Association, 99 S. Ct. 3055 (1979), see Fish Law Memo #2. Other recent Supreme Court decisions include Puyallup Tribe v. Dept. of Game, 433 U.S. 165 (1977) (Puyallup III) [state courts have no jurisdiction over the Puyallup Tribe as a tribe because of sovereign immunity]; Puyallup Tribe v. Dept. of Game, 414 U.S. 44 (1973) (Puyallup II) [tribe has the right to net fish commercially for steelhead; state courts are to determine equitable allocation between the treaty and sport fishermen]; Puyallup Tribe v. Dept. of Game, 391 U.S. 392 (1968) (Puyallup I) [the state of Washington can restrict net fishing when necessary for conservation purposes]; and Udall v. Federal Power Commission, 387 U.S. 428 (1967) [license to construct High Mountain Sheep dam on Snake River cannot be issued without evaluating alternatives and their effects on anadromous fish, including building no dam at all -- see Fish Law Memo #3, p. 2].

2. Idaho ex rel Evans v. Oregon, 48 U.S.L.W. 4115 (1980).

3. 40 Stat. 915 (1915).

4. Master's Report at 9.

5. Under Art. III, § 2 cl.2 of the United States Constitution and 28 U.S.C. § 1251(a)(1) the United States Supreme Court has original and exclusive jurisdiction over disputes between two or more states. In practice, however, the Court has exercised its discretion to deny the parties' request to file a complaint when a sufficient federal question is not alleged.

6. 302 F. Supp. 899 (D. Ore. 1969), consolidated with United States v. Oregon. Sohappy involved a suit brought by certain members of the Yakima Tribe against Oregon fish and wildlife officials in order to define the nature and extent of their treaty fishing rights. Ultimately, the United States Ninth Circuit Court of Appeals affirmed the District Court holding that the treaty fishermen were entitled to a fair and equitable share of the anadromous fish, which in the case of spring chinook meant fifty percent. 529 F.2d 570 (9th Cir. 1974). Subsequently, a management plan was presented to and approved by the District Court, which had retained continuing jurisdiction, thus providing the basis for the claim that the litigation is "pending." The plan established allocation formulas for salmon and steelhead runs destined for areas above Bonneville Dam. According to the plan, the treaty fishermen get forty percent of the harvestable spring and summer salmon runs and are limited in their steelhead harvest to those fish taken for subsistence and ceremonial purposes (as well as those taken incidental to commercial fisheries provided for in the plan).

As to the second argument, the Special Master concluded that the Court was competent to resolve the problem of apportioning the fish between the parties. Analogizing apportionment of anadromous fish in an interstate river to apportionment of the water of an interstate river (disputes over which the Supreme Court has adjudicated on numerous occasions), the Special Master concluded that Idaho had presented a federal question over which the Court could assert jurisdiction.

Finally, the Special Master examined the argument that the United States must be a party to the Idaho suit. According to Oregon, Washington, and the United States (which was invited to submit a "friend of the court" brief) there were three reasons why the participation of the United States in this lawsuit was necessary. First, under the Fishery Conservation and Management Act of 1976 the federal government regulates the ocean fishery from the three mile state jurisdictional boundary to the two hundred mile limit. It therefore has a substantial effect on the number of fish returning to the Columbia River. Second, the federal government has certain trust obligations to a number of Columbia Basin tribes and consequently would have to participate in the suit if the tribes' fishing rights would be affected by Idaho's claims. Third, the federal government owns eight hydroelectric dams that separate Idaho from the Pacific Ocean (Bonneville, The Dalles, John Day, McNary, Ice Harbor, Lower Monumental, Little Goose, and Lower Granite), the operation of which has a significant impact on the vitality of the upriver fish runs.

Because of these latter three assertions, the Special Master declared that the United States was an "indispensible party" and recommended that the suit be dismissed unless the federal government was made a party. Because of the doctrine of sovereign immunity,[7] Idaho could not force the federal government to participate in the suit against its will. Since the United States refused to intervene, the net result of the Special Master's conclusion was that Idaho was unable to obtain a judicial forum in which to present its claim.

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7. Sovereign immunity, a much criticized doctrine evolving from the medieval notion that "the King can do no wrong", effectively means that the United States cannot be sued without its consent.

