Nos. 1, 2 and 3, Original

In the Supreme Court of the United States

STATE OF WISCONSIN, ET AL., PLAINTIFFS

v.

STATE OF ILLINOIS AND METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, ET AL.

STATE OF MICHIGAN, PLAINTIFF

v.

STATE OF ILLINOIS AND METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, ET AL.

STATE OF NEW YORK, PLAINTIFF

v.

STATE OF ILLINOIS AND METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, ET AL.

ON MOTION TO REOPEN

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In *Wisconsin* v. *Illinois*, 388 U.S. 426 (1967), this Court entered a consent decree that amicably resolved a lengthy dispute among the Great Lakes States concerning the amount of water that the State of Illinois could permissibly divert from the Lake Michigan watershed for any purpose, including for use in the Illinois Waterway, which connects Lake Michigan with the Mississippi River system. The decree permits the Court to reopen the decree to enter any modification or supplemental decree that the Court "deem[s] * * * to be proper in relation to the subject matter in controversy" in the water-diversion litigation. *Id.* at 430. The questions presented by the State of Michigan's motion are:

1. Whether a demand that the United States, the State of Illinois, and the Metropolitan Water Reclamation District (Water District) take certain steps to impede the migration of two invasive species of Asian carp is "proper in relation to the subject matter" of the water-diversion litigation, as necessary to warrant reopening of that litigation.

2. Whether this Court should exercise its discretion to permit Michigan to commence a new original action in this Court rather than pursue equally effective relief in federal district court against the responsible federal agencies and the Water District.

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JURISDICTION

The jurisdiction of this Court is invoked under Article III, § 2, Clause 2, of the United States Constitution and 28 U.S.C. 1251(a) and (b)(2).

STATEMENT

The State of Michigan seeks leave to reopen the decree in *Wisconsin* v. *Illinois*, 388 U.S. 426 (1967), or in the alternative to commence a new original action. The subject matter of this new dispute is Michigan's allegation that two invasive species of Asian carp are about to enter the Great Lakes.

1. This litigation involves the Chicago Area Waterway System (CAWS), a system of canals and natural waterways that serves as both a navigation link between Lake Michigan and the Mississippi River system and an outlet for the storm water and effluent of the City of Chicago. The canal system extends between Lake Michigan and the Des Plaines River, a tributary of the Illinois River and ultimately of the Mississippi River. The canal system was originally constructed by Illinois and local governments to permit Chicago to dilute and dispose of wastewater without its entering Lake Michigan. Using the canal system, Illinois redirected the Chicago River, which naturally flowed east into Lake Michigan, to flow west into the Des Plaines. The Chicago River Controlling Works were constructed at the confluence of the Chicago River and Lake Michigan. The connection between the Lake Michigan and Mississippi drainage basins was made permanent with the completion of the Chicago Sanitary & Ship Canal in 1900. See *Missouri* v. *Illinois*, 200 U.S. 496 (1906). The waterway system also includes the Calumet River, which meets Lake Michigan at Calumet Harbor, and the Grand Calumet and Little

Calumet Rivers, which cross the Illinois-Indiana border and provide access to Lake Michigan at points in Indiana. Construction in the Calumet portion of the waterway system included the dredging and reversal of the Calumet River (which now flows away from Lake Michigan), the erection of the Thomas J. O'Brien Lock and Dam on that river, and the construction of the Cal-Sag Channel linking the three Calumet rivers with the main Chicago Sanitary & Ship Canal. See Mich. App. 78a-79a; see also *id.* at 85a (map).[1]

By statute, the U.S. Army Corps of Engineers operates and maintains the Chicago Sanitary & Ship Canal as necessary to sustain navigation from Chicago Harbor on Lake Michigan to Lockport on the Des Plaines River. See, *e.g.*, Energy and Water Development Appropriation Act, 1982, Pub. L. No. 97-88, § 107, 95 Stat. 1137 (1981); Supplemental Appropriations Act, 1983, Pub. L. No. 98-63, Tit. I, Ch. IV, 97 Stat. 311. Vessels enter and exit the Chicago end of the canal system through the O'Brien Lock and through locks at the Chicago River Controlling Works (the Chicago Lock). Mich. App. 77a. Both facilities also include sluice gates, which are used to combat the risk of flooding during significant rainstorms by drawing water from the canal system into Lake Michigan. In very severe flooding conditions, the locks are also opened to permit additional water to be diverted into Lake Michigan.

The Corps owns the locks and the sluice gates at the O'Brien Lock, and it operates them both for navigation and, pursuant to agreements with the Metropolitan Water Reclamation District of Greater Chicago (Water Dis-

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[1] References to "Mich. App." are to the appendix to Michigan's motion to reopen.

trict), for flood-control and water-quality purposes. The Water District owns the locks at the Chicago Lock, but the Corps operates the locks for navigation and, pursuant to agreements with the Water District, for flood-control purposes. The Water District owns and operates the sluice gates at the Chicago River Controlling Works. The Water District also owns and operates the Wilmette Pumping Station on the North Shore Channel, which includes pumps and a sluice gate; the Corps has no involvement in the operation of the Wilmette Pumping Station. Mich. App. 89a-90a.

2. Bighead and silver carp (Asian carp) are invasive species of fish that have successfully reproduced in the Mississippi River system. The Corps, other federal agencies, and their Illinois counterparts have been aware for some time of the possibility that Asian carp could travel from Mississippi River tributaries through the Chicago Area Waterway System and into the Great Lakes. Those agencies have been working actively to combat that possibility. See, *e.g.*, Asian Carp Working Group, *Management and Control Plan for Bighead, Black, Grass, and Silver Carps in the United States* at v, 2, 70-71 (Oct. 2007), http://asiancarp.org/Documents/Carps_Management_Plan.pdf.

Our previous memoranda in opposition to Michigan's two motions for a preliminary injunction discussed those efforts in detail. See U.S. Prelim. Inj. Opp. 4-17; U.S. Renewed Prelim. Inj. Opp. 3-6, 19-20, 21-23; see also Ill. Prelim. Inj. Opp. 7-10, 28-29; Ill. Renewed Prelim. Inj. Opp. 4-6, 16-17; Water District Renewed Prelim. Inj. Opp. 8-12. In this brief we repeat only a few salient aspects of those efforts and discuss developments since our last memorandum was filed on February 25, 2010.

