

Nos. 1, 2, and 3, Original

In The
Supreme Court of the United States
October Term 1966

STATES OF WISCONSIN, MINNESOTA, OHIO, AND PENNSYLVANIA,
Complainants,
v.
STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT
OF GREATER CHICAGO,
Defendants,
UNITED STATES OF AMERICA,
Intervenor.

STATE OF MICHIGAN,
Complainant,
v.
STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT
OF GREATER CHICAGO,
Defendants,
UNITED STATES OF AMERICA,
Intervenor.

STATE OF NEW YORK,
Complainants,
v.
STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT
OF GREATER CHICAGO,
Defendants,
UNITED STATES OF AMERICA,
Intervenor.

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**STATE OF WISCONSIN'S RESPONSE TO STATE OF MICHIGAN'S
MOTION FOR PRELIMINARY INJUNCTION**
— ◆ —

J.B. VAN HOLLEN
Attorney General

THOMAS J. DAWSON
Assistant Attorney General
State Bar # 1016134

CYNTHIA R. HIRSCH
Counsel of Record
Assistant Attorney General
State Bar #1012870

Attorneys for Complainant,
State of Wisconsin
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3861
hirschcr@doj.state.wi.us

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**STATE OF WISCONSIN'S RESPONSE TO STATE OF MICHIGAN'S
MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

The State of Michigan, in its motion for preliminary injunction, has asked the Court to enjoin the State of Illinois, the Metropolitan Water Reclamation District of Greater Chicago, and the U.S. Army Corps of Engineers to immediately take all available measures within their respective control, consistent with the protection of public health and safety, to prevent the migration of bighead and silver carp into Lake Michigan (Michigan's Motion for Preliminary Injunction at p. 28).

Specifically, the State of Michigan has asked the Court to enjoin the above-named defendants and intervenor to accomplish specific tasks relating to the closing and ceasing operation of specific locks and sluice gates that control the flow of water between Lake Michigan and the rest of the Chicago waterway system (Michigan's Motion for Preliminary Injunction at p. 28, (a) and (b)). In addition, Michigan is asking the Court to enjoin the parties to install certain interim barriers between certain rivers and Lake Michigan in order to prevent bighead and silver carp from entering Lake Michigan (Michigan's Motion for Preliminary Injunction at pp. 28-29, (c) and (d)).

Finally, and most important to Wisconsin, the State of Michigan is asking the Court to enjoin the defendants and intervenor to complete and operate the existing electrical dispersal barrier system at full operating

power and comprehensively monitor the canal and connective waterways for the presence and eradication of bighead or silver carp (Michigan's Motion for Preliminary Injunction at p. 29, (e)-(g)).

The State of Wisconsin, by its Attorney General and as one of the Complainants to No. 1 of the Original action, is in full agreement with the relief requested by the State of Michigan. Wisconsin invokes this Court's retained jurisdiction under paragraph 7 of the 1967 Decree in *Wisconsin v. Illinois*.¹ The Attorney General for the State of Wisconsin was specifically authorized on December 15, 2009, by the Wisconsin Assembly to vigorously pursue every legal means available to prevent silver and bighead species of Asian carp from entering the Great Lakes.² The State of Wisconsin supports Michigan's motion for preliminary injunction and strongly urges the Court to grant all of the relief requested at this time.

ARGUMENT

Factors to be considered by the Court before issuing a preliminary injunction are: (1) the movant's likelihood of success on the merits, (2) the movant's likelihood to suffer irreparable harm in the absence of preliminary relief, (3) whether the balance of equities tips in favor of the movant, and

¹ *Wisconsin v. Illinois*, 388 U.S. 426 (1967).

² 2009 Wisconsin Assembly Resolution 16, <http://www.legis.state.wi.us/2009/data/AR16hst.html>, Wis. Stat. § 165.25(1m) (2009).

(4) whether an injunction is in the public interest.³

I. IRREPARABLE HARM TO THE STATE OF WISCONSIN IS IMMINENT.

In Wisconsin the waters of the Great Lakes basin have been declared by statute to be precious natural resources shared and held in trust by states.⁴ The Wisconsin public trust doctrine was applied at statehood to the State of Wisconsin through the Northwest Ordinance of 1787 and the Wisconsin Constitution, Article IX, Section 1, and has been expansively interpreted to safeguard the public's use of navigable waters for commercial and recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty.⁵

Wisconsin waters of Lake Michigan and Lake Superior support a popular and thriving sport fishery which includes private anglers, licensed guides and charter captains. There are approximately 235,000 anglers who fish 3.7 million days each year primarily for rainbow, brown and lake trout, chinook and coho salmon, walleye, smallmouth bass, Great Lakes

³ *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008) (citing *Munaf v. Geren*, 553 U.S. ___, ___, 128 S.Ct. 2207, 2218-2219, 171 L.Ed.2d 1 (2008); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982)).

⁴ Wis. Stat. § 281.343(1m)(a)1.

⁵ *Muench v. Public Service Comm.*, 261 Wis. 492, 499-500, 503-508, 515g, 515m, 53 N.W.2d 514 (1952); *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983). See also *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387, 452-53 (1892).

strain muskellunge, and yellow perch.⁶ Wisconsin licensed 359 charter captains in 2009. Based on Wisconsin Department of Natural Resources (WDNR) creel surveys of major fisheries in 2008 (not all fisheries are covered), anglers harvested a minimum of 640,000 fish in Lake Michigan⁷ and 36,000 fish in Lake Superior.⁸

Sport fishing in Wisconsin waters of Lake Michigan and Lake Superior generated \$419 million in economic activity and supported 5,000 jobs in Wisconsin alone, based on a comprehensive survey conducted in 2006 by the United States Fish and Wildlife Service and the Department of the Census (see n.5) and an economic analysis done by the American Sportfishing Association.⁹

⁶ USFWS 2008. 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation – Wisconsin. U.S. Department of the Interior, Fish and Wildlife Service, and U.S. Department of Commerce, U.S. Census Bