

# The Burger Court Opinion Writing Database

## *Idaho ex rel. Andrus v. Oregon*

429 U.S. 163 (1976)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

November 19, 1976

Re: No. 67 Original, Idaho v. Oregon and Washington

Dear Byron:

I agree with your proposal in the November 17 memo. I also agree that it is helpful to incorporate the disclaimer Potter suggests.

Regards,

WLB

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

December 6, 1976

RE: 67 Original - Idaho v. Oregon and Washington

Dear Byron:

This will confirm my "join" in your proposed  
order in the above.

Regards,

WSB

Mr. Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

November 18, 1976

RE: No. 67 Original - Idaho v. Oregon & Washington

Dear Byron:

I agree that your suggested orders should be  
entered at the appropriate times.

Sincerely,

*Bill*

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

December 3, 1976

RE: No. 67 Orig. Idaho v. Oregon & Washington

Dear Byron:

I agree with the Memorandum of December 2 you  
have circulated in the above.

Sincerely,



Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

November 18, 1976

Re: No. 67 Original, Idaho v. Oregon and Washington

Dear Byron,

I suggest that the following language be added to the Order you have proposed in this case:

- (1) After the word "parties," in line 3 add "and having concluded that this is a case over which the Court has original and exclusive jurisdiction,";
- (2) After the word "ordered" in line 4, add ", without deciding whether the bill of complaint states a claim upon which relief may be granted,".

I make this suggestion because on occasion in the past we have denied leave to file a complaint, after argument, upon the ground that the complaint did not on its merits support a cause of action on which the plaintiff could prevail. See, e.g., California v. Washington, 358 U.S. 64. If we granted leave to file without more, here, the contrary implication could be drawn that we think the complaint does state a cause of action. Yet we all agreed at the Conference that, even apart from the paragraphs asking admission to the interstate compact, this is an unprecedented claim -- quite different, for example, from a claim asking equitable division of water rights.

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I realize that your proposed Order directs the States to answer "or otherwise plead." But this seems to me too subtle a signal that, by allowing this complaint to be filed, "we have not necessarily ruled that Idaho has stated a cause of action." I would much prefer an explicit disclaimer along the lines above indicated.

Sincerely yours,

P.S.  
1.5

Mr. Justice White

Copies to the Conference

*[Handwritten signature]*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 17, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 67 Original, Idaho v. Oregon and Washington

I suggest that the following order in this case might be appropriate:

The Court having heard oral argument by the Attorneys General of the States and having considered the written submissions of the parties, it is ordered that the motion of the State of Idaho for leave to file a bill of complaint is granted insofar as the State of Idaho seeks to secure relief limited to that which is prayed for in numbered paragraphs 1, 2, 6 and 7 of its proposed complaint, which read as follows:

1. That this Honorable Court accept and assume jurisdiction of this case;
2. That the Court declare and affirm that Plaintiff is entitled to an equitable portion of the upriver anadromous fishery of the Columbia River Basin and that the Court determine Plaintiff's equitable portion based on the evidence;
6. That the Court award Plaintiff its costs in this action;
7. For such other and further relief as this Court may deem proper and necessary.

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In all other respects, the motion for leave to file the bill of complaint is denied. The States of Oregon and Washington are directed to file answers to the bill of complaint or to otherwise plead within 60 days and process is ordered to issue accordingly. This order leaves open the question of the indispensability of the United States as a party for decision after evidence, in the event the United States does not enter its appearance in the case.

After answer, if a Special Master is to be appointed, as I would assume he would be, the following might be an appropriate order: \_

It is ordered that \_\_\_\_\_, of \_\_\_\_\_, be, and he is hereby, appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and the authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed, with all convenient speed, to submit a report with recommendations relative to the disposition of the questions raised by the pleadings.

(This paragraph would be included only if the United States has not entered its appearance.) The order entered herein on \_\_\_\_ U. S. \_\_\_\_, left open the question of the indispensability of the United States as a party for decision after evidence. In hearing the evidence, the Master is directed, so far as is practicable, to hear first the evidence bearing on the indispensability of the United States, if the United States has not previously entered its appearance in the case. He is requested to examine and report on that point, if practicable, separately and prior to his report on the other issues, determining particularly whether effective relief could be granted petitioner without substantially affecting the interest of the United States.

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The Master should be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistance, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, the Chief Justice shall have authority to make a new designation which shall have the same effect as that originally made by the Court herein.

The foregoing treatment of the indispensability issue is adapted from Texas v. New Mexico, 344 U.S. 906 (1952).