The Corps, the United States Fish and Wildlife Service, the United States Environmental Protection Agency, and the United States Coast Guard, together with officials of the Illinois Department of Natural Resources, the Water District, and the Great Lakes Fishery Commission, have formed an Asian Carp Regional Coordinating Committee. The Coordinating Committee has drafted a comprehensive strategy to combat Asian carp in both the near and the long terms. *Draft Asian Carp Control Strategy Framework* (Feb. 2010), http://www.asiancarp.org/RegionalCoordination/documents/AsianCarpControlStrategyFramework.pdf (*Framework*). The Framework includes more than 30 short- and long-term steps that member agencies are undertaking to combat the spread of Asian carp.[2]

Congress has given federal agencies a number of tools to combat the threat of carp migration into the area. First, the electric Dispersal Barrier Project, designed to prevent invasive aquatic species from migrating between the Mississippi River system and the Great Lakes, was constructed and is being upgraded at Congress's specific direction to the Corps. See pp. 6-7, *infra*.

Second, to support the efficacy of the electric Dispersal Barrier Project and permit solutions to be implemented on an expedited basis, Congress has granted the Secretary of the Army temporary emergency authority to undertake "such modifications or emergency measures as [he] determines to be appropriate, to prevent aquatic nuisance species from bypassing the Chicago Sanitary and Ship Canal Dispersal Barrier Project

[2] The Great Lakes States have been invited, through their governors and attorneys general, to comment on and participate in refining the Framework. Michigan has provided comments on the Framework.

* * * and to prevent aquatic nuisance species from dispersing into the Great Lakes." Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, § 126, 123 Stat. 2853 (2009) (Section 126). If not renewed, Section 126 remains in force until October 28, 2010. See *ibid.* The Secretary has delegated his authority under Section 126 to the Assistant Secretary of the Army (Civil Works), who has already taken some steps pursuant to that authority and is in the process of considering others.

a. *The Three Electric Dispersal Barriers.* The primary goal of the intergovernmental efforts to combat Asian carp migration has been to keep the Asian carp out of the CAWS altogether. To prevent the passage of invasive species between the Mississippi River system and the Great Lakes, Congress has both authorized and directed the construction of electric dispersal barriers at the southwestern end of the Chicago Sanitary & Ship Canal, approximately five river miles upstream of the Lockport Lock and 31 river miles downstream of the Chicago Lock on Lake Michigan. An electric dispersal barrier operates by creating an electrical field in the water of the canal, which either stuns fish or creates sufficient discomfort to deter them from attempting to pass through the area. The field is created by running direct electrical current through steel cables secured to the bottom of the canal. *Framework* ES-1, 22; Mich. App. 28a, 32a-33a; App. to U.S. Prelim. Inj. Opp. 105a-108a.

The first electric dispersal barrier (Barrier I) was authorized by Congress in 1996 and became operational in 2002. Mich. App. 30a; App. to U.S. Prelim. Inj. Opp. 47a-48a; 16 U.S.C. 4722(i)(3)(C). Shortly after Barrier I was completed, the Corps decided, pursuant to its con-

tinuing authorities program, to construct a second, even more capable barrier (Barrier IIA) nearby. Congress then specifically authorized that project. App. to U.S. Prelim. Inj. Opp. 50a; District of Columbia Appropriations Act, 2005, Pub. L. No. 108-335, § 345, 118 Stat. 1352 (2004); see Mich. App. 30a-31a; Water Resources Development Act of 1986, Pub. L. No. 99-662, § 1135, 100 Stat. 4251. Barrier IIA has been fully operational since April 2009. Mich. App. 31a.

A third barrier (Barrier IIB) is under construction and will be completed later this year, as a further component of the Barrier II project that Congress authorized in 2004. *Framework* 22. The Corps sought and received urgent funding to expedite and complete the construction. Barrier IIB is designed to be at least as capable as Barrier IIA. Having both barriers in operation will permit one to continue operating when the other needs to be shut down for periodic maintenance. *Ibid.*; App. to U.S. Prelim. Inj. Opp. 10a-11a, 13a, 55a-56a, 109a. Congress has also directed that Barrier I be upgraded and made permanent, so that it can complement the operation of the other two barriers. Water Resources Development Act of 2007 (2007 Act), Pub. L. No. 110-114, § 3061(b)(1)(A), 121 Stat. 1121.

b. *Rotenone Poisoning.* Barrier IIA was taken offline for necessary maintenance in early December 2009, while Barrier I remained in operation. Barrier I then underwent brief maintenance after Barrier IIA resumed operation. To combat the threat that Asian carp would cross through the barrier location while one of the barriers was offline, the Fish and Wildlife Service and other participating agencies—including the Michigan Department of Natural Resources—executed a "Rapid Response" containment operation, applying the fish poison

rotenone to a 5.7-mile stretch of the canal, beginning upstream (lakeward) of the fish barriers and extending downstream to the Lockport Lock. *Framework* 25; App. to U.S. Prelim. Inj. Opp. 57a, 109a-110a, 140a; Pet. for Supplemental Decree 20. Caged carp were used to verify that the poisoning was effective to kill fish at various depths throughout the treated stretch of the canal. Biologists collected approximately 55,000 pounds of dead or surfaced fish during this operation. The only Asian carp was a single dead bighead carp found 5 miles downstream of the electric dispersal barriers. App. to U.S. Prelim. Inj. Opp. 57a, 140a-142a.

c. *eDNA Testing And Other Monitoring Efforts*. Federal agencies have for some time used electrofishing (a technique that uses electrodes to attract and stun fish for easy capture) and commercial netting to monitor the CAWS for the advancement of Asian carp. App. to U.S. Prelim. Inj. Opp. 58a-59a, 139a; App. to U.S. Renewed Prelim. Inj. Opp. 14a, 69a-71a. Even with sustained effort, see U.S. Renewed Prelim. Inj. Opp. 3-4, 19, these techniques have not located any live or dead Asian carp in the CAWS upstream of the electric fish barriers.

