

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 67 Original
TITLE STATE OF IDAHO, EX REL. JOHN V. EVANS, GOVERNOR:
JIM JONES, ATTORNEY GENERAL: JERRY M. CONLEY,
DIRECTOR, DEPARTMENT OF FISH AND GAME
PLACE Washington, D.C.
DATE March 23, 1983
PAGES 1 thru 53

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ALDERSON REPORTING

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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF IDAHO, EX REL. JOHN V. :
EVANS, GOVERNOR; JIM JONES, :
ATTORNEY GENERAL; JERRY M. :
CONLEY, DIRECTOR, DEPARTMENT :
OF FISH AND GAME, :
Plaintiffs, :
v. :
STATES OF OREGON AND WASHINGTON :
- - - - -x

No. 67 Original

Washington, D.C.
Wednesday, March 23, 1983

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:07 o'clock a.m.

APPEARANCES:

JIM JONES, ESQ., Attorney General of Idaho, Boise, Idaho;
on behalf of the Plaintiffs.
EDWARD B. MACKIE, ESQ., Chief Deputy Attorney General of
Washington, Olympia, Washington; on behalf of
Defendant Washington.

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1 disproportionate sharing of Idaho origin fish, as I have
2 just outlined, the very evidence which we believe this
3 Court wanted in the original decision issued in 1981.

4 He chose a narrow, unrepresentative time frame
5 of runs depressed by dams and overfishing by the
6 defendants, when there was no significant harvest of
7 fish available. The only significant harvest was by the
8 defendants in 1977, and it was on the summer -- on the
9 spring chinook run. At that time, even though there
10 were not enough fish to meet the escapement that the
11 defendants had agreed on with the Indians in the
12 five-year plan, the defendants conducted a downstream
13 harvest, and during that year they took 78 percent of
14 the harvest of spring chinook, and that was during the
15 five-year period that the Master actually did consider.

16 Idaho did harvest some fish during those
17 years, but they were harvests that were conducted in the
18 hatchery areas on surplus fish that were not needed for
19 spawning requirements. The Master did not take into
20 account the massive effort that was just getting under
21 way to restore these runs to their former numbers so
22 that they would once again be harvestable.

23 The facts are that the runs are being restored
24 through existing hatchery efforts in the three states.
25 They are going to be restored additionally under the

1 Lower Snake which contemplates nine new hatcheries.
2 About three or four of those are presently on line, and
3 others are in the works. Under the Northwest Electric
4 Power Planning and Conservation Act, a tremendous effort
5 is just getting under way to restore the damage caused
6 by the Lower Columbia Dams, and that is going to have an
7 effect, because it is going to be implemented starting
8 immediately.

9 Granting relief to Idaho will not be in vain,
10 because passage mortality losses upstream are such now
11 that renewed runs will get to Idaho. An allocation
12 formula can be made using existing methodology and
13 formulas that the defendants use each year already in
14 making allocations of fish for the Indians under their
15 five-year plan.

16 It is not going to be that much more difficult
17 to take a share of the non-treaty fishery, the
18 non-treaty harvestable surplus, and set it aside for
19 Idaho, so that we can share in the fish that we
20 contribute to these runs.

21 The Indians found that it was necessary for
22 them to get a court decreed allocation of fish, because
23 they are in the same position that we are. We are end
24 users. In other words, the defendants fish below both
25 us and the Indians. They can take the fish. We have no

1 control over them. And it was apparent to the Indians
2 that they needed the protection of a court decree, and
3 we believe that we do, too.

4 QUESTION: What kind of a formula is used to
5 protect the Indian rights?

6 MR. JONES: In the Sorhappy case, the Federal
7 District Court said that the Indians were to get 50
8 percent of the harvestable surplus. Then the parties
9 agreed on a five-year plan, starting in 1977 -- it just
10 terminated last year -- whereby an escapement of 120,000
11 fish over Bonneville was agreed on. The Indians were
12 then to get a certain amount, and it is in the formula
13 in the five-year plan for ceremonial and subsistence
14 fishers.

15 QUESTION: Is it in the nature of an
16 escapement number?

17 MR. JONES: It is after the escapement is
18 met. Then the fish are shared on a percentage basis.
19 The Indians get 40 percent above the escapement and
20 above the ceremonial fishery. The defendants get 60
21 percent. So it is on a percentage basis. And that is
22 fair to all parties, and that is what we are basically
23 after here.

24 I would like to give you a brief background
25 on --

1 QUESTION: What is the formula that you think
2 will protect Idaho's interests?

3 MR. JONES: The formula that we have laid out
4 is essentially at Pages 81 and 82 of our brief, and we
5 are saying that you go one step beyond the five-year
6 plan, and that you take the 60 percent of the non-treaty
7 fishery and slice off an allocation for Idaho. We are
8 saying that with regard --

9 QUESTION: An allocation not yet determined?

10 MR. JONES: Not yet determined. What we are
11 suggesting is that of that 60 percent, you use existing
12 methodology and formulas to find out how much Idaho
13 contributed. If Idaho contributed, say, 40 percent to
14 that 60 percent, then you take that 40 percent and give
15 Idaho 40 percent of it and give the defendant 60
16 percent. In other words, we are willing to share the
17 fish that we contribute.

18 QUESTION: But didn't the Master say you could
19 not tell how many Idaho had contributed?

20 MR. JONES: The Master indicated that, but the
21 un rebutted testimony by Idaho's experts was that you
22 could determine it, and that un rebutted testimony was
23 based on formulas that the defendants have devised. And
24 apparently the Master did not understand those formulas,
25 but we are willing to live with them.

1 QUESTION: Well, General Jones, you are not
2 suggesting the Master isn't entitled to disbelieve
3 testimony even though it is unrebutted, are you?

4 MR. JONES: Well, we are saying that if it is
5 not inherently incredible, if it is not contradicted, if
6 people don't punch holes on it, if it is not inherently
7 incredible, he has to live with it, we think.

8 QUESTION: What if the Master concluded that
9 it is simply an unknowable factor, and therefore it
10 wouldn't be a matter of impugning the credibility or
11 integrity of the witness, but simply a conclusion that
12 the witness was in outer space in terms of giving an
13 opinion?

14 MR. JONES: Well, Mr. Chief Justice, I think
15 that he did not say it was unknowable, and possibly it
16 could be, but historically the runs have been 50 percent
17 contributed by Idaho, and that is recognized by the
18 experts for Washington, Oregon, and Idaho, and fish
19 counts are kept, so that you can find out certainly a
20 year afterwards what the run was, and what --

21 QUESTION: Aren't you including in Idaho's
22 contribution the hatchery fish?

23 MR. JONES: We include hatchery fish in all
24 the calculations.

25 QUESTION: Why do you assign those hatcheries

1 to Idaho?