I take it that we have not necessarily ruled that Idaho has stated a cause of action. You will note that the suggested order directs the States to answer or otherwise plead. Even if they were directed to answer, I take it that a motion for judgment on the pleadings based on failure to state a cause of action would be appropriate under the federal rules which cover original actions insofar as appropriate. See F.R.C.P. 12(c) and 12(h)(2).

You will note that the above is drawn almost entirely from the very helpful memorandum of Susan Goltz, a copy of which is attached.

  
B.R.W.

November 16, 1976

MEMORANDUM FOR MR. JUSTICE WHITE

Subject: No 67 Original, Idaho v. Oregon and Washington

I. Proposals for Order

IT IS ORDERED that the motion of the State of Idaho for leave to file a bill of complaint is granted insofar as the State of Idaho seeks to secure relief limited to that which is prayed for in numbered paragraphs 1, 2, 6 and 7 of its proposed complaint, which read as follows:

"1. That this Honorable Court accept and assume jurisdiction of this case;

2. That the Court declare and affirm that Plaintiff is entitled to an equitable portion of the upriver anadromous fishery of the Columbia River Basin and that the Court determine Plaintiff's equitable portion based on the evidence;

6. That the court (sic) award Plaintiff its costs in this action;

7. For such other and further relief as this Court may deem proper and necessary. "

In all other respects, the motion for leave to file a bill of complaint is denied.

IT IS FURTHER ORDERED that \_\_\_\_\_, be, and he is hereby, appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses,

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issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The master is directed to submit such reports as he may deem appropriate.

This order leaves open the question of the indispensability of the United States as a party for decision after evidence. In hearing the evidence, the master is directed, so far as is practicable, to hear first evidence bearing on the indispensability of the United States, if the United States does not enter its appearance in the case. He is requested to examine and report on that point, if practicable, separately and prior to his report on the other issues, determining particularly whether effective relief could be granted plaintiff without affecting the interest of the United States.

Notes: Paragraph one disposes of the motion in accord with the result you indicated.

Paragraph two is adopted from the Court's order in No. 17 Original, Nebraska v. Iowa, 379 U.S. 996 (February 1, 1965). In Nebraska, the Court heard argument on the motion on January 25, and, on February 1, simultaneously granted the motion and appointed a Special Master without first, by Court order, directing that process be served on the defendant and an answer filed. This procedure was also followed in No. 15 Original, Illinois v. Michigan, 360 U.S. 712 (1959).

An example of the more common practice is the per curiam order in No. 12 Original, Virginia v. Maryland, 355 U.S. 269 (1957), which states as follows:

The Court having heard oral argument by the Attorneys General of the States and having considered the printed briefs of counsel, the Court is of the opinion that the motion for leave to file the bill of complaint should be granted. The State of Maryland is directed to file an answer to the bill of complaint within 60 days and process is ordered to issue accordingly.

See, also, No. 50 Original, Vermont v. New York, 406 U.S. 186 (1972).

In light of your suggestion that a motion to dismiss Idaho's complaint for failure to state a claim upon which relief may be

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granted appears appropriate, the immediate referral of the complaint to a Master may be salutary. Proceedings before the Master take on the trappings of an ordinary lawsuit.\* Moreover, because a defendant's brief in opposition to the motion for leave to file a bill of complaint "is the equivalent of a motion to dismiss at the preliminary stage of the case. . . (s)ee Alabama v. Texas, 347 U.S. 272" (Stern and Gressman, Supreme Court Practice, 4th ed. (1969) at 401), the instant defendants may feel constrained to file an answer in response to the Court's direction and defer submission of a request for dismissal of the complaint. I am speculating that a request for judgment on the pleadings may come sooner if the case is transferred to a Master without first inviting formal pleadings from the defendants.

Paragraph three is adopted from No. 9 Original, Texas v. New Mexico, 344 U.S. 906 (1952). In Texas, as in the instant case, the SG had filed a memorandum for the United States as amicus curiae asserting that the Government was an indispensable party to the action.

## II. Authority of the Master to Entertain a Motion to Dismiss and to Recommend Dismissal to the Court

Rule 9(2) states as follows:

The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court.

Once process is served, the defendant in an original action, as in any other civil suit, may move to dismiss or file an answer. (See, Stern & Gressman at 407.) A master, at the direction of the Court,

\*"If (the motion for leave to file) is granted, the Court will direct that process be served on the defendant, and the litigation then follows a course similar to that of an action in an ordinary trial court. The defendant may move for dismissal or may answer, and motions for summary judgment and judgment on the pleadings are probably in order." The Original Jurisdiction of the United States Supreme Court, 11 Stan. L.R. at 688 (1959).