Electrofishing and netting can be used to capture Asian carp. See App. to U.S. Renewed Prelim. Inj. Opp. 70a-71a (electrofishing in February 2010 near Starved Rock Dam, a location downstream of the electric fish barriers where Asian carp are known to exist, recovered between 30 and 40 Asian carp). Those methods, however, are limited in their ability to detect fish that are present only in very small numbers. The Corps accordingly decided to canvass the scientific community for any additional, more sensitive detection technologies. In August 2009, the Corps entered into a cooperative agreement with Dr. David Lodge of the University of

Notre Dame to use an experimental technique known as environmental DNA (eDNA) testing. App. to U.S. Prelim. Inj. Opp. 14a-15a, 61a-62a. Fish DNA may find its way into the waterway in various microscopic bits of tissue, such as intestinal cells shed during defecation. *Id.* at 116a. Dr. Lodge's technique, which he describes as "novel" (*id.* at 113a, 118a), is to collect water samples, filter them for solids, extract all DNA from the solids, and then analyze the DNA for genetic markers unique to the bighead and silver carp species. *Id.* at 117a-118a. Finding that such markers are present in a given sample, however, does not show whether the eDNA came from a live or dead fish; how many fish there might be (if live fish are present); or how the eDNA came to be at that location (*e.g.*, from a live fish or in ballast-water discharge). *Id.* at 22a, 128a-129a. Using its own scientific experts, the Corps has undertaken to validate the eDNA science and, through peer review, to verify its efficacy in detecting the leading edge of the Asian carp. That validation effort is expected to conclude in the near future. App. to U.S. Renewed Prelim. Inj. Opp. 13a-14a, 32a-35a.

Some of the samples collected by Dr. Lodge's team from sites lakeward of the electric dispersal barriers have tested positive for eDNA from one or both species of Asian carp. Those locations lakeward of the barriers with positive test results include the North Branch of the Little Calumet River (near the O'Brien Lock), the Cal-Sag Channel, the North Shore Channel, the Chicago Sanitary & Ship Canal, Grand Calumet River, Calumet River (lakeward of the O'Brien Lock), and Calumet Harbor. See *Environmental DNA Results as of March 12, 2010*, http://www.lrc.usace.army.mil/pao/12March2010_eDNA_update.pdf (last visited Mar. 22,

2010) (map reflecting number of sampling dates with positive results for each location); see also U.S. Prelim. Inj. Opp. 12-13, 15-16; U.S. Renewed Prelim. Inj. Opp. 7.[3] Updates on the eDNA results are regularly made public on the website of the Corps' Chicago District, http://www.lrc.usace.army.mil. The eDNA results continue to be the basis for selecting locations for targeted netting and electrofishing operations like those described above (which so far have not detected any Asian carp upstream of the fish barriers). Given the novel nature and inherent limitations of the eDNA science (see p. 9, *supra*) and the ongoing validation and peer review, however, the Corps and its partner agencies do not consider the eDNA results to establish definitively that live Asian carp are on the lake side of the electric fish barriers, much less that they are present in numbers that present an imminent threat that a sustainable population could be established. See U.S. Prelim. Inj. Opp. 45-47; App. to U.S. Renewed Prelim. Inj. Opp. 12a-14a.

d. *Flooding Barrier Construction.* As Michigan notes, some portions of the CAWS upstream of the electric fish barriers closely parallel the Des Plaines River and the defunct Illinois & Michigan Canal. Pet. for Supplemental Decree 11. Because of that close proximity, the Corps has identified a risk that, during a flood, Asian carp could be swept from the river or the canal into the CAWS upstream of the fish barriers. The Corps has already conducted an efficacy study and recommended constructing land barriers to prevent Asian carp from entering the CAWS by flood in that manner. In January 2010, the Assistant Secretary of the Army

[3] In addition to those discussed in our last filing, a second location in the Chicago Sanitary & Ship Canal (in the Lockport Pool) has tested positive for silver carp.

invoked her authority under Section 126 to approve the Corps' recommendations. The project is expected to be completed later this year. *Framework* 17; App. to U.S. Prelim. Inj. Opp. 3a, 26a.[4]

e. *Studies Examining How To Prevent Passage Of Asian Carp Through The Locks.* Since our previous memorandum, the Corps has formally initiated a study of the possibility of constructing deterrents at key locations in the CAWS, which potentially could permit navigation while redirecting fish to locations where they could be eradicated. Technologies under evaluation include acoustic deterrents, air-bubble curtains, and strobe lights. See 75 Fed. Reg. 12,217 (2010). Comments on that study have already closed, *ibid.*, and the Corps expects to submit a recommendation to the Assistant Secretary in the near future. See U.S. Renewed Prelim. Inj. Opp. 5.

The Corps is also evaluating a potential short-term strategy termed "modified structural operations," which would impede Asian carp migration by changing the way existing structures in the CAWS are operated. Under several of the alternatives being considered as part of that strategy, the locks would be closed to traffic for recurring periods, and lock operations would be synchronized with other efforts by federal and state agencies, such as targeted poisoning or intensive electrofishing and netting, to determine whether Asian carp are present, to capture or kill any Asian carp that may exist, and to prevent Asian carp from passing at times when the lock is open to navigation. *Framework* ES-2 to

[4] Michigan initially demanded in its preliminary-injunction motion that the Corps construct such barriers, but has since acknowledged that the Corps is already doing what Michigan asked. Renewed Mot. for Prelim. Inj. 7.

ES-3; *id.* at 15-16. The Corps expects to submit a recommendation to the Assistant Secretary in time to permit action this spring on any courses of action that are identified as potentially effective. U.S. Renewed Prelim. Inj. Opp. 5.

f. *Study Of Longer-Term Solutions.* The Corps has also embarked on a much larger study of how to prevent transfers of aquatic invasive species between the Mississippi River basin and the Great Lakes basin, in either direction, "through [both] the Chicago Sanitary and Ship Canal and other aquatic pathways." 2007 Act § 3061(d), 121 Stat. 1121. That study will consider (among other things) the course of action Michigan seeks in this litigation—*i.e.*, the permanent ecological separation of the two basins. *Framework* 23-24; see Pet. for Supplemental Decree 29-30.

3. Michigan initiated proceedings in this Court on December 21, 2009. It moved to reopen the 1967 decree in *Wisconsin* v. *Illinois*, *supra*, which regulates the amount of water that Illinois may divert from Lake Michigan, and to supplement that decree with a new one ordering the United States, the State of Illinois, and the Water District to take specified actions to combat the migration of Asian carp. In the alternative, Michigan sought leave to commence a new original action against the United States, Illinois, and the Water District. Pet. for Supplemental Decree 29-30.