III. The Supreme Court Decision

The Supreme Court's 7-2 decision essentially rejected all of the Special Master's indispensibility determinations and overturned the recommendation to dismiss Idaho's suit. The Court specifically held that the failure of the suit to include the United States did not prevent the Court from rendering an adequate judgment and remanded the case to the Special Master with instructions to proceed on the merits.[8]

While agreeing with the Master that the federal regulation of the ocean fishery affects the total number of fish returning to the river, the Court concluded that such regulation has little to do with the issue of the proper allocation of non-treaty fish once they have entered the Columbia River.

The Master's reliance on the trustee relationship between the United States and the tribes also was discounted by the Court. Under the terms of the Sohappy plan, the non-treaty fishermen have the right to the opportunity to catch a percentage of the "harvestable fish."[9] Since Idaho seeks an equitable apportionment only of the non-treaty share, the Court concluded that "as a mathematical proposition the relief sought by Idaho need not involve the Indians at all."[10] The Special Master came to basically the same conclusion but felt that without some control over the tribes, the Court could not guarantee that more fish would reach Idaho even though more fish would be passing through Oregon and Washington's non-treaty fishing areas. Without this guarantee, the Special Master felt that an adequate remedy was impossible. The Supreme Court apparently did not share the Special Master's fear that the tribal fishermen might sabotage the scheme by taking more

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8. In the course of its opinion, the Court did not discuss the defendants' first two arguments (i.e., that the pendency of the Sohappy case barred the suit and that Idaho's claim was insufficient to warrant the Court's attention), thus impliedly accepting the Master's rejection of them.

9. Harvestable fish is defined in the Plan as those fish entering the Columbia River and destined to pass Bonneville Dam, not including allowances for ceremonial and subsistence fish and spawning escapement.

10. Idaho ex rel Evans v. Oregon and Washington, 48 U.S.L.W. 4115, 4117 (1980).

fish than they were allocated under Sohappy.[11] Moreover, should a violation of the Sohappy decree occur, the Court noted that Idaho could intervene in the Oregon District Court proceeding for the sole purpose of enforcing the decree.

Turning to the last of the indispensibility factors, the Supreme Court disagreed with the Special Master's reliance on the effects of the eight federal dams on fish production as requiring the presence of the United States in the litigation. Since Idaho stressed that it did not object to the operation of the dams, the Court accepted the argument that more fish reaching the dams will result in more fish crossing the dams and ultimately more fish reaching Idaho. The Court noted that mortality rates have been estimated and incorporated into existing apportionment plans and implied that similar estimates could be made a component of an apportionment plan that included Idaho.

The State of Washington, apparently not convinced that the Special Master's rationale would carry the day, advanced two further arguments before the Supreme Court. First, the state asserted that the Sohappy plan was founded on the assumption that the non-treaty fishermen in Oregon and Washington were entitled to take any fish not allocated to treaty fishermen or spawning escapement. Thus, any allocation to Idaho would abrogate the Sohappy agreement. The Court, however, rejected this argument, noting that the agreement only allocates the fish between the treaty and non-treaty fishermen and does not purport to allocate the non-treaty share among the particular states. Furthermore, the Court observed that even if the agreement did so allocate, it would not survive a Supreme Court finding that Idaho was entitled to some share of those fish now harvested by Oregon and Washington.

Washington's second argument was that so few fish are being harvested by non-treaty fishermen at the present time that further restrictions would not have an appreciable effect on the number of fish reaching Idaho. The Supreme Court, while not dismissing the claim entirely, found that it was irrelevant to the question of whether Idaho's claim should be heard. Rather, the Court felt that this argument addressed the merits of Idaho's case, and therefore should be raised at the subsequent proceedings on the merits. The Court then remanded the case to the Special Master with instructions to proceed on the merits.

IV. Looking Ahead to Trial on the Merits

Notwithstanding the importance to Idaho of the Supreme Court's ruling, the dispute is far from resolved. If past adjudications of disputes of this sort are any indication, the litigation will be protracted. Given the number of actors involved and the array of issues that must be addressed, determining an "equitable allocation" may prove to be a difficult and time-consuming process. On the other hand, it may be a short-lived battle since an out-of-court settlement is always possible, and perhaps has greater appeal to Oregon and Washington now that Idaho's position has been strengthened by the Court's preliminary decision. The question, of course, is whether it has improved enough to encourage settlement.