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may entertain any additional pleadings, see Rule 9(6).

In 1971, the Court referred to a Master a motion for leave to file an amended complaint. The Master, after a hearing, concluded that the complaint failed as a matter of law to state a cause of action. The Master submitted his report to the Court. After oral argument, the Court denied the motion based on the Master's findings, No. 27 Original, Ohio v. Kentucky, 410 U.S. 641 (1973).

### III. Relegation of Indispensable Party Issue to Special Master

In addition to the example cited in Notes to Part I of this memorandum (Nebraska v. Iowa, *supra*), the Court has, on other occasions, employed the office of the Master to consider questions of intervention or joinder after the Court has accepted jurisdiction. In No. 13 Original, Texas v. New Jersey, the Court appointed a Master and referred Florida's motion for leave to intervene. The Court directed the Master "to hear the parties and report his opinion and recommendation as to whether the motion should be granted," 372 U.S. 926 (February 25, 1963). On June 3, the Court entered an order reciting, "The report of the Special Master is received and ordered filed. The motion of the State of Florida for leave to intervene is granted," 373 U.S. 948.

In No. 10 Original, Arizona v. California, 348 U.S. 947 (1955), the Court referred a motion to join as parties the States of Colorado, etc. to a Master "to hear the parties and report with all convenient speed his opinion and recommendation as to whether the motion should be granted."

In No. 12 Original, Illinois v. Michigan, 362 U.S. 958 (1960), a petition of intervention filed by the United States was referred to a Master.

Susan Ackerman Goltz

✓  
BRW  
I agree with  
Potter's suggested  
changes  
JW

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 18, 1976

Re: No. 67 Original, Idaho v. Oregon

Dear Potter:

I have no objection to the changes you suggest in the order in this case and shall abide by the wishes of the Conference.

Sincerely,



Mr. Justice Stewart

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 2, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 67 Original, Idaho v. Oregon and Washington

The following order partially granting the motion for leave to file modifies the proposal of November 17 and also incorporates Brother Stewart's suggestion:

The Court has considered the written submissions of the parties and heard oral argument by the Attorneys General of the States with respect to the motion of the State of Idaho for leave to file a bill of complaint. It having been concluded that the Court has original and exclusive jurisdiction of this case at least insofar as the motion for leave to file is hereby granted, it is hereby ordered that the motion of the State of Idaho for leave to file a bill of complaint is granted to the extent that the complaint prays that the Court declare that the State of Idaho is entitled to an equitable portion of the upriver anadromous fishery of the Columbia River Basin and that the Court determine Idaho's equitable portion based on the evidence and award costs and appropriate incidental relief. The motion is in all other respects denied. This order is not a judgment that the bill of complaint, to the extent that permission to file is granted, states a claim upon which relief may be granted. This order also leaves open the question of the indispensability of the United States as a party for decision after evidence, in the event the

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United States does not enter its appearance in the case. The States of Oregon and Washington are directed to file answers to the bill of complaint or to otherwise plead within 60 days and process is ordered to issue accordingly.

B.R.W.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 18, 1976

Re: No. 67 Original, Idaho v. Oregon

Dear Byron:

I agree with Potter's suggested changes.

Sincerely,



T. M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 6, 1976

Re: No. 67 Original, Idaho v. Oregon and Washington

Dear Byron:

I agree with your memorandum of December 2.

Sincerely,

A handwritten signature in dark ink, appearing to be 'T.M.' with a stylized flourish.

T. M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 18, 1976

Re: No. 67 Orig. - Idaho v. Oregon and Washington

Dear Byron:

I would go along with an order along the lines suggested in your memorandum of November 17. In fact, I thought this was in accord with the vote at the conference, rather than a deferral to March 1977.

Sincerely,



Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 6, 1976

Re: No. 67 Orig. - Idaho v. Oregon and Washington

Dear Byron:

What you propose with your memorandum of December 2  
has my approval.

Sincerely,

*HAL*

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 18, 1976

Re: No. 67 - Orig. - Idaho v. Oregon and Washington

Dear Byron:

I agree with Harry's comments approving your  
proposed order.

Sincerely,



Mr. Justice White

Copies to the Conference

✓ J  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 6, 1976

Re: No. 67 Orig. - Idaho v. Oregon & Washington

Dear Byron:

I agree with your memorandum of December 2nd.

Sincerely,



Mr. Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

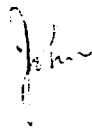
November 18, 1976

Re: No. 67 Original, Idaho v. Oregon and  
Washington

Dear Byron:

Your suggested order is acceptable to me.

Respectfully,



Mr. Justice White

Copies to the Conference