Michigan also filed an accompanying motion for a preliminary injunction. This Court denied that motion on January 19, 2010. Michigan filed a renewed motion for a preliminary injunction on February 4, 2010. This Court denied that motion on March 22, 2010.

ARGUMENT

Michigan has brought before the Court an entirely new dispute about keeping invasive species from *entering* Lake Michigan, in the guise of a motion to reopen a decades-old decree about how much water may be *removed* from Lake Michigan. The motion to reopen therefore does not properly lie. Michigan must instead seek this Court's leave to commence a new original action, and this case does not meet the standards for invoking this Court's sparingly exercised original jurisdiction. A federal district court would be the proper forum to consider Michigan's claims for relief, once Michigan complies with the requirement of identifying a final and reviewable agency action to which it objects.

A. This Case Is Not Related To The 1967 Water-Diversion Decree

Michigan suggests that this case is properly brought in this Court as a follow-on to a series of cases, resolved decades ago, about removing water from Lake Michigan. But litigants may not evade the stringent requirements for invoking this Court's original jurisdiction (and seeking injunctive relief against sovereign defendants, see Pet. for Supplemental Decree 29-30) simply by pleading a request to "supplement" an old decree instead of filing a new action seeking a new decree. Cf. *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995) (leave to commence an action in this Court requires permission, and parties may not circumvent that "important gatekeeping function" by introducing new issues into existing litigation). This case does not bear any significant relationship to the water-diversion litigation, and Michigan's attempt to circumvent this Court's pleading requirements by invoking an unrelated decree should be rejected.

1. The decree that Michigan seeks to reopen concerned only diversions of water from Lake Michigan

The prior litigation on which Michigan relies had nothing to do with invasive species. Rather, this Court considered only how much water may be removed from the Lake Michigan watershed by being pumped or otherwise diverted into the canal system and thus allowed to flow into the Mississippi River system.

Chicago has been allowed to divert water from Lake Michigan into the Chicago River since Chicago first obtained a permit from the Secretary of War in 1925. *Wisconsin* v. *Illinois*, 278 U.S. 367, 405-407 (1929).[5] Several Great Lakes States brought suit in this Court against Illinois and the Water District, alleging that the diversion was unlawfully excessive because it was causing the water level of Lake Michigan and the other Great Lakes to decrease. See *id.* at 409-410. This Court agreed that the diversion was far in excess of what was needed to sustain navigation, and that the excess was unlawful. See *id.* at 420. The Court concluded that Illinois must take steps to decrease its need for direct diversions of water into the canal, and decrease its diversions to a much smaller amount within a specified time. *Wisconsin* v. *Illinois*, 281 U.S. 179, 198 (1930). The Court concluded, however, that Illinois could take additional water from Lake Michigan for its own domestic use, which could then be treated, pumped into the canal, and allowed to flow west into the Mississippi system. See *id.* at 199-200. Congress subsequently ratified that deci-

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[5] That permit followed various short-term permits issued by the Corps and suits by the United States, see *Sanitary Dist.* v. *United States*, 266 U.S. 405 (1925), to prevent excessive diversions from Lake Michigan. See *Wisconsin* v. *Illinois*, 278 U.S. at 399-400, 404-406.

sion, providing that the water permitted to be diverted under this Court's decree was authorized to be sent down the canal for navigation to make the channel a "commercially useful waterway." Act of July 3, 1930, ch. 847, 46 Stat. 929.[6]

Decades later, other Great Lakes States petitioned this Court to reopen the decree, alleging that Illinois was taking too much water from Lake Michigan for its own domestic use (as opposed to use for navigation in the canal) and that Illinois should be compelled either to return all of its domestic pumpage to Lake Michigan or to stop diverting water from Lake Michigan altogether. The United States intervened in that litigation.[7] After lengthy evidentiary proceedings, a Special Master recommended amending the decree to cap (at the then-existing level) all of Illinois's direct and indirect diversions from the Lake Michigan watershed into the canal system—not just direct diversions from the Lake, but also treated effluent and stormwater runoff diverted into the canal that would otherwise have returned to Lake Michigan. Report of the Special Master at 11-13, 434-436, *Wisconsin* v. *Illinois*, *supra* (Nos. 1, 2, 3 and 11, Original). The decree recommended by the Master, stipu-

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[6] At various times Illinois sought and was granted temporary increases in its permitted diversion. *Wisconsin* v. *Illinois*, 311 U.S. 107 (1940); *Wisconsin* v. *Illinois*, 352 U.S. 945, 352 U.S. 983 (1956).

[7] Contrary to the suggestion by amici AGL et al. (Br. 20-21 & n.9), the United States did not suggest that the scope of the litigation be broadened to include matters other than water diversion; rather, the United States explained that the extent to which diversions of water were permitted or restricted would affect numerous federal interests. See, *e.g.*, U.S. Pet. in Intervention at 26, *Wisconsin* v. *Illinois*, *supra* (Nos. 2, 3 and 4, Original) (explaining "the effects of the diversions from Lake Michigan upon the various interests of the United States") (capitalization omitted).

lated to by the parties, and entered by the Court thus set out a formula for determining how much water Illinois is diverting from the Lake Michigan watershed and how to determine whether Illinois is diverting too much in a given accounting period. *Wisconsin* v. *Illinois*, 388 U.S. 426, 427-429 (1967). Precisely how to divert and use its allocated share of lake water was left up to Illinois. See *id*. at 427-428.

The decree provided that the Court would retain jurisdiction to enter any modification or supplemental decree "which it may deem at any time to be proper in relation to the subject matter in controversy." 388 U.S. at 430. It is that "reopener" provision on which Michigan relies here.[8]

2. Michigan's nuisance and APA claims are not "proper in relation to" the water-diversion decree under the decree's reopener clause

Even when an existing decree contains a reopener provision, that provision may relax the requirements for bringing a *new* claim only if the new claim "fall[s] within [the reopener's] purview." *Nebraska* v. *Wyoming*, 507 U.S. 584, 593 (1993). A reopener provision in a water-apportionment decree does not encompass the parties' every future dispute about water; rather, it preserves the Court's "latitude to correct inequitable allocations" of water, in response to new or changed issues. *Arizona*

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[8] This Court has entered one such modification since 1967: in 1980, on recommendation of the Special Master and by agreement of the parties, the Court modified the procedure for determining whether Illinois is diverting, on average, more than its allotted share of water. See *Wisconsin* v. *Illinois*, 449 U.S. 48 (1980). "The goal of [the amendment was] to maintain the long-term average annual diversion of water from Lake Michigan at or below" the level set in the 1967 decree. *Id*. at 53.

v. *California*, 460 U.S. 605, 625 (1983). And even when a reopener clause does apply, "the interests of certainty and stability" still require "considerable justification" to reopen an existing decree resolving an interstate dispute over sovereign matters, such as the apportionment of water rights. *Nebraska* v. *Wyoming*, 507 U.S. at 593.

Michigan's own allegations make clear that this new case is not "proper in relation to the subject matter in controversy" in the prior water-diversion litigation, as would be required to invoke the 1967 decree's reopener provision. 388 U.S. at 430. The "subject matter in controversy" in 1967 and 1980 was the total amount of water from the Lake Michigan watershed (including stormwater runoff that never actually enters the Lake) that Illinois may divert to various uses that culminate in diversion into the canal system. How Illinois may apportion that water among domestic use, sanitation, and navigation was left to Illinois (subject to federal regulation). *Id*. at 427-428. Here, Michigan expressly disclaims any challenge to the amount of water Illinois may divert, or to the permissible purposes of diversion. See Pet. for Supplemental Decree 2 ("The Petition does not seek to alter the quantity of water being diverted from Lake Michigan under the existing Decree, as most recently amended. Instead, the Petition seeks modification of the means created and maintained by Defendants and the Corps to accomplish the diversion."); see also Mich. Renewed Prelim. Inj. Mot. 7 (abandoning request that the Court regulate water levels in the CAWS).[9] But neither the 1967 decree nor the 1980 modification specified where or how Illinois could divert the water; those are

[9] That disclaimer by Michigan refutes the attempt by one of its amici to argue (Indiana Br. 7-8) that this case concerns the conditions under which Illinois may divert water from Lake Michigan.

matters that this Court has consistently treated as intrastate concerns, to be settled separately from the interstate allocation of water. See, *e.g.*, *United States* v. *Nevada*, 412 U.S. 534, 538 (1973).[10] Nor did the decree impose any environmental regulation of the connections between Lake Michigan and the canal system except for the focused restriction on how much water could be diverted out of the Lake.

Thus, the current dispute is not "proper in relation to the subject matter in controversy" in the water-diversion litigation, as would be required to invoke the reopener clause in the prior decree. *Wisconsin* v. *Illinois*, 388 U.S. at 430. Michigan asserts that "but for" the waterway, it would not face the threat of Asian carp. Mich. Br. in Supp. of Mot. To Reopen and for a Supplemental Decree 7, 21 (Mich. Br. in Supp.). But the existence of the waterway was not the subject of the prior litigation or decree in this Court.

One of Michigan's amici contends that "some relation" between the closed case and the new one is enough to justify reopening. Mich. Shoreline Caucus Br. 18-19 (parsing the phrase "in relation to"). But amicus overlooks a key term in the decree. The reopener clause requires more than just a relation; it requires that a new dispute be "*proper* in relation to the subject matter" of the closed dispute. 388 U.S. at 430 (emphasis added). If the scope of reopening truly were as broad as Michigan and its amici contend, any Great Lakes State could de-

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[10] Amici AGL et al. incorrectly assert (Br. 21 n.9) that by asking that the Water District be restrained from operating its sluices or pumps, and hence from diverting water directly from the Lake, Michigan has placed the 1967 decree at issue. In fact, the decree caps diversions by Illinois as a whole and does not entitle the Water District to divert any particular portion of Illinois's apportioned share.

mand that the prior litigation be broadened to include innumerable disputes over flooding, shipping, navigation, pollution, conservation, or recreation—each of which, like Michigan's claim here, bears no relation to the prior litigation except that it pertains to the same bodies of water. This Court's previous consideration of how much water could be pumped or otherwise diverted into the CAWS does not oblige the Court to serve as a tribunal of first instance over every allegation of harm arising not from the amount (or even the fact) of the water diversion, but from the waterway's mere existence.

Even substantial overlap with the original dispute often is not enough to justify reopening a closed case to inject a new and distinct dispute. For instance, in *New Jersey* v. *Delaware*, No. 11, Original, this Court recently denied leave to reopen a decree to settle a new dispute that bore a far closer relationship to the original dispute than does Michigan's new claim here. This Court previously had resolved a title dispute over the bed of the Delaware River by holding that within a specified twelve-mile circle, Delaware held title all the way up to the low-water mark on the New Jersey shore. *New Jersey* v. *Delaware*, 291 U.S. 361, 385 (1934). The Court's decree retained jurisdiction to enter future modifications. *New Jersey* v. *Delaware*, 295 U.S. 694, 698 (1935). Delaware subsequently refused permission to build a structure from the New Jersey riverbank out onto the Delaware riverbed. New Jersey asked this Court to reopen the case and to specify that the decree had left undisturbed New Jersey's right, under a pre-existing interstate compact, to exercise riparian jurisdiction within the twelve-mile circle, even over wharves extending out onto Delaware's riverbed. N.J. Br. in Supp. of Mot. to

Reopen & for a Supplemental Decree at 18, *New Jersey* v. *Delaware,* 546 U.S. 1028 (2005) (No. 11, Original). Delaware opposed the motion to reopen on the ground that the dispute over whether riparian rights extended across the boundary was not sufficiently related to the original dispute over the boundary itself. Del. Br. in Opp. at 23-25, *New Jersey* v. *Delaware*, *supra* (No. 11, Original). This Court denied the motion to reopen. 546 U.S. 1028 (2005). It should do the same here: this Court's prior handling of litigation that involved the CAWS, including how much water may be diverted into the waterway from Lake Michigan, does not furnish a basis for this Court to reopen Nos. 1, 2, and 3, Original, whenever a party wishes to raise any new dispute that happens to involve both the waterway and the lake.