A. Potential Effects on Oregon and Washington

If Idaho prevails on the merits, the most direct impact will be on the non-treaty fishing practices of Oregon and Washington. Even if Washington's suggestion that nothing else can be done is true, the Court nevertheless may be able to fashion a prospective remedy for Idaho which would at least change the harvesting practices in the future. For instance, the Court might make Idaho's allocation of the upriver runs contingent on the improvement of the stocks. In this situation, what might initially be a "hollow right" might ripen into something more significant in the future.

On the other hand, as long as the runs are large enough to permit some non-treaty fishing in the lower river (although the lower river spring chinook gillnet season this year was only one day -- see Fish Law Briefs) Washington's contention that nothing more can be done may be difficult to prove and might convince the Court that Idaho's

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11. Since more fish would be entering the tribal fishing zone above Bonneville Dam on their way to Idaho, the tribal fishermen potentially will have more fish to catch.

remedy need not be contingent. Thus, the Court might, for example, order the lower river gillnet fishing seasons adjusted to protect Idaho's allotment. Furthermore, assuming there exists the capability to estimate the percentage of ocean fish that return to the Columbia River, the Court could order state-regulated ocean fishing within the three mile limit reduced in order to ensure that a greater number of fish enter the Columbia River estuary and ultimately reach Idaho.

Should Idaho prevail on the merits, the manner in which the Supreme Court defines Idaho's share of the fish will determine which non-treaty fishing interests will shoulder the burden of providing more fish to Idaho. If Idaho is allocated a percentage of the non-treaty, Idaho-bound fish still in the ocean, all user groups (i.e., state regulated ocean fishing, lower river, and upriver) may have to reduce their harvests in order to assure Idaho its share. Alternatively, if Idaho's share is defined as a percentage of the non-treaty share of the fish once they have entered the Columbia River, only the lower river commercial and sport fishery will feel the impact. Finally, if Idaho's share is defined as a percentage of the non-treaty fish passing Bonneville Dam, the upriver sport fishermen may bear the entire burden of satisfying Idaho's court-ordered share of upriver anadromous fish.

B. Potential Effect on the Indians

In contrast to the more obvious impacts on Oregon and Washington, the potential effects on the tribal fishermen are harder to predict. On first impression, it might appear that the tribes would be delighted with the Court's decision. Should Idaho prevail on the merits, more fish will be passing Bonneville Dam, giving the treaty fishermen a better chance to catch their quota guaranteed by the Sohappy decision. On the other hand, if Idaho loses the case on the merits, the tribes presumably will be no worse off.

It is worth noting, however, that the tribes did not request to participate in the suit nor did they express support for Idaho's claims. This may be attributable to a general distrust the tribes have for any scheme subjecting the upriver fish to further manipulation, even though tribal fishermen may benefit from the participation of another upriver interest in the regulatory scheme. More probably, the tribes' quiescence is due to their desire to avoid any situation which might jeopardize their Sohappy allocation. Thus, the Idaho suit is potentially a two-edged sword for the tribes: perhaps providing an ally for the maintenance of upriver runs, but also perhaps providing an additional competitor that must be dealt with in devising fishing regulations.

C. Outlook for the Upriver Stocks

The ultimate impact on upriver anadromous fish stocks of a ruling favorable to Idaho on the merits of the case is far from clear. On the one hand, if Idaho is adjudicated a portion of the non-treaty catch, the upriver runs may benefit from having an additional advocate with harvesting rights. Moreover, having the upriver state participate in the allocation process along with its downriver neighbors may enhance the prospect for more comprehensive decisionmaking, since greater geographic representation will result.

On the other hand, there is no assurance that allocating to Idaho a share of the nontreaty catch will measurably improve prospects for the depleted upriver runs. There is, for example, no real assurance that reducing the Oregon and Washington take will result in more fish reaching Idaho -- more fish passing Bonneville Dam may merely mean more fish passage mortalities at the seven additional federal dams that Idaho-bound fish must hurdle. This prospect underscores the futility of attempting to equitably allocate a diminishing resource without addressing the causes of its decline. An equitable share of nothing remains, undeniably, nothing.

Without a commitment from the federal government to alter the operations of Columbia Basin federal water projects, any potential solutions to improve the depleted state of the upriver runs will necessarily be piecemeal. This is perhaps best illustrated by the federal government's commitment of $70 million for the construction of upriver hatcheries without a commensurate effort to alter project operations in order to ensure that the fruit of these federal dollars will not be destroyed in federal power turbines or stranded in federal reservoirs.[12]

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12. See Fish Law Memo #6, pp. 4-9, for additional details on the Lower Snake River Compensation Plan and Columbia Basin water project operations.

Of course, the ultimate irony in the still-pending Supreme Court case is that in order to gain access to the Court, Idaho had to narrowly frame its claims to exclude consideration of the effects of federal activities on Idaho anadromous fish -- thus ensuring that any forthcoming judicial resolution will necessarily be piecemeal in nature. The situation reinforces the critical need for a comprehensive solution: one that will provide institutional mechanisms affording all users of Columbia Basin water resources an opportunity to participate in decisions affecting the management of this most highly developed river system in the world. Currently the best (though not the only) prospect for achieving such a comprehensive solution may be found in the pending Northwest Energy Bill (some versions of which contain fish protection provisions -- see below), rather than through the judicial process.

The above analysis is principally the work of Michael McArthur-Phillips, whose more detailed law review article "Odd Man Out: Idaho's Bid for a Share of Upriver Anadromous Fish" will appear in Environmental Law's "Symposium on the Columbia River." The symposium issue is available for $5.00 from Environmental Law, Lewis and Clark Law School, 10015 S.W. Terwilliger Blvd., Portland, OR 97219.

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FISH LAW BRIEFS

HOUSE COMMERCE COMMITTEE PASSES ENERGY BILL WITH STRONG FISH PROVISIONS

In what may be the most significant congressional action ever taken to protect the Region's depleted anadromous fishery stocks, the House Interstate and Foreign Commerce Committee on March 19 passed its version of S. 885 -- the "Pacific Northwest Electric Power Planning and Conservation Act." The House Committee's version of the bill that originally passed the Senate in April, 1979 contains provisions that could ensure attainment of the unfilled commitment to parity in water project operations that fisheries' interests were promised over two decades ago with the enactment of the Fish and Wildlife Coordination Act.[1] For example, among its five purposes[2] the proposed legislation seeks

> to protect, mitigate, and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish, which are of significant importance to the social and economic well being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions substantially obtainable from the management and operation of the Federal Columbia River Power System and other facilities on the Columbia River and its tributaries.

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1. See Fish Law Memo #6.

2. The other four purposes are: (1) to encourage conservation and efficiency both in the use of electric power and in the development of renewable resources and to assure an adequate, efficient, and reliable power supply consistent with applicable environmental laws; (2) to provide for widespread participation and consultation (including federal and state fisheries agencies, Indian tribes and the public) in developing regional energy and fisheries protection plans; (3) to ensure that Pacific Northwest electric consumers continue to pay all the costs of producing, transmitting, and conserving the resources necessary to meet the Region's electric power requirements; and (4) to maintain (except as specifically altered by the Act) the existing authorities and responsibilities of federal, state, local, and private entities and the ability of consumers to take actions under other federal and state laws.

In order to achieve this goal § 4(h) of the Committee's bill expands considerably upon the language employed in the same section of the Senate bill. The Commerce Committee version essentially contains four separate directives in § 4(h), which embody most of the recomendations set forth in Anadromous Fish Law Memo #4:

1. The Power Planning Council[3] is required to request (prior to the development or amendment of the regional electric energy plan) the recommendations of federal and state fish and wildlife agencies and indian tribes concerning: (a) measures to protect, mitigate, and enhance fish and wildlife affected by the operation of Basin dams, specifically including measures designed to achieve "sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish"; and (b) research and development designed to provide improved fish passage and survival conditions at the Basin's hydroelectric dams.

These fisheries agency and tribal recommendations must be made within 90 days of the Council's request and must be supported by "detailed information and data." They are then subject to review and comment (including, at the discretion of the Council, public hearings) by water management agencies, power producing agencies, energy customers, and the general public. If the Council determines that the recommendations are "not inconsistent" with the purposes of the Act,[4] then the Council must adopt the recommendations.[5] The Council's decision is expressly made subject to the standards of judicial review contained in the Administrative Procedure Act.[6]

2. BPA is directed to fund measures designed to protect fish and wildlife consistent with the purposes of the Act.

3. BPA and other federal agencies responsible for the operation or regulation of hydroelectric facilities are directed exercise their responsibilities, consistent with the purposes of the Act, to adequately protect, mitigate, and enhance fish and wildlife in a manner that provides "equitable treatment"[7] for fish and wildlife.

4. The Council must submit an annual report to the relevant congressional committees (drafts of which may be commented upon by fisheries' agencies and the public) on all actions it takes to implement the Region's Energy Plan, including fishery protection measures.

While the Commerce Committee's version of the bill represents a dramatic improvement over the bill passed by the Senate, predictions as to its adoption by Congress are premature. The two biggest hurdles are the House Interior Committee, whose Water and Power Resources Subcommittee now will mark-up Commerce Committee's language, and eventually a joint House-Senate conference committee which will have to reconcile any differences between the language passed by the two houses. Political pressure from power interests to dilute fishery protection provisions is likely to be considerable. Persons willing to express their interest in the legislation should contact:

Cong. Abraham Kazen, Jr.
Chairman, Subcommittee on Water and Power Resources
U.S. House of Representatives
Washington, D.C. 20515

Oregon residents may wish to contact Congressman Jim Weaver, a member of the Subcommittee, at the above address. Other key roles in the evolution of the law are likely to be played by Congressman Al Swift [1511 Longworth House Office Bldg., U.S. House of Representatives, Washington, D.C. 20515] and (particularly in the conference committee) Senators Henry Jackson, Frank Church, and Mark Hatfield, all members of the Senate Energy and Natural Resources Committee. [U.S. Senate, Washington, D.C. 20510].

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3. The Senate's 5-member version of the Council was composed of one member each from Oregon, Washington, Idaho and Montana and the Administrator of BPA. The House Committee's bill, on the other hand, would establish an 11-member Council with proportional representation as follows: 4 members from Washington, 3 from Oregon and 2 each from Idaho and Montana [§ 4(a)].

4. See note 2 and accompanying text.

5. The Council would, however, have the authority to modify or adopt other recommendations it finds consistent with the purposes of the Act.

6. § 4(a)(1) of the Act, referencing § 9(d).

7. An improvement over the "equal consideration" language mentioned in Fish Law Memo #4.

PACIFIC COUNCIL ADOPTS OCEAN SALMON PLAN

On March 28, the Pacific Fishery Management Council submitted a much-criticized 1980 salmon management plan to the Secretary of Commerce, thereby setting the stage for what may be another round of litigation over the consistency of the plan with treaty fishing rights. The Secretary must either approve or disapprove the plan within sixty days -- if disapproved in whole or in part, the Pacific Council will have 45 days to resubmit the plan. As a practical matter, however, these time constraints are modified substantially by the May 1 opening date set by the Council for the commercial troll fishery.

This year, the Council has established a "goal" of a return of 169,000 upper fall chinook and has set a commercial troll season that provides for three additional days of fishing than occurred last year. The Council has recommended that an ocean recreational season of the same length as last year's but has provided for an increase in the bag limit to 3 fish per angler from last year's 2-fish limit. Additional information on the Council's action will be provided in the next issue.

ATTEMPTS BY GILLNETTERS TO LENGTHEN SPRING CHINOOK SEASON FAIL

A record-low run size estimate and a concern that sport fishing opportunity not be pre-empted by commercial fishing prompted the Columbia River Compact to permit only one day of gillnetting for spring chinook on the lower Columbia this year. The run size estimate proved accurate, and the record-low run resulted in a total commercial catch of less than 300 fish -- the lowest in history.

Asserting that the 24-hour season was designed to unfairly reduce the commercial harvest for the benefit of the sport fishery, commercial fishing groups filed suit in both Washington and Oregon courts in an attempt to require the states to lengthen the gillnet season. Both courts dismissed the suits on jurisdictional grounds.

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