

Nos. 2201ORG, 2202ORG, 2203ORG

IN THE
Supreme Court of the United States

STATES OF WISCONSIN, MINNESOTA, OHIO,
and PENNSYLVANIA,

-and-

STATE OF MICHIGAN,

-and-

STATE OF NEW YORK,

Plaintiffs,

v.

STATE OF ILLINOIS, METROPOLITAN WATER
RECLAMATION DISTRICT OF GREATER CHICAGO,
and UNITED STATES OF AMERICA,

Defendants.

ON MOTION FOR LEAVE TO REOPEN ORIGINAL ACTIONS OR,
IN THE ALTERNATIVE, OPEN A NEW ORIGINAL ACTION

**METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER
CHICAGO'S BRIEF IN OPPOSITION TO PETITION TO REOPEN AND
FOR A SUPPLEMENTAL DECREE**

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**BRIEF IN OPPOSITION TO PETITION TO REOPEN
AND FOR A SUPPLEMENTAL DECREE**

The Metropolitan Water Reclamation District of Greater Chicago, by its General Counsel, respectfully submits this Brief in Opposition to the Petition to Reopen and for a Supplemental Decree submitted by the State of Michigan.

STATEMENT OF THE CASE

The State of Michigan ("Michigan") is requesting that this Court issue a Supplemental Decree in the matter of *Wisconsin v. Illinois, Michigan v. Illinois* and *New York v. Illinois*,¹ Nos 1, 2 and 3, Original. That case involved the diversion of water from Lake Michigan ("Lake") by the State of Illinois ("Illinois"). Originally, the states of Wisconsin, Michigan, Ohio, Minnesota, Pennsylvania and New York brought suit in the 1920s challenging the diversion of water from the Lake into the Chicago Sanitary and Ship Canal ("Canal").² These Great Lake States alleged that Illinois and the Metropolitan Sanitary District of Greater Chicago (now known as the Metropolitan Water Reclamation District of Greater Chicago) ("District") were diverting unlawfully excessive amounts of water from the Lake because the diversion was causing the water levels of the Lake and the other Great Lakes to decrease. The purpose of the diversion was to reverse the flow of the Chicago River away from the Lake and into the Canal and eventually to the Des Plaines River and, finally, the

1. *Wisconsin v. Illinois*, 278 U.S. 367 (1929).

2. *Id.* at 402, 417.

Mississippi River.³ In finding for the complaining states, this Court allowed diversion of Lake water to maintain navigability of the Chicago River, but held that diversion for local sanitation purposes was not lawful. In balancing the harm to the health of the people within the District's jurisdiction versus the harm to the riparian rights of the complaining states, this Court declined to immediately enjoin the District from diverting water from the Lake.

Following the recommendations of a Special Master, a decree was entered by this Court in 1930 whereby Illinois was required to take steps to decrease its diversions within a specific timeframe but allowed Illinois to take water for its own domestic use, which could be treated, pumped into the Canal and allowed to flow into the Mississippi waterway system.⁴ Notably, this Court gave the District time to "devise proper methods for providing sufficient money and to construct and put in operation with all reasonable expedition adequate plants for the disposition of the sewage through other means than the lake diversion."⁵ The Court retained jurisdiction over the case "for the purpose of any order or direction or modification decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy."⁶

3. See Mich. App. 86a.

4. *Wisconsin v. Illinois*, 281 U.S. 179, 198 (1930).

5. *Wisconsin v. Illinois*, 278 U.S. at p. 420-421.

6. *Wisconsin v. Illinois*, 281 U.S. 696 (1930).

The 1930 Decree was modified in 1933 and again in 1956 relative to the quantity of diverted water allocated to Illinois. In 1933, the Special Master found that the District lacked the financial resources to comply with the mandate of the Decree in that the District was unable to raise funds sufficient to "cause and secure the completion of adequate sewage treatment or sewage disposal plants and sewers."⁷ In 1956, this Court granted a temporary modification of the Decree to allow for an increased diversion allocation on an emergency basis. Increased diversion was necessary to alleviate navigational issues caused by low water levels in the Mississippi River.⁸

In 1967, this Court entered a Decree which superseded the 1930 Decree. The 1967 Decree was issued after this Court reopened Original cases Nos. 1, 2 and 3 and granted leave to file Original case No. 11 based upon allegations that Illinois was taking too much water from the Lake for its own domestic use rather than to maintain navigation in the Canal.⁹ The Decree also set forth diversion allocations for Illinois. Additionally, the Decree set forth a formula for determining the amount of water being diverted by Illinois from the Lake watershed and how to determine whether too much water was being diverted during a given accounting period.¹⁰ The Decree allowed Illinois to determine the methods of diversion and uses for its

7. *Wisconsin v. Illinois*, 289 U.S. 395, 411 (1933).

8. *Wisconsin v. Illinois*, 352 U.S. 945 (1956).

9. *Wisconsin v. Illinois*, 388 U.S. 426 (1967).

10. *Id.* at 427-429.

allocation of Lake water.¹¹ The Decree contained a jurisdictional provision whereby the Court would retain jurisdiction to enter any modification or supplemental decree deemed at any time to be proper in relation to the subject matter in controversy.¹² In 1980, upon the recommendation of the Special Master and the agreement of the parties, the Court amended the Decree to allow for a modification of the accounting method which is applied to determine the amount of water being diverted by Illinois.¹³ The Decree has not been amended since 1980, nor has it ever addressed any activity other than diversion of Lake water.

SUMMARY OF THE ARGUMENT

The District opposes Michigan's request for this Court to exercise jurisdiction over this matter. First, Michigan's Petition should be denied as it improperly seeks to reopen the 1967 Decree entered by this Court in the matter of *Wisconsin v. Illinois*.¹⁴ The subject matter of that Decree is the amount of diversionary Lake water allotted to Illinois. In turn, Illinois dictates to the District the portion of that total allotment that it can use to manage the Chicago Area Waterway System ("CAWS"). Historically this Court will not reopen a decree that only tangentially relates to the subject matter involved in the dispute before it. In the instant case, Michigan seeks to reopen the Decree to resolve a

11. *Id.* at 427-428.

12. *Id.* at 430.

13. See *Wisconsin v. Illinois*, 449 U.S. 48 (1980).

14. 388 U.S. 426 (1967).

conflict over diversion of Lake water to create a forum in which to argue over what action should be taken by the United States, Illinois and the District to prevent the spread of Asian carp to the Lake. The tangential thread of commonality in these two disputes is that they both involve the CAWS. Under this Court's prior decisions, such a remote connection is inadequate to reopen the prior Decree.

In the alternative, Michigan contends that, if this Court declines to reopen the 1967 Decree in *Wisconsin v. Illinois*, this Court should nonetheless exercise exclusive, original jurisdiction over the dispute. The District submits that this Court should decline to exercise jurisdiction after weighing the "seriousness and dignity of the claim" as presented by Michigan under the analysis set for in *Mississippi v. Louisiana*.¹⁵ That analysis should lead this Court to conclude that the proactive plan of action by numerous federal, state and local governmental agencies, including the parties before this Court, that has been in place and continues to move rapidly forward should be allowed to address this matter rather than ordering closure of the locks, which is fraught with unintended consequences as was more fully set forth in the District's Response to Michigan's Motion for Preliminary Injunction previously filed with this Court.

15. 506 U.S. 73, 77 (1992).

ARGUMENT**I. The 1967 Decree Should not be Reopened Because the Facts in the Instant Case are not Sufficiently Related to the Subject Matter of the Existing Decree.**

Michigan has come before this Court to seek redress for an entirely new dispute: whether Illinois, the Corps of Engineers ("Corps") and the District are managing the CAWS in a manner which allows invasive species, specifically Asian carp, to enter the Lake and whether Illinois, the District and the Corps must be compelled to change the way in which they manage the waterways. Rather than bring this matter to federal court where jurisdiction would lie over the District, Michigan seeks its relief directly from this Court. In looking at case law on the issue of reopening an existing decree fashioned by this Court, it is abundantly clear that an existing decree is reopened only under limited circumstances and any modifications to the existing decree are narrowly tailored to address only those new circumstances that relate directly to the subject matter of the existing decree.¹⁶ While several amici have filed briefs in support of Michigan's position, the rationale that "the Court has taken original jurisdiction over the earlier controversies involving the same canal," does not result in a sufficient basis for this Court to exercise its original jurisdiction in this matter. (Br. of Plaintiffs States of New York, Minnesota and Wisconsin in Support of Mot. to Reopen and Renewed Mot. for a P. I., p. 1.)