In the *New Jersey* v. *Delaware* litigation, the Court instead granted permission to file a new action, 546 U.S. at 1028; see *New Jersey* v. *Delaware*, 552 U.S. 597 (2008), and Michigan seeks, in the alternative, permission to do the same. Pet. for Supplemental Decree 30; Mich. Br. in Supp. 9-10, 31-36. As we now discuss, leave should be denied for that alternative course as well.

B. This Court Need Not Exercise Its Original Jurisdiction Because A District Court Can Provide Michigan With A Fully Adequate Forum

This dispute is properly one between Michigan and the entities that could grant the relief Michigan seeks—the Corps and the Water District. Both of those entities are subject to suit in federal district court in Illinois, and this suit involves the sort of issues—implicating the scientific and policymaking expertise of numerous different agencies on immensely complex, important, and technical environmental issues—that this Court has said dis-

trict courts are better suited to review and manage in the first instance. *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 500-505 (1971). This Court should remit Michigan's claims against those entities to that fully adequate forum.

1. The availability of an alternative forum counsels against this Court's exercising jurisdiction

Even in disputes between States, over which this Court has exclusive original jurisdiction, 28 U.S.C. 1251(a), this Court exercises that jurisdiction only "sparingly." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (citations omitted); see *id.* at 77. Disputes between a State and the United States, over which this Court's original jurisdiction is concurrent rather than exclusive, 28 U.S.C. 1251(b)(2), are even less likely to be heard on the merits in this Court. *Nebraska* v. *Wyoming*, 515 U.S. at 27 n.2 (Thomas, J., concurring in part and dissenting in part) (since *United States* v. *Nevada*, *supra*, "[this Court] ha[s], in the majority of actions by States against the United States or its officers, summarily denied the motion for leave to file a bill of complaint").

In deciding whether to exercise its jurisdiction, this Court gives great weight to whether "the issue tendered" may be resolved in an alternative forum. *Mississippi* v. *Louisiana*, 506 U.S. at 77.[11] If it may, this Court

[11] This Court also considers the "seriousness and dignity of the claim" by the plaintiff. *E.g.*, *Mississippi* v. *Louisiana*, 506 U.S. at 77 (citation omitted). We agree that Michigan's allegations of impending harm to Lake Michigan generally satisfy that factor here, because the protection of the Great Lakes from invasive aquatic species is an issue of great importance. See Mich. Br. in Supp. 33. But Michigan's allegation that *Illinois* has failed to monitor its waterways, which is central to its Michigan's argument that litigation should take place in this Court,

is "particularly reluctant to take jurisdiction." *United States* v. *Nevada*, 412 U.S. at 538. And that is so even if the plaintiff's alternative is to bring a proceeding against fewer than all of the defendants that might be made parties in the original action. For instance, in *United States* v. *Nevada*, this Court denied the United States leave to file an original action against California and Nevada because an action in district court against Nevada alone would suffice, even though California could refuse to be joined in such a suit. See *ibid*. Similarly, this Court denied one State leave to sue another when the same issue was being litigated against the defendant State by a political subdivision (and other citizens) of the plaintiff State. *Arizona* v. *New Mexico*, 425 U.S. 794, 797-798 (1976) (per curiam).[12]

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does not state a ripe dispute, much less one of sufficient seriousness to call for this Court to exercise original jurisdiction. See pp. 23-25, *infra*.

[12] The notion that this Court will deny leave to file only if litigation is already pending in the alternative forum, Shoreline Caucus Br. 17; New York Br. 6-7, is wrong. Such a first-to-file rule would negate this Court's authority to manage not only its exclusive, but also its concurrent, original jurisdiction. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93-94, 108 (1972); accord *Washington* v. *General Motors Corp.*, 406 U.S. 109, 113 (1972). Accordingly, even when no parallel action is pending, this Court requires would-be plaintiffs to explore any possibility that an alternative forum can hear the case before granting leave to file an original action. For instance, when it appeared that district courts might be able to hear an interpleader dispute between States, this Court denied leave to file such an action in this Court (and denied an accompanying motion for preliminary injunction), later granting leave to file in this Court only after full exploration of the issue (in district court and in this Court) made clear that the district court lacked jurisdiction. See *California* v. *Texas*, 457 U.S. 164, 164-165 (1982) (per curiam); *California* v. *Texas*, 437 U.S. 601 (1978) (per curiam); *Cali-*

2. Michigan's dispute is with the Corps and the Water District, and it has no ripe quarrel with Illinois

Michigan's sole basis for asserting that no alternative forum exists is that it has named Illinois as a defendant. But it appears to have named Illinois as a defendant only because Illinois was a defendant in the previous action that Michigan improperly seeks to reopen. In this action, the only parties necessary to accord Michigan full relief on the issues it raises are the Corps and the Water District. And the Corps and the Water District plainly are subject to suit in federal district court. See, *e.g.*, *Village of Thornton* v. *United States Army Corps of Eng'rs*, 31 F. Supp. 2d 1060 (N.D. Ill. 1998) (federal environmental claim against Corps, supplemental nuisance claim against Water District).

Michigan's prayer for relief makes clear that Michigan's only ripe dispute is with the Corps and the Water District, not Illinois. All of the "facilities" that Michigan seeks to declare unlawful (Pet. for Supplemental Decree 29) are operated by either the Corps or the Water District. Michigan acknowledges as much. See Mich. Br. in Supp. 24-25. And any permanent ecological separation between Lake Michigan and the Mississippi River system (Pet. for Supplemental Decree 29-30) would require federal action. See p. 3, *supra* (citing federal statutes requiring that the CAWS be maintained as a navigable waterway).

Similarly, in both of its motions for a preliminary injunction, Michigan was unable to specify any action that, in its view, Illinois (not the Water District) should

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fornia v. *Texas*, 434 U.S. 993 (1977). As discussed below, in this case the alternative forum plainly has jurisdiction over proper defendants.

be undertaking but is not.[13] The only basis Michigan has advanced for separately naming Illinois as a defendant is its assertion that only Illinois can take "active measures to capture, kill, or impede the movement of Asian carp" in waterways within Illinois, and that the State has not "announced * * * any [such] active measures." Mich. Renewed Mot. for Prelim. Inj. 21, 36-37. But Michigan has not shown a ripe controversy on that score, much less one "of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Mississippi* v. *Louisiana*, 506 U.S. at 77 (citation omitted). Illinois has repeatedly explained that it *is* undertaking active measures, and Michigan has repeatedly failed to specify what Illinois should be doing differently. See Ill. Prelim. Inj. Opp. 28-30; Ill. Renewed Prelim. Inj. Opp. 4-6, 16-17. This Court routinely denies leave to file bills of complaint when the complained-of conduct is not presenting or threatening any real or substantial injury. See, *e.g.*, *Mississippi* v. *City of Memphis*, 130 S. Ct. 1317 (2010) (citing *Colorado* v. *New Mexico*, 459 U.S. 176, 187 n.13 (1982)).[14]

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[13] Indeed, one of Michigan's requested forms of interim relief—construction of a new structure to block fish passage in the Little Calumet River, Mot. for Prelim. Inj. 28—apparently did not pertain to Illinois at all: the Little Calumet River joins Lake Michigan not in Illinois but in Indiana. See Pet. for Supplemental Decree 11.

[14] Nor is there any merit to the suggestion (AGL Br. 16-17 & n.6; Mich. Renewed Prelim. Inj. Mot. 37) that an Illinois law asserting title to fish in Illinois waters makes Illinois the only possible actor that can combat nuisance fish: state law does not bind the federal government, and the Corps has broad, clear authority under Section 126 to take any necessary action to combat the carp. See App. to U.S. Prelim. Inj. Opp. 3a; see also Ill. Renewed Prelim. Inj. Opp. 15-20 (explaining that the argument is also incorrect as a matter of Illinois law).

In short, the State of Illinois is not a necessary party to this action at all. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 97 (1972) (in nuisance action against six Wisconsin subdivisions, Wisconsin was not a necessary party, although it could be a proper defendant if named). Michigan would not be able to obtain any greater or better relief with Illinois in the case than without it.

Michigan cannot overcome that point by insisting that, as the master of its complaint, it can name another State as defendant and, by that means, entitle itself to sue in this Court. Amici make that argument explicitly. See Shoreline Caucus Br. 15-17; Indiana Br. 9. Indeed, one amicus expressly states (Shoreline Caucus Br. 8) that its argument would permit Michigan to sue Illinois in this Court and seek an order directing Illinois not to do anything itself, but to *direct the Water District* to provide exactly the same relief that a district court could impose against the Water District in its own right. Amici's notion that this Court must hear any dispute if the plaintiff State chooses to name a State as defendant fundamentally misconceives the gatekeeping function that this Court exercises in deciding whether to grant leave to file a bill of complaint.

The principle that a plaintiff is master of its complaint has little or no application in a case within this Court's original jurisdiction. As discussed above, pp. 21-22, *supra*, plaintiffs must proceed in an adequate alternative forum, not in this Court, even when the plaintiffs can pursue only some of the same defendants there. *United States* v. *Nevada*, 412 U.S. at 538; cf. *New York* v. *New Jersey*, 256 U.S. 296, 306-307 (1921) (original action against New Jersey not necessary, because State was bound by stipulation signed by Passaic Valley Sewerage Commissioners, and relief afforded by that stipu-

lation eliminated need for injunctive action against State). And more generally, this Court has denied a State's motion for leave to file an action against another State on a number of occasions. See, *e.g.*, *Arkansas* v. *Oklahoma*, 546 U.S. 1166 (2006) (No. 133, Original); *Arkansas* v. *Oklahoma*, 488 U.S. 1000 (1989) (No. 115, Original); *Louisiana* v. *Mississippi*, 488 U.S. 990 (1988) (No. 114, Original); *Pennsylvania* v. *Alabama*, 472 U.S. 1015 (1985) (No. 101, Original); *Pennsylvania* v. *Oklahoma*, 465 U.S. 1097 (1984) (No. 98, Original). Even when it has permitted an original action to proceed, this Court has sometimes concluded that the presence of one or more named defendants is not necessary to afford relief, and dismissed those defendants. See, *e.g.*, *Kentucky* v. *Indiana*, 281 U.S. 163, 173-175 (1930).

That the Water District is a political subdivision of Illinois does not in any way make Illinois a necessary defendant. Amici advance the theory that Illinois is responsible for whatever the Water District does; that Michigan may therefore sue Illinois; and that naming Illinois defeats the jurisdiction of the alternative forum. Shoreline Caucus Br. 8-11, 15-16; AGL Br. 15-16. That argument misses the point. The question here, unlike in the cases on which amici rely, is not whether Illinois is responsible in a legal sense for the Water District's actions and, if not, is entitled to dismissal on the merits. See *Missouri* v. *Illinois*, 180 U.S. 208, 242 (1901) (overruling demurrer); accord *Wisconsin* v. *Illinois*, 289 U.S. 395, 399-400 (1933) (Illinois made "no objection * * * to [being joined] as a party defendant" but disputed its "legal liability * * * for the acts of the Sanitary Dis-

trict").[15] Rather, the question is whether Michigan can obtain the identical relief against the Water District in another forum. If it can, this Court will require it to go there. See pp. 21-22, *supra*. In the earlier phase of the water-diversion litigation, there was no alternative forum, because the dispute —whether Illinois was diverting an inequitably large quantity of water from Lake Michigan—was quintessentially one among the States, not their instrumentalities. See, *e.g.*, *South Carolina* v. *North Carolina*, 130 S. Ct. 854, 867 (2010) ("[A] State's sovereign interest in ensuring an equitable share of an interstate [water supply] is precisely the type of interest that the State, as *parens patriae*, represents on behalf of its citizens) (citing *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam)); accord *id.* at 870 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("An interest in water is an interest * * * properly pressed or defended by the State."). Here the federal district courts are open to hear a suit against the Corps and the Water District, as no one disputes. And the claims that Michigan brings are likely cognizable in a district court at the appropriate time—although, as we explain below, many are premature at present and others are without merit.

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[15] Amicus Shoreline Caucus's suggestion (Br. 9-11, 15-16) that this Court should apply issue preclusion based on those cases would be without merit even if the issue were in fact the same. The United States did not become a party to the water-diversion litigation until 1960, *Wisconsin* v. *Illinois*, 361 U.S. 956 (1960), and the decree resolving that litigation expressly did not resolve disputed questions of law. See 388 U.S. at 427 ("it being unnecessary at this time to consider the Special Master's legal conclusions"); Joint Mot. & Proposed Decree at 2-3, *Wisconsin* v. *Illinois*, *supra* (Nos. 1, 2, 3 and 11, Original).

As this Court explained in *Wyandotte Chemicals*, an interstate dispute that involves an alleged nuisance, but that implicates a problem that many responsible regulatory agencies "are actively grappling with on a more practical basis," should be addressed to an ordinary trial court if it can be. 401 U.S. at 503. That is especially true where, as here, any action against the United States must arise under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, in the form of judicial review of action taken by a federal agency, based on the administrative record compiled by that agency. See pp. 28-30, *infra*. The alternative would be to embroil this Court in the review of a "formidable" factual record in the first instance, which "even with the assistance of a most competent Special Master" would be a serious and unwarranted drain on this Court's time and resources. *Wyandotte Chemicals*, 401 U.S. at 503, 504; accord *Washington* v. *General Motors Corp.*, 406 U.S. 109, 113 (1972). That conclusion in no way diminishes the importance of the issues raised in this case, see *Wyandotte Chemicals*, 401 U.S. at 505; it merely explains why this case may appropriately be handled by the usual orderly process for judicial review of administrative action, however important, in the lower federal courts. Cf. *Massachusetts* v. *EPA*, 549 U.S. 497 (2007).

3. Michigan has not identified any reviewable agency action

Although a district court is the appropriate forum for this dispute, the claim as pleaded against the United States is premature in any court, under well-established principles of APA review. Michigan acknowledges that if the Court does not reopen the 1967 decree, Michigan seeks to proceed under the APA, Pet. for Supplemental

Decree 26-29, and indeed, even if this Court were to reopen the water-diversion litigation, the APA would be the only basis for Michigan to bring this new claim against the United States.[16] But Michigan does not identify any "final agency action," 5 U.S.C. 704, by the Corps (or any other federal agency) that it could challenge, in this Court or in district court, as arbitrary, capricious, or otherwise "not in accordance with law." 5 U.S.C. 706(2)(A). Indeed, the Corps has undertaken and is undertaking several actions to implement measures that Michigan demands. See, *e.g.*, pp. 6-7, 10-11, *supra.* The record amply refutes Michigan's suggestion (Pet. for Supplemental Decree 27) that the Corps has reached some sort of final determination to rest on Barrier IIA for the defense of the Great Lakes to the exclusion of all other measures.

Amici AGL et al. assert (Br. 23)—based on a statement taken out of context from the government's memorandum in opposition to Michigan's first preliminary-injunction motion—that the Corps has undertaken final agency action by denying a request by Michigan that the locks be closed. But see U.S. Prelim. Inj. Opp. 21, 38. In fact, Michigan made no such request of the Corps before filing this action. See App. to U.S. Prelim. Inj. Opp. 85a (letter from Michigan Attorney General asking

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[16] The APA is the only possible basis on which to conclude that the sovereign immunity of the United States has been waived, in this Court or any other. The Tucker Act does not waive sovereign immunity for cases sounding in tort (such as nuisance), 28 U.S.C. 1491(a)(1), and the Federal Tort Claims Act does not waive sovereign immunity for tort claims seeking equitable relief, see 28 U.S.C. 1346(b)(1). And Michigan does not contend that the United States, or Illinois, has violated the prior decree. See Mich. Br. in Supp. 18 (acknowledging that Michigan seeks to modify rather than enforce the prior decree).

not for complete lock closure but for, "if necessary, changes in lock and water control operations to prevent the passage of fish into Lake Michigan"). And in any event, the Corps is actively considering a number of alternative ways of deterring the Asian carp from migrating through the locks, including high-tech barriers and modified structural operations. See pp. 11-12, *supra*. That consideration will conclude with one or more recommendations for action by the Assistant Secretary of the Army, who is the final decisionmaker under Section 126. And until she makes a decision, there is no reviewable agency action. See *Dalton* v. *Specter*, 511 U.S. 462, 469-470 (1994); *Franklin* v. *Massachusetts*, 505 U.S. 788, 798-800 (1992).

The courts of appeals disagree over whether the final agency action requirement of the APA is jurisdictional. See *Sharkey* v. *Quarantillo*, 541 F.3d 75, 87 n.10 (2d Cir. 2008) (citing cases); *Gros Ventre Tribe* v. *United States*, 469 F.3d 801, 808-809 (9th Cir. 2006) (noting an intra-circuit conflict on this issue), cert. denied, 552 U.S. 824 (2007). But regardless whether the absence of final agency action affects the federal courts' jurisdiction to entertain Michigan's action against the United States or instead merely precludes Michigan from obtaining any relief, the prematurity of Michigan's claims is a further reason to deny Michigan leave to file.[17]

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[17] Michigan's claims against the United States also fail to state a claim, for a number of reasons. See, *e.g.*, U.S. Prelim. Inj. Opp. 39-43; U.S. Renewed Prelim. Inj. Opp. 16-17 & n.4. This Court, however, generally does not require a motion for leave to file to satisfy the standard for stating a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Rather, in cases where the threshold legal viability of the plaintiff's claims is in question, the Court invites the defendants to file a motion to dismiss and either rules on that motion itself or refers

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Michigan has not properly invoked this Court's jurisdiction. Indeed, each of the jurisdictional flaws discussed above was raised during the preliminary-injunction briefing; Michigan offered essentially no rejoinder, see Mich. Renewed Prelim. Inj. Mot. 36-37, and the Court denied both preliminary-injunction motions. This case does not concern the volume of Illinois' diversions from Lake Michigan; indeed, it does not truly concern any act or omission by Illinois, or any final action by a federal agency. For those reasons, it does not belong in this Court.

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it to a Special Master. See, *e.g.*, *Montana* v. *Wyoming*, 129 S. Ct. 480 (2008) (motion to dismiss referred to Special Master); *Kansas* v. *Nebraska*, 528 U.S. 1001 (1999) (same); *New Hampshire* v. *Maine*, 532 U.S. 742, 756 (2001) (motion to dismiss granted after oral argument); *Wyoming* v. *Oklahoma*, 488 U.S. 921 (1988) (motion to dismiss denied summarily). If the Court were to grant Michigan's motion for leave to file, it should take the same course here and permit the defendants to file motions to dismiss.

CONCLUSION

The motion to reopen should be denied. The alternative motion for leave to commence a new action in this Court should also be denied.

Respectfully submitted.

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