2 MR. JONES: Pardon?

3 QUESTION: Why do you assign those hatcheries
4 to Idaho as a state?

5 MR. JONES: Well, because this Court, I
6 believe, recognized in the Washington fishing vessel
7 case -- I believe it was that case -- that hatcheries
8 are there primarily to compensate for damages caused by
9 the dams, and the principle has been recognized with
10 respect to the Indians, and it should be recognized with
11 respect to us, and those hatcheries are apportioned,
12 like under the Lower Snake Compensation Plan, those
13 hatcheries are apportioned to compensate, they are
14 distributed to compensate for the damages that were
15 caused by the dams.

16 We didn't put the dams there. We didn't put
17 those dams there that caused our fish to die.

18 QUESTION: You didn't put all the hatcheries
19 there, either.

20 MR. JONES: But --

21 QUESTION: Did you?

22 MR. JONES: It is just like the fellow that
23 goes out and gets mowed down on the street. He didn't
24 get mowed down --

25 QUESTION: Well, I just asked you, did you put

1 all the hatcheries in? .

2 MR. JONES: No, but --

3 QUESTION: Who did?

4 MR. JONES: But when he is compensated --

5 QUESTION: Who did? Who --

6 MR. JONES: Idaho Power put some of them in.

7 QUESTION: And who else?

8 MR. JONES: The federal government put some of
9 them in. Idaho put some of them in.

10 QUESTION: How many -- what -- How many
11 hatcheries did Idaho itself put in?

12 MR. JONES: We have funded the McCall hatchery
13 in McCall, Idaho.

14 QUESTION: How many hatcheries are there?

15 MR. JONES: There are eight hatcheries in
16 operation in Idaho.

17 QUESTION: And you say -- and Idaho financed
18 one?

19 MR. JONES: Idaho has financed one. The
20 others were given by way of compensation for dams that
21 we didn't place there. In other words, they are just
22 making up, they are mitigating for the damages
23 occasioned to us by virtue of the fact that they were
24 placed there. We didn't have anything to do with -- and
25 they are mitigating. They are compensating.

1 QUESTION: How many of the fish that you claim
2 Idaho is supplying are hatchery fish?

3 MR. JONES: Presently, about 30 to 50 percent
4 of the spring chinook in the runs are hatchery fish.
5 The rest are wild fish. And about 50 to 60 percent of
6 the steelhead are hatchery fish.

7 QUESTION: Could I ask you again, the formula
8 that you want would provide for how many fish coming
9 over Bonneville?

10 MR. JONES: The same amount that the --

11 QUESTION: The 120,000?

12 MR. JONES: The 120,000 -- well, the 120,000,
13 but you have to include the Indian catch, so it would
14 have to be somewhere over 120,000. But that is what we
15 talk about when we talk about an escapement. It is the
16 number over Bonneville less the Indian catch.

17 QUESTION: And out of the 120,000, how much of
18 that would be necessary to keep their runs going?

19 MR. JONES: All of it.

20 QUESTION: All of it.

21 MR. JONES: All of it. You can't fish on a
22 minimum escapement.

23 QUESTION: Well, all right, but what I really
24 want to know, then, is how would you ever harvest any
25 fish?

1 MR. JONES: Well, we would have to get 120,000
2 fish over the dam plus the Indian catch --

3 QUESTION: Plus your share.

4 MR. JONES: -- and plus our share.

5 QUESTION: I see. The 120,000 is the minimum
6 to keep the runs alive?

7 MR. JONES: That's correct. If we're going to
8 continue the runs, we've got to have at least that many.

9 QUESTION: And how many -- Do you have -- Can
10 you quantify like that, the Indians would get how many
11 fish?

12 MR. JONES: Well, they would get 40 percent of
13 the harvestable surplus. Let's say that there were
14 180,000 fish going over --

15 QUESTION: So they count the fish going over
16 Bonneville --

17 MR. JONES: Right, the defendants do that
18 every year.

19 QUESTION: -- and then you take off 120, and
20 whatever is left over, the Indians get half of them?

21 MR. JONES: Well, no, there are 30,000 fish
22 under their plan that have to go upriver. The
23 defendants can take a certain amount of those, a maximum
24 of 7,500 --

25 QUESTION: Above Bonneville?

1 MR. JONES: -- above Bonneville when you have
2 between 120,000 and 150,000.

3 QUESTION: All right. All right. I've got
4 it.

5 MR. JONES: And then above the 150,000 you
6 have your harvestable surplus, and that is the amount
7 that is allocated out to the treaty and non-treaty
8 fisheries.

9 QUESTION: What would be an optimum
10 escapement, how many?

11 MR. JONES: An optimum escapement would be
12 somewhere in the vicinity of 150,000 plus the Indian
13 fisheries. And that would provide for maximum sustained
14 yield, and essentially that is what they are shooting
15 for.

16 QUESTION: How many years have there been that
17 many available for an optimum escapement?

18 MR. JONES: Prior to the 1970's, there would
19 have been certainly enough for an optimum escapement. I
20 think --

21 QUESTION: Since the seventies. Are there
22 enough for an optimum escapement?

23 MR. JONES: Prior to the 1970's -- I believe
24 that for the first three years of the seventies, there
25 would have been enough. As a matter of fact, it is

1 interesting that when we had seven dams on line in the
2 system, when the mortality rates had been fairly well
3 established at about two fish for each one that reached
4 Idaho through the entire system, so you lose a maximum
5 of one fish as they are coming up the river for one that
6 you get, at a time when we had that situation existing
7 starting in 1970, we had two of the record runs of fish
8 in the spring chinook runs.

9 QUESTION: When was the last dam put in?

10 MR. JONES: The last dam was put in in 1975,
11 but it did not add --

12 QUESTION: And that is the one closest to
13 Idaho, isn't it?

14 MR. JONES: That's the Lower Granite Dam. It
15 did not add significantly to the mortality, because
16 measures were incorporated in that dam to make sure that
17 the fish could get up the ladders. So it did not add
18 very much to the mortality rate.

19 QUESTION: How about going down?

20 MR. JONES: Downstream, mortality is a more
21 difficult situation. But they have had good success
22 with the screening, and one of the things -- one of the
23 things in the Lower Snake Compensation Plan and the
24 Columbia River Basin Plan, a copy of which has just come
25 to our attention, and it has been lodged with the Court,

1 a copy provided to counsel, that plan is designed to
2 either transport fish around the dams on their
3 downstream migration or to properly screen the turbines
4 so that the won't have the mortalities that we've had.

5 That has been the sticking point, and that is
6 really what the problem is with the narrow constrained
7 time frame that the Master used. He used a time frame
8 where we were suffering yet from overfishing by the
9 defendants in previous years. The runs were suffering
10 from those strains caused to it. They were suffering
11 from the upstream and downstream mortality from the
12 dams.

13 But during that five-year period we didn't
14 take into account all of the massive effort that is
15 being made and going to be made to affect those upstream
16 and downstream mortalities, so we have an artificial
17 period of time.

18 QUESTION: General Jones, to get one fish to
19 Idaho, it requires that two die en route, two others die
20 to get one through to Idaho?

21 MR. JONES: No. With regard to spring
22 chinook, one or less have to die to get one to Idaho,
23 and that is set out in Pages 4 and 5 of our reply
24 brief. It has the upstream mortality rates for the
25 years 1962 through 1980. The mortality rate for spring

1 chinook in 1962 was 1.33. In 1968, when John Day Dam,
2 and that's the big killer, when John Day Dam went on
3 line, it went to 1.56, and it has been going back and
4 forth between that figure and 2.24 since that period of
5 time. But it is generally --

6 QUESTION: So it is one to two now --

7 MR. JONES: Right.

8 QUESTION: -- to get one to Idaho.

9 MR. JONES: Right. With regard --

10 QUESTION: And it is your position that it is
11 better to prevent people downstream from catching those
12 fish, that we should force them to die rather than be
13 caught and used to get Idaho's fish upstream? Is that
14 basically it?

15 MR. JONES: Well, we are not saying that we
16 should force them to die. We are saying that we have
17 got a strong state commitment by the state of Idaho and
18 by the federal government to ensure that those runs do
19 not die out. The Central Idaho Wilderness Act, the Wild
20 and Scenic Rivers Act give high priority to maintaining
21 those salmon runs.

22 As a matter of fact, the defendants give
23 priority by their 120,000 escapement plus the Indian
24 harvest. They give high priority to maintaining those
25 runs. And I think that all of the parties would like to

1 see those runs continue.

2 QUESTION: What is going to happen now that
3 the five-year plan has terminated? Is there some
4 prospect for another agreement?

5 MR. JONES: Well, if the five new --

6 QUESTION: Because the Indians are not parties
7 to this case.

8 MR. JONES: What we do here today will not
9 affect the Indians, because they have a court decree to
10 fall back on.

11 QUESTION: The United States is not a party,
12 either.

13 MR. JONES: That's correct, and this Court
14 decided that that was not necessary.

15 QUESTION: No, I know.

16 MR. JONES: And we don't believe that it is
17 necessary, because we have a court decree to fall back
18 on for the Indians where they get 50 percent of the
19 fish.

20 QUESTION: So you want the defendant states
21 not to fish so much below Bonneville.

22 MR. JONES: That's essentially it. We are
23 saying, let a few --

24 QUESTION: And let more fish get through
25 Bonneville and also keep their catch down above

1 Bonneville.

2 MR. JONES: That's correct. They don't do too
3 much fishing above Bonneville. We are just saying, let
4 a few of them come up to Idaho. Now, you know, during
5 the events leading up to this suit, we did have an
6 agreement at one point, and that was in 1972, and I
7 believe the defendants recognize that we were entitled
8 to some fish, and at that time there were some hatchery
9 fish, too, but anyway, they agreed in 1972 that we could
10 have an upriver escapement of spring chinook of 40,000.
11 That would be above the uppermost Snake Dam.

12 And essentially that would give us a spawning
13 escapement goal of 30,000 plus about 10,000 above the
14 uppermost Snake Dam.

15 QUESTION: How many fish do have to reach
16 Idaho waters to satisfying the spawning requirement,
17 30,000?

18 MR. JONES: Thirty-thousand over the uppermost
19 dam.

20 QUESTION: Has to get to Idaho?

21 MR. JONES: Right, and anything above that can
22 be fished on. Actually, you can fish below that level
23 if you take the surplus of the hatcheries, which we did
24 during this five-year period, and it is a progressive
25 way to manage your fish. It is recognized by the Oregon

1 Department of Fisheries and Wildlife as being a
2 progressive technique that all of the parties are going
3 to have to adopt.

4 QUESTION: Have they tried the transporting of
5 fish downstream around the dams?

6 MR. JONES: That has been tried, and it has
7 been successful for steelhead.

8 QUESTION: How about the salmon?

9 MR. JONES: The salmon?

10 QUESTION: What do they do, lose their way on
11 the way back?

12 MR. JONES: No. If you use a barge, they can
13 keep the scent.

14 QUESTION: I see.

15 MR. JONES: As far as we know, that's what
16 gets them back up the river. They get the scent of the
17 water.

18 QUESTION: Yes, all right.

19 MR. JONES: But if you use a barge, that
20 generally is taken care of. But in any event, I wanted
21 to just basically outline what Judge Brightenstein felt
22 the situation was when he first considered the case, and
23 this really is representative of the situation.

24 In 1978, in his report, Judge Brightenstein
25 said, "The contribution of Idaho to the total system

1 fishery is substantial. Idaho produces many fish and
2 receives few. To a significant extent, Idaho is
3 subsidizing the downstream fishery, both Indian and
4 non-Indian."

5 And that was supported, those initial findings
6 were supported by uncontroverted evidence in the
7 record. That evidence showed that from 1962 until 1980,
8 Idaho contributed 50 percent to the upriver runs of
9 spring chinook, the defendants harvested 435,622 fish of
10 Idaho origin, constituting 83 percent. They left us 17
11 percent of the harvestable amount.

12 During that same period, we produced 40
13 percent of the summer chinook. They harvested 75
14 percent of the Idaho origin summer chinook for a total
15 of 58,069. We produced or we contributed 48 percent of
16 the steelhead to the upriver run. The defendants
17 harvested 58 percent, which amounted to 370,484 fish.

18 We believe that the evidence building on that
19 shows that not only were the dams depressed because of
20 -- or were the runs depressed because of the dams, and
21 the mortality caused by the dams, but also because of
22 overfishing by the defendants.

23 With regard to spring chinook, they fished in
24 seven years, 1958, '59, '60, '63, '65, '67, and '74, in
25 which an adequate minimum escapement was not provided

1 for, and one of the highest priorities in fish
2 management is to ensure that you have that minimum
3 escapement so that you can continue the species. They
4 took 515,000 fish and about half of those were of Idaho
5 origin.

6 And it should be pointed out that in 1974,
7 just one year before the period that the Master thought
8 was important, they fished against the recommendations
9 of the biologists. The biologists said, we aren't going
10 to have a fishable run, a harvestable run, but they
11 fished anyway, and they seriously impacted that run.
12 The escapement over Bonneville was almost half what it
13 should have been. It was 68,000 and some odd fish.

14 And that had impact. When you overfish in one
15 year, it has impact in the future, because there should
16 have been additional fish available in 1968 which would
17 have been four-year-olds out of the '74 return, and
18 five-year-olds in the 1969 run, yet the 1969 run -- or
19 '79 run, which the Master did consider, was a record
20 low.

21 So, essentially, if we say there is no relief
22 in sight, we are allowing the defendants to benefit from
23 their management practices, which allowed fishing below
24 a minimum escapement.

25 The same situation is generally applied with

1 regard to the summer chinook and the steelhead trout.
2 We believe that a remedy is appropriate, that
3 it is feasible, and that it is necessary. Idaho should
4 be allocated a share of the fish that it contributes to
5 these runs. We are not asking for the defendant's
6 fish. We are asking just to share in the fish that we
7 contribute.

8 As the director of the -- or as the Department
9 of Fisheries in Washington indicated in the publication
10 entitled A Plan for Revitalizing The Salmon Fisheries of
11 Washington State, at Page 8 -- that is exhibit I-25 --
12 "As a general rule, we must recognize that a major
13 proportion of salmon must be returned to all areas where
14 they originate for disposition as their owners choose."

15 And what they are saying essentially is that
16 you have got to reward the people that are the husbands
17 for these fish, maintain the husbandry, the stewards for
18 those fish, to give them some incentive to carry on, and
19 that is what we are asking for.

20 QUESTION: General Jones, can I ask one
21 question?

22 MR. JONES: Yes.

23 QUESTION: And you don't have to answer it
24 right now, but before you get through, it would be very
25 helpful to me if you picked any year you like and tell

1 me for a particular run how many fish you think the
2 Indians, your adversaries, and you could take out of
3 that run under your proposal.

4 MR. JONES: Okay. Justice Stevens, if I
5 could, when I get up during my rebuttal, I will figure
6 that out and --

7 QUESTION: Because I can't -- it is very, very
8 difficult to understand your theory. At least it is for
9 me.

10 MR. JONES: Okay. I would like to outline --

11 QUESTION: I think you are coming into your
12 rebuttal time now.

13 MR. JONES: Okay. I would like to outline
14 just what I think are the minimum elements of any
15 allocation plan. Number One, we need to have minimum
16 escapements over Bonneville and Lower Granite Dams, and
17 that is essentially necessary. Right now it is really
18 essential because the five-year plan has expired, and I
19 don't know that there are any minimum escapements that
20 bind them, so that we can have proper management.

21 There should be an allocation for Idaho, and
22 hopefully an allocation based on contribution, which
23 will give the parties incentive to contribute to those
24 runs.

25 Number Three, there should be a sharing of

1 passage losses, because those dams were built primarily
2 for the benefit of the defendants. They get the
3 benefits of the power. They ought to share the burden
4 of the passage losses.

5 And Number Four, there ought to be a catchup
6 clause just like the Indians have that say, if you don't
7 make the proper allocation this year, the upstream
8 states get it the next year, and it works both ways.

9 I would submit to the Court that these fish
10 are a treasure, not only for Idaho but for the nation,
11 and they can and must be protected and restored, and I
12 think that in order to do that, you have to give the
13 stewards a share of the bounty.

14 Thank you.

15 CHIEF JUSTICE BURGER: Mr. Mackie.

16 ORAL ARGUMENT OF EDWARD B. MACKIE, ESQ.,

17 ON BEHALF OF DEFENDANT WASHINGTON

18 MR. MACKIE: Mr. Chief Justice, and may it
19 please the Court, the starting position that the state
20 of Idaho takes is to assert that the Master in some way
21 restricted the record they had an opportunity to make.
22 That assertion is simply false. The Master did not
23 restrict the record which the plaintiffs had an
24 opportunity to make in this suit. The Master's report
25 and statistics indicates run sizes from 1956 on. The

1 record has material reflecting runs that are prior to
2 1956.

3 What the Master did was, having heard the
4 testimony on the question of indispensability, which
5 resulted in the report, and then subsequently when the
6 matter was remanded to the Master for proceeding upon
7 the merits, took the testimony, the exhibits, and the
8 arguments, and from that looked at the totality and
9 could see the marked changes that have occurred in the
10 Columbia River and Snake system as a result of the dams
11 and the impact on the fishery, and having that knowledge
12 before him, indicated that if the court was to prescribe
13 a decree to address an allocation as sought by Idaho,
14 one should look at what the realities of life are now,
15 to address that decree, rather than to address a decree
16 on the basis of what may have occurred in the 1940's,
17 fifties, or sixties.

18 So, the record is in fact full. It is not
19 restricted to the most recent period.

20 On the presentation of argument for the
21 indispensability question, one of the contentions for
22 indispensability was that most of these dams on this
23 system are owned and operated by the federal government
24 or licensees of the federal government, and therefore
25 the United States for that reason was an indispensable

1 party, because its control of the flow of water through
2 those dams and the turbines as contrasted with spill had
3 a direct impact on the availability of fish.

4 Idaho's response was that they accept the
5 dams, they accept the loss, and therefore the United
6 States was not indispensable upon that theory. This
7 Court in the opinion remanding it back to the Master
8 acknowledged that position taken by Idaho.

9 Now, it turns back to this Court. They are
10 taking the posture that one should in some way apportion
11 the loss that occurs by upstream passage of the fish
12 rather than Idaho being the area where the fishery takes
13 place after the fish have gone through eight dams on its
14 upward matter.

15 QUESTION: Mr. Mackie, do you concede that
16 Idaho is entitled under some theory to an equitable
17 share of the fish?

18 MR. MACKIE: Your Honor, our position on that
19 is that Idaho's claim is novel, it is unique, it has no
20 precedent in terms -- in any case law nor any that they
21 could develop for having "a right" here at all. The
22 Court has found that the issue is in fact justiciable,
23 so that it can be considered by a court for relief.

24 We therefore believe that if there is any
25 right, it is an equitable right, and that equitable

1 right comes in --

2 QUESTION: Well, do you concede that Idaho has
3 an equitable right to some share of the fish?

4 MR. MACKIE: In terms -- I believe that Idaho
5 could present in an appropriate circumstance a need to
6 have some protection which would give rise --

7 QUESTION: Well, just in the abstract, does
8 Idaho have an equitable right to a share of anadromous
9 fish?

10 MR. MACKIE: Your Honor, in the abstract, my
11 response is that the right comes into being because of
12 the need to create it, and therefore if in fact they
13 have demonstrated the need, that gives rise to the
14 equitable right. The equitable right does not exist
15 free-standing, separate, and apart from any --

16 QUESTION: Well, as I read your brief, I
17 thought you were saying that fish just weren't a subject
18 for equitable apportionment, and that the Master was
19 just wrong in saying that Idaho was -- did have an
20 equitable right, and if it could prove it up, it would
21 get relief. I thought you were just against that.

22 MR. MACKIE: Your Honor, what our position was
23 is that Idaho having failed to prove need for any
24 protection, it is not appropriate therefore to label
25 that they have a right at the outset. If they --

1 QUESTION: You don't think our prior opinion
2 precluded the Master -- would have precluded the Master
3 from, after hearing the evidence, saying there is not a
4 right to equitable apportionment?

5 MR. MACKIE: Yes. You are --

6 QUESTION: The case is justiciable. It is
7 like filing a complaint. It is certainly justiciable,
8 but it is justiciable, you might -- you might judge it
9 by saying you fail to state a cause of action.

10 MR. MACKIE: Your Honor, the Master addressing
11 that point found that it was inappropriate to dismiss
12 the action without having it proceed to the merits to
13 determine whether there might be a right that would give
14 rise.

15 QUESTION: Do you disagree with that --

16 MR. MACKIE: And that is what this Court
17 affirmed.

18 MR. MACKIE: Do you disagree with that
19 judgment?

20 MR. MACKIE: No, I do not disagree with that
21 judgment.

22 QUESTION: Okay.

23 MR. MACKIE: But it means --

24 QUESTION: Well, the Master determined that
25 Idaho was entitled to an equitable share, did he not?

1 MR. MACKIE: That's the point that we
2 indicated, that the Master, by having concluded that
3 there was no need for any relief, should not therefore
4 recognize that there is an underlying right. Until the
5 Master finds that there is a need, there should not be a
6 recognition of a right.

7 QUESTION: But you didn't take exception to
8 that.

9 MR. MACKIE: We did not take exception to the
10 Master's conclusion of dismissal of the action. The --
11 I --

12 QUESTION: I am still puzzled --

13 MR. MACKIE: Excuse me.

14 QUESTION: -- about your legal position. I
15 hate to -- Supposing you had a case where there were no
16 dams at all, and your state took off all the fish,
17 fished them all. Would Idaho have any rights?

18 MR. MACKIE: I believe that if the downstream
19 states completely pre-empted the entire fishery --

20 QUESTION: Correct.

21 MR. MACKIE: -- Idaho would be in a position
22 of claiming some relief from the --

23 QUESTION: They would have a legal -- they
24 would have an equitable right under those facts?

25 MR. MACKIE: They would, under the general

1 approach of the water rights cases for original
2 jurisdiction, this Court would in fact condone the
3 fashioning of some relief to protect Idaho from that
4 pre-emptive action by the downstream states.

5 QUESTION: And you don't disagree with that as
6 a matter of law.

7 MR. MACKIE: Right.

8 QUESTION: Well, Mr. Mackie, does your answer
9 suggest that you think every time a person -- a state is
10 entitled to equitable apportionment in the abstract,
11 they are also entitled to a decree? Couldn't the Master
12 -- I mean, I read the Master's finding in this case as
13 being pretty much saying in the abstract they may have
14 some right, but there just isn't any way we could give
15 them relief on these facts.

16 MR. MACKIE: I agree, Your Honor. There is --
17 The Master concluded no relief. And all we are saying
18 is that actually when one "says there is a right" the
19 general reaction is, therefore "there should be a
20 remedy," and that when one is looking to the recognition
21 of something which is new and novel, as is here
22 presented, it is prudent to say that we will try to
23 describe what the nature of that may be when there is a
24 need for some relief.

25 QUESTION: The principle of Ahkan's Razor. If

1 there is no remedy, you don't have to worry about
2 whether there is a right.

3 MR. MACKIE: That's right, Your Honor.

4 QUESTION: In that respect, now, we who are
5 not experienced in water matters may get confused even
6 about very elementary things, water and fish. Is there
7 a difference on the right of a state with respect to
8 water and the contents of the water, on terms of
9 allocation?

10 MR. MACKIE: Yes, Your Honor. The first is
11 that in water rights traditionally those adjudications
12 have tried to resolve and harmonize the respective
13 rights held by individuals and entities in varying
14 states.

15 QUESTION: And is that based on need?

16 MR. MACKIE: That is based historically, when
17 you are dealing with two states both of whom have a
18 right of prior appropriation doctrine, of merging those
19 two systems. When you deal with a state which has
20 Riparian rights and appropriation rights, trying to
21 merge the two systems. But generally those cases have
22 recognized on a historical priority the older
23 established right provided it has not been abandoned.

24 Now, more recently, this Court in the
25 Colorado-New Mexico case issued in December seems to put

1 a more current re-examination of what rights are being
2 exercised that have been historical to determine whether
3 some of those rights may be withdrawn back and
4 transferred. In that case, all of the water had
5 effectively been previously appropriated to New Mexico,
6 and the claim was for water in Colorado. The Master
7 ordered a withdrawal from the New Mexico portion and
8 given to Colorado.

9 This Court remanded it to the Master to make
10 further findings because it was not satisfied that -- of
11 the reasons for the transfer, and the Court had various
12 opinions on it. But it does say that you look more at a
13 current use rather than the historical approach that has
14 been more common in water right. It is to look at what
15 has been the historical pattern of the use and recognize
16 those historical patterns when they can be made
17 compatible.

18 But in the water cases, there are two very
19 important things related to this. One, the water cases
20 have traditionally refused to grant a state -- a
21 preferred position to the state of origin. This Court
22 reaffirmed that refusal in the Colorado-New Mexico case
23 at Footnote 13. That same approach has been in the
24 Nebraska-Wyoming case.

25 Idaho's claim here is "a state of origin" it

1 has. In water right, that does not give a preferred
2 position.

3 Second, in water, the state of origin is in
4 fact where the total volume as it exits the state has in
5 fact been formed. The amount of water as it flows
6 across the border is a certain quantity of water, and
7 then it exits the state. In this situation, Idaho is
8 the place of birth, and those fish which are born there
9 leave Idaho when they weigh between one-tenth of a pound
10 and one-fortieth of a pound when they leave Idaho.

11 When they return, and Idaho is here asserting
12 basically a claim and a preferred position for harvest,
13 those fish average about 15 pounds, which is a factor of
14 150 to 600 times the weight of when these fish left, and
15 that growth and that weight gain all occurs outside the
16 state of Idaho.

17 QUESTION: But certainly not all of it in the
18 state of Washington.

19 (General laughter.)

20 MR. MACKIE: No, Your Honor, it does not. It
21 occurs in river, it occurs on the coastal waters, in
22 Alaska, in the ocean.

23 QUESTION: What is your point? I am trying to
24 get the point.

25 MR. MACKIE: My point is that they are

1 asserting a preferred right by virtue of this fish which
2 weighs basically a tenth of a pound leaving it to a
3 preferred position for any of the adult fish that
4 return, they should have the first priority for
5 harvest.

6 QUESTION: But isn't it true that the fish
7 that originate in Washington and Oregon are also very
8 small when they originate?

9 MR. MACKIE: Certainly.

10 QUESTION: So that the percentages aren't
11 affected by the size at the time of birth, are they?
12 Percentage in the run at any given time is --

13 MR. MACKIE: No, the percentage in terms of
14 the run is not affected, but the question is is what the
15 interest is of the originating state.

16 QUESTION: Well, it is really more than an
17 originating state, because it is also the state to which
18 the fish would normally return if there were no dams and
19 no fishing.

20 MR. MACKIE: Your Honor, the position by Idaho
21 is that if a run by virtue of what happens to the other
22 components is -- 100 percent of the run originates from
23 Idaho, then they are entitled to 100 percent of the
24 harvest, with no harvest permitted by the downstream
25 states. That is the Idaho formula. And on one of their

1 documents in their brief, they identify one of the
2 steelhead year runs as being 98 percent of Idaho
3 origin. Under their formula, therefore, they are
4 entitled to 98 percent of that run. Washington is 2
5 percent.

6 QUESTION: Ninety-eight percent of what?

7 MR. MACKIE: Ninety-eight percent of the 98
8 percent. What Idaho does -- excuse me. On upstream --
9 we are referring here to upstream stocks. Those are
10 fish which go above Bonneville Dam, which is the first
11 of the eight dams on the Columbia and the main portion
12 of the Snake. Those fish as they cross that dam are
13 destined for a multitude of different locations, some of
14 those in various tributaries, main stem Columbia, and
15 also the Snake River.

16 Idaho takes the posture that those fish which
17 come from the Snake River, the boundary line with
18 Washington and Idaho, are, by their definition, "Idaho
19 origin stocks." They take that percentage and they say,
20 okay, if the entire run is 100 fish, and if 60 come from
21 that Idaho component, they are entitled to --

22 QUESTION: Yes, but that is just addressing
23 the fish that get above the dam.

24 MR. MACKIE: Idaho's --

25 QUESTION: The question is how many fish get

1 above the dam.

2 MR. MACKIE: Yes, but Idaho's posture is that
3 you put the restrictions upon the fisheries below the
4 first dam.

5 QUESTION: Exactly, in order to let more fish
6 up, but they are not saying you aren't entitled to take
7 any Idaho fish below the dam.

8 MR. MACKIE: Idaho is saying that --

9 QUESTION: Are they?

10 MR. MACKIE: Yes, they are, Your Honor.

11 QUESTION: I don't understand that.

12 MR. MACKIE: No. Excuse me. What they are
13 saying, Your Honor, is that if the run -- if the run --

14 QUESTION: If some Idaho fish get above the
15 dam, they get 98 percent of 98 percent.

16 MR. MACKIE: They get 98 percent of 98
17 percent, which means --

18 QUESTION: Of the fish that get above the dam.

19 MR. MACKIE: No, Your Honor. They say in
20 terms -- 98 percent of "the harvestable fish." They are
21 not talking about above the dam. And they are further
22 -- therefore, under their theory of 98 percent,
23 Washington would be, and Oregon, entitled to take two
24 fish from that run out of the 100.

25 QUESTION: You mean anywhere, below the dam or

1 above the dam?

2 MR. MACKIE: That's right, and further, if
3 Washington took those two fish below the dam and the 100
4 was computed at the dam, we would not be able to take
5 two because we would have to take one to factor in for
6 the loss that goes on to Idaho. That is their position.

7 QUESTION: Well, Mr. Mackie, assume for a
8 moment that a state like Idaho is able to prove a need.
9 Then what formula do you think is appropriate to ensure
10 that Idaho gets an equitable share?

11 MR. MACKIE: Your Honor, I don't believe that
12 this case lends itself to any formula, because --

13 QUESTION: I know you don't, but I am asking,
14 you know, if the Court were faced with a situation where
15 they had to devise something, what do you think is fair?

16 MR. MACKIE: What I am saying -- excuse me,
17 Your Honor -- is that I cannot in terms give you a
18 formula because the number of fish is a factor of what
19 is the division of the runs. What portion in turns
20 would be going to Idaho contrasted with the other
21 areas. The smaller the Idaho total of the whole -- For
22 example, in their brief, their reply brief, they have
23 identified what they designate to be the percentage
24 interest that occurs of Idaho in a given year, and those
25 are not 50 percent, they range over the map.

1 For example, with reference to summer chinook,
2 in the most recent year, 14 percent of the total run is
3 of Idaho origin. The year before, 10 percent; 33
4 percent before that. The smaller the Idaho portion of a
5 harvestable total of mixed stocks, one has to therefore,
6 if you preserve a catch for Idaho, avoid catching a
7 substantial portion of the non-Idaho stocks, because
8 those stocks are intermixed in the lower river, and
9 therefore if you are harvesting those fish which are
10 spring chinooks that are destined for places other than
11 Idaho, if Idaho has a set formula amount, you then have
12 to refrain from harvesting fish you otherwise would
13 harvest. Now, conversely --

14 QUESTION: Now, in a low year, is it to
15 everybody's interest to let a large escapement go across
16 so that there will be more fish in the future?

17 MR. MACKIE: The parties in this suit
18 stipulated in the pretrial order in Number 16 that all
19 three states are interested in protecting and enhancing
20 the upriver spring chinook, summer chinook, summer
21 steelhead runs originating in the Snake River and its
22 tributaries, and the downstream states consistently try
23 to manage those runs so that the returns are being made
24 to perpetuate that species --

25 QUESTION: Should there be then a minimum

1 escapement requirement so that the fish are perpetuated?

2 MR. MACKIE: For the minimum escapement
3 requirement, it is interesting that counsel made
4 reference to the Northwest Power Council as being the
5 savior coming upon the horizon for these fish runs. What
6 that council recommended or stated in a document which
7 was lodged by Idaho with this Court on Friday was that,
8 "The Council has examined these positions" -- this is
9 the positions of the various fish agencies and utilities
10 as to what goals should be for fish escapement --
11 "carefully, and does not believe that the information
12 now available is adequate to support a final decision on
13 goals, and they therefore have prescribed that all of
14 those entities are required to report their proposals by
15 April 15, 1984."

16 That is found in Section 201, Pages 2.1 and
17 2.2.

18 QUESTION: Report them where?

19 MR. MACKIE: Excuse me?

20 QUESTION: Report them where?

21 MR. MACKIE: To the Pacific Northwest Power
22 Council, which was created by the 1980 Pacific Northwest
23 Power and Conservation Act.

24 QUESTION: Is Sohappy being reopened?

25 MR. MACKIE: Sohappy's status, Your Honor, is

1 that two of the four tribes indicated that they no
2 longer wished to proceed with the five-year agreement,
3 and that notification was given a little over a year
4 ago. The District Court is nevertheless continuing to
5 provide for the management of the fishery based on the
6 five-year agreement. They did it last year, and the
7 Court is continuing to do it this year.

8 QUESTION: So it still has jurisdiction, and
9 it is going to manage it on that basis, but I suppose it
10 will be -- there will be further litigation then.

11 MR. MACKIE: If the parties are unable to
12 reach a replacement agreement, then it would appear that
13 further litigation is the only alternative.

14 QUESTION: In which case there would be a
15 decree, and it would set a minimum escapement.

16 MR. MACKIE: The decree might or might not,
17 Your Honor, set a minimum escapement.

18 QUESTION: The agreement did, though, didn't
19 it?

20 MR. MACKIE: Yes. With the agreement, the
21 traditional areas of dispute on an Indian fishery have
22 been how many fish are necessary for conservation and
23 what should be the division of the harvest. So the
24 agreement addressed both points.

25 QUESTION: Yes.

1 MR. MACKIE: When the courts have entered
2 decrees with reference to quantifying the Indian fishing
3 share, they have done so with reference to the
4 harvestable portion, but have not made part of their
5 decree what is required for the purposes of escapement,
6 leaving that to the ongoing management of the respective
7 parties. So, what the Court might do if litigation is
8 required there is up in air.

9 Further, that five-year agreement, counsel
10 refers to the 40-60 sharing of upriver spring chinook.

11 QUESTION: Is Idaho a party to the Sohappy?

12 MR. MACKIE: No, they are not, Your Honor.

13 QUESTION: But Washington and Oregon are? Or
14 just their fishing authorities?

15 MR. MACKIE: Oregon was the original party in
16 Sohappy in 1969.

17 QUESTION: As a state.

18 MR. MACKIE: As a state. In 1974, the Court
19 indicated an intention to change its decree because the
20 '69 degree in Sohappy was a fair share. In 1974, in
21 light of the changing in the impact, Washington moved to
22 intervene and was made a party. So Washington and
23 Oregon were a party in '74.

24 The District Court then changed its decree
25 from fair share to 50 percent. That was appealed to the

1 Ninth Circuit, which in 1976 said that you have not
2 considered the appropriate factual matters in changing
3 your decree. We hereby set aside your setting 50
4 percent and remand back for further proceedings to
5 determine the appropriate share.

6 QUESTION: And then there was an agreement.

7 MR. MACKIE: Then there was an agreement
8 executed in 1977 which provided for a five-year period.

9 QUESTION: Has Idaho ever tried to intervene
10 in that suit?

11 MR. MACKIE: No, Your Honor, they have not.

12 QUESTION: Let me go back to my question and
13 see if it will clarify some of these things for me.
14 Your friend in his argument was emphasizing several
15 times the origin of these fish, that is, they were
16 hatched, born in the state of Idaho, and then left, and
17 when they left they were about the size of a large
18 sardine, but when they come back they are 15, 16, 17
19 pounds. You both agreed on that.

20 Now, I take it that his complaint about the
21 Master's findings is that the Master has not given
22 sufficient consideration to the place of origin of these
23 fish. Idaho is asserting a special right in the fish
24 which originate there. Now, you challenge that, I take
25 it? Or what is your view about the place of origin?

1 How important is that?

2 MR. MACKIE: I believe that the place of
3 origin is simply one of a large number of factors that
4 go into the consideration of making an allocation if an
5 allocation is to be made. Just as it is in terms of
6 water allocations between states, the point of origin is
7 not the determinative factor. You look to the
8 historical uses, whether there is wastage, the whole
9 combination, for trying to harmonize for an allocation.

10 Idaho only wants to look at one element, which
11 is the element of the point of origin. We contend that
12 you have to look at the totality in terms of the
13 historical patterns, the industry, what the impact, the
14 economic, and so forth.

15 What the Master in terms looked at here is
16 taking Idaho's posture as to the harvest historically,
17 from 1962 to 1980, where counsel makes reference to the
18 division that occurred. Now, their own document, when
19 looked at in their brief at Pages 27 through 30, reveals
20 that from 1962 to 1980, Idaho harvested of these three
21 species 373,000 fish.

22 During that same period, when you take the
23 Washington and Oregon harvest and then factor it
24 downward to reflect -- in other words, if Washington
25 harvested and Oregon two fish in the lower river, that

1 would not reflect on two fish even being made available
2 to Idaho. So the fish which in theory would have
3 reached Idaho had there not been a harvest was 558,362,
4 which means during that period Idaho received 40 percent
5 of the harvest of these stocks, and the two downstream
6 states combined 60 percent.

7 In the most recent seven-year period, 1977
8 through 1980, which reflects the installation not only
9 of the dams but the increase in the number of turbines
10 on the Snake River from three to 24, reflects in terms
11 the impact totally barring access to elements of the
12 Snake River with the Brownley, Oxlow, and Hell's Canyon
13 Dam, the 1971 impact of the Dorsvach Dam on the Meka
14 tributary of the Clearwater for production in Idaho,
15 with all of those, during that period --

16 QUESTION: Do all of those dams have ladders?

17 MR. MACKIE: No, Hell's Canyon is a complete
18 blockage, and therefore that series completely blocked
19 that entire area of the Snake River to any further fish
20 production. On -- The others do have ladders, but the
21 problem of passage, Your Honor, is both upstream and
22 downstream.

23 Now, during this most recent seven-year
24 period, Idaho harvested of these three species 56,500
25 fish. Washington and Oregon, when you take the catch

1 which was 27,000 and factor it downward for the
2 mortality, reflects 15,953 fish that had been caught
3 zero would have been available in Idaho for harvest.

4 That is a sharing of the harvest of 78 percent
5 for Idaho and 22 percent for Washington and Oregon.

6 QUESTION: Mr. Mackie, can I interrupt with a
7 question about the figures? They vary dramatically from
8 year to year in all sorts of ways, and I notice one of
9 the most complete schedules in the papers is the one at
10 Pages 4, 5, and 6 of your adversary's reply brief. They
11 are not -- of course, all those are not findings by the
12 Master.

13 To what extent do you think it is proper for
14 us to rely on those figures? Do you challenge them at
15 all?

16 MR. MACKIE: Your Honor, for the purposes of
17 this case at this point we are not challenging those
18 numbers. What those numbers show is, when one looks in
19 hindsight on a lag basis, there is an amazing counting
20 system that takes place in this watershed, and when you
21 look back in time, you can do all kinds of marvelous
22 things by using your calculator and your computer.

23 QUESTION: Well, yes, but for example, do you
24 accept the basic Idaho percentages that they set forth
25 in those tables? You had the 98 percent as one

1 example. That was kind of an unusual year.

2 MR. MACKIE: Yes.

3 QUESTION: The other percentages are
4 consistent with your understanding of the record.

5 MR. MACKIE: On the basis of what is in the
6 record, I believe these are fairly accurate, Your Honor,
7 but what I am emphasizing is that these numbers make one
8 look and say, it is very easy to compute.

9 QUESTION: I understand.

10 MR. MACKIE: What the Master was indicating is
11 that what these very numbers indicate is what when you
12 are trying to manage a run during a given year, they are
13 radically different one year from another on a wide
14 variety of actions that you can't tell here.

15 Now, it is also in terms of Idaho's figures we
16 should point out that on Page 29 of Idaho's brief they
17 report the downstream catch as total for the period 1962
18 to 1980 as being 870,484. That is clearly a
19 typographical error, because the total is 370,000, a
20 slight change of a half a million off of that figure.

21 QUESTION: What page is that?

22 MR. MACKIE: That is on Page 29 of the Idaho
23 brief, under the total that they have for a column. It
24 is off by half a million.

25 CHIEF JUSTICE BURGER: Counsel, for your

1 timing rely on the supplementary signal there. This one
2 seems to be out of order. MR. MACKIE: Thank you, Your
3 Honor.

4 In an original action, the standard for relief
5 is that the Plaintiff seeking relief must have an injury
6 of serious magnitude and must clearly and fully prove
7 it. They must prove it and establish it by clear and
8 convincing evidence. This is the standard which has
9 been enunciated by Justice Holmes in the Missouri versus
10 Illinois decision, in New York versus New Jersey, more
11 recently in Colorado versus New Mexico.

12 This Court in the last proceedings at 444 U.S.
13 380 identified it as adversely and unfairly affecting
14 Idaho. The Master, who has heard and examined all of
15 the testimony, all of the exhibits, which are numerous,
16 all of the briefing and arguments, has found that Idaho
17 has failed to sustain that burden, that Idaho not only
18 failed, but the Master found that Oregon and Washington
19 have in fact acted in good faith in their management of
20 this fishery.

21 We submit therefore that the Master's report
22 should be accepted.

23 QUESTION: Are a lot of the hatcheries above
24 Hell's Canyon?

25 MR. MACKIE: No, Your Honor.

1 QUESTION: Hell's Canyon blocks either way?
2 MR. MACKIE: Hell's Canyon is a complete
3 blockage, and --
4 QUESTION: Either way.
5 MR. MACKIE: -- fish cannot traverse in either
6 direction.
7 QUESTION: Is there any way to cure that or
8 not?
9 MR. MACKIE: No, the height of those dams and
10 the way that they are designed for Oxbow, Brownley, and
11 Hell's Canyon, those are permanent blockages to that
12 entire basin for fish production.
13 QUESTION: So it is really the -- the fishery,
14 the spawning grounds then is really for the rivers
15 originating in Idaho below Hell's Canyon.
16 MR. MACKIE: And also in terms for tributaries
17 which go into Oregon, which Idaho is claiming -- because
18 the hatchery is put into Idaho.
19 QUESTION: Yes.
20 QUESTION: Do tributaries go into Oregon or
21 come from Oregon?
22 MR. MACKIE: Excuse me. The tributaries flow
23 from Oregon into the Snake River.
24 CHIEF JUSTICE BURGER: Mr. Attorney General,
25 you have a few minutes remaining.

1 ORAL ARGUMENT OF JIM JONES, ESQ.,

2 ON BEHALF OF THE PLAINTIFFS - REBUTTAL

3 MR. JONES: Thank you, Mr. Chief Justice.

4 QUESTION: You were going to respond with some
5 figures for us.

6 MR. JONES: Yes. Now, we have done a
7 calculation, and I believe this is in the supplemental
8 brief that was filed with the Court, with the Master,
9 taking the 1977 year as an example --

10 QUESTION: Supplemental brief filed where?

11 MR. JONES: With the Master.

12 QUESTION: Is that here?

13 MR. JONES: It should be in the record.

14 QUESTION: In the record.

15 MR. JONES: It should be in the record.

16 Now, taking a total upriver run size for
17 spring chinook of 175,000, in that year, the Washington
18 and Oregon origin fish were 53 percent. Idaho origin
19 fish constituted 47 percent, which amounted to 82,000
20 fish. Those were headed up the river to the Snake River
21 to Idaho. And that is figured using existing
22 methodology that the defendants are well acquainted
23 with. Using the seven-year -- or the five-year plan
24 that was in existence at that time, of Idaho origin
25 fish, the treaty fishery would have received 10,400.

1 Oregon and Washington, considering the contribution of
2 53 percent, would have received of the harvestable
3 surplus 8,300.

4 We would have had an escapement over Lower
5 Granite Dam, the uppermost dam on the Snake River, of
6 37,200. That would have left a spawning escapement of
7 30,000 fish, and Idaho would have had a harvest based on
8 their 47 percent contribution to the Idaho -- to the
9 entire run, they would have had a harvest of 7,200
10 fish.

11 So, what we are doing is taking the fish that
12 Idaho contributes to that run, using existing
13 methodology that the defendants use and that they rely
14 on in determining that we should receive 47 percent of
15 the Idaho origin harvestable surplus, the non-treaty
16 surplus, and that the defendant should receive 53
17 percent of it. They would take theirs down the river.
18 We would take ours up the river.

19 QUESTION: That is assuming all the hatchery
20 fish are attributed to Idaho.

21 MR. JONES: That would include the
22 approximately 30 to 50 percent of the run that is
23 comprised of hatchery fish. I previously mentioned a
24 case that -- I think I miscited it -- the case in which
25 the Court indicated that hatchery fish should be

1 considered the same as natural fish because they are
2 only mitigating for damages caused by the dams was a
3 Court of Appeals case, United States against Washington,
4 694 Federal 2nd 1374, a Ninth Circuit case, where
5 Washington was making the contention that the Indians
6 shouldn't have any part of the hatchery fish, and the
7 Court stated, the fact is that the state hatchery
8 program was established to mitigate for fish
9 artificially lost by the -- to replace fish artificially
10 lost by dams, and that they should --

11 QUESTION: But your whole argument depends on
12 the fish being your fish.

13 MR. JONES: Well, they do come from hatcheries
14 in Idaho.

15 QUESTION: That makes them your fish.

16 MR. JONES: Well, it gives us a little bit of
17 a claim, along with the defendants, too.

18 QUESTION: Oh, a little bit of a claim?

19 MR. JONES: A little -- a claim to share them.

20 QUESTION: I thought that was your whole
21 claim.

22 MR. JONES: We are only asking --

23 QUESTION: Your whole claim was that because
24 the fish were born in Idaho, henceforth and forevermore
25 they belong to Idaho.

1 MR. JONES: Well, because Idaho has had to
2 make a lot of sacrifices to make sure that those fish
3 continue, we are not able to have any dams on our wild
4 and scenic rivers so that those fish can continue. We
5 are not able to do any dredge or placer mining. So we
6 have made a lot of sacrifices. We are not able to use
7 the waters of those rivers for harvests.

8 QUESTION: Who required you to do that?

9 MR. JONES: A majority of Idahoans apparently
10 supported --

11 QUESTION: So Idaho did it on their own.

12 MR. JONES: No. And the federal government
13 did, too. A majority of Idaho people supported --

14 QUESTION: Wait a minute. Wait a minute. Did
15 the federal government order those dams built?

16 MR. JONES: That is correct.

17 QUESTION: I thought you said the people of
18 Idaho did it.

19 MR. JONES: The people of Idaho supported the
20 Central Wilderness Area Act that said that we couldn't
21 have any dams on those rivers. The Wild and Scenic
22 Rivers Act, which Congress passed here, which said we
23 couldn't have any dams on those rivers, and one of the
24 reasons for that is to make sure that these runs of fish
25 continue. So we've had our sacrifices, and we ought to

1 be able to share in the bounty. That is all we are
2 asking for.

3 QUESTION: May I just ask one other question
4 about the figures you gave us? Were those for the -- Am
5 I correct, they were for spring chinook for the 1976
6 year?

7 MR. JONES: Seventy-seven, Your Honor.

8 QUESTION: They don't jibe with the record if
9 they are '77. Well, that's all right.

10 MR. JONES: The figures around it, I think
11 that we have set those out in that supplemental brief.
12 There were some corrections that were made, but I
13 believe that they were correct numbers, and that they
14 were just rounded.

15 QUESTION: For '77, though?

16 MR. JONES: For '77.

17 CHIEF JUSTICE BURGER: Thank you, gentlemen.
18 The case is submitted.

19 (Whereupon, at 11:09 o'clock a.m., the case in
20 the above entitled matter was submitted.)

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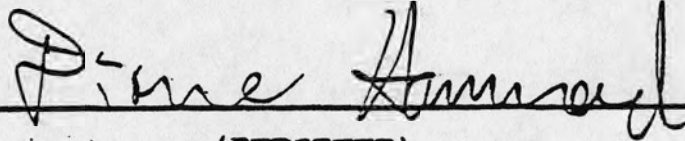
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: STATE OF IDAHO, EX REL. JOHN V. EVANS, GOVERNOR: JIM JONES ATTORNEY GENERAL: JERRY M. CONLEY, DIRECTOR, DEPARTMENT OF FISH AND GAME

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

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