16. See *Nebraska v. Wyoming*, 515 U.S. 1, 9 (1995).

In *Nebraska v. Wyoming*, this Court ruled that parties may not introduce new issues into existing litigation even when the existing decree contains a reopener provision, unless the new claim falls within the purview of the reopener.¹⁷ This is precisely what Michigan seeks to do in the instant case. Michigan bases its complaint against defendants on the theory that facilities in the CAWS constructed to allow for diversion of water from the Lake are unlawful in that they allow the passage of invasive species into the Lake. (See Mot. to Reopen, p. 1-2). Michigan does not seek to modify or alter the amount of Lake water diversion allotted to Illinois or the way in which the diversion is calculated, as is the subject of the 1967 Decree. As a matter of fact, Michigan expressly disavows any interest in modifying the amount of diversionary water allotted to Illinois or the way in which that allotment is calculated. (Mot. to Reopen, p. 2). Instead, Michigan seeks to link the prior Decree with its current request for relief by claiming that modification of the means by which diversion is accomplished relates directly to the 1967 Decree. While granting Michigan the relief sought in its Petition may indirectly modify how diversionary waters are taken from the Lake, the major thrust of Michigan's Petition (and Renewed Motion for Preliminary Injunction) is to close the locks to navigation in an effort to stop fish passage from the CAWS to the Lake.

In essence, Michigan is attempting to bootstrap the current matter involving invasive species to the prior case before this Court involving water diversion. While Michigan's motive for doing so is uncertain, it would

17. *Id.* at 9 (1995).

appear that Michigan wants to circumvent the requirement that the United States consent to being sued, a requirement that exists even in original jurisdiction cases.¹⁸

In *Arizona v. California*, this Court declined to reopen an existing decree because it found that there were no changed circumstances or unforeseen issues not previously litigated that warranted revisiting prior factual determinations.¹⁹ In its analysis, this Court recognized that the newly sought relief related to the subject matter of the existing decree, but saw opening the decree as running contrary to the strong interest in finality to the litigation.²⁰

A case directly on point is *New Jersey v. Delaware*, wherein this Court denied a request to reopen a decree that related to the boundaries between the states of Delaware and New Jersey.²¹ The decree contained language allowing for the decree to be reopened. When a dispute arose many years later over whether New Jersey had a right under a pre-existing interstate compact to exercise riparian rights over land owned by Delaware, New Jersey sought to reopen the decree. In declining to reopen the decree, the Court found that the dispute over riparian rights extending across the

18. See *California v. Arizona*, 440 U.S. 59, 61-62 (1979).

19. 460 U.S. 605, 625 (1983).

20. *Id.* at 606.

21. 295 U.S. 694 (1934); 546 U.S. 1028 (2005); 552 U.S. 597 (2008).

boundary was not sufficiently related to the dispute over the boundary itself.²²

Similarly, the relief sought by Michigan in the instant case does not relate to Lake water diversion allocations. Closing the locks and sluice gates and compelling the parties to take certain other actions in the CAWS in an effort to prevent the advancement of Asian carp into the Great Lakes through this one pathway is unrelated to the 1967 Decree setting forth Illinois' allotment of Lake water diversion and the formula by which to calculate diversion amounts. Thus, it is appropriate for this Court to decline to reopen the 1967 decree and deny Michigan's Petition to Reopen and for Supplemental Decree on the basis that the instant matter is not sufficiently related to the subject matter of the 1967 Decree.

II. The Court Should Decline to Exercise Its Exclusive, Original Jurisdiction.

In the alternative, Michigan requests that this Court find it has original jurisdiction to hear Michigan's claims pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U.S.C. §1251(a). While the Court has exclusive, original jurisdiction, assuming that the State of Illinois is a proper party, the Court still has discretion as to whether or not to exercise such jurisdiction. This is not a case wherein the Court should exercise its jurisdiction. Original jurisdiction should only be exercised "sparingly,"

²² *New Jersey v. Delaware*, 546 U.S. 1028 (2005); 552 U.S. 597 (2008).

and it is not necessary for the Court to exercise it just because its jurisdiction is exclusive.²³ In determining whether a case is “appropriate” for this Court’s original jurisdiction, the Court looks at the nature of the interest of the complaining state, focusing on the seriousness and dignity of the claim, and the availability of an alternative forum in which the issue tendered can be resolved.²⁴

The District respectfully requests that the Court focus on the “seriousness and dignity of the claim” presented by Michigan.²⁵ The District agrees with all parties that the threat of Asian carp getting into the Lake is a serious one. What the District takes issue with is the manner in which Michigan seeks to deal with this threat, i.e., bringing the current action before this Court. Michigan’s action, and re-action, ignores the efforts of numerous federal, state and local governmental agencies, including those before this Court, to proactively deal with the threat of Asian carp entering the Lake.

As more fully set forth in the United States Solicitor General’s Memorandum in Opposition to Michigan’s Motion for Preliminary Injunction, numerous proactive steps had already been taken to combat Asian carp from getting into the Lake at the time the Solicitor General’s

23. *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976).

24. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (internal citations and quotations omitted) (1992).

25. See *Id.* quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972).

Response had been filed.²⁶ These steps include, but are not limited to development of a Rapid Response Plan, installing and maintaining three electrical dispersal barriers, ballast and bilge water restrictions, rotenone poisoning, environmental DNA (“eDNA”) testing and a variety of other responses.²⁷

The joint efforts of all parties involved in the process have continued unabated since the Solicitor General filed her Response to Michigan’s Motion for Preliminary Injunction. In fact, in February 2010, the governors of Michigan, Wisconsin and Illinois, along with representatives from various federal agencies, participated in an “Asian Carp Summit” at the White House. The end result of this summit was a commitment by the federal government to provide in excess of an additional \$70 million to fund both short and long-term strategies to combat Asian carp migration. This comprehensive plan is set forth in the Asian Carp Workgroup draft “Asian Carp Control Strategy Framework,” (“Framework”), and is accessible at <http://asiancarp.org>. The Framework sets forth a dynamic plan of action that continues to be developed and implemented by all necessary parties with the goal of preventing migration of Asian carp into the Lake.

26. See Solicitor General’s Memorandum in Opposition to Preliminary Injunction, pp. 4-17.

27. *Id.*

Finally, beginning on February 17, 2010, and continuing weekly thereafter, various governmental agencies have been fishing and sampling lakeside of the electric fish barrier in an effort to locate any Asian carp. This has involved expending a tremendous amount of resources searching for actual Asian carp as opposed to eDNA. Thankfully, no Asian carp have been found lakeside of the electric fish barriers as of February 24, 2010. (District's Resp. and App. to Michigan's Renewed Mot. for Prelim. Inj., pp. 10-11.).

This proactive plan of action is far more effective than Michigan's requested relief, which could lead to a variety of unintended consequences, not the least of which from the District's perspective, is the increased likelihood of flooding in and around the Chicago area. Consequently, this Court should decline to exercise its original, exclusive jurisdiction.

CONCLUSION

WHEREFORE, the Metropolitan Water Reclamation District of Greater Chicago respectfully requests that this Court deny Michigan's Petition to Reopen the Supplemental Decree entered in 1967, as amended in 1980, in *Wisconsin v. Illinois*, Nos. 1, 2 and 3, Original, and decline Michigan's request to, in the alternative, exercise original jurisdiction over the dispute the State of Michigan has brought before this Court.

Respectfully submitted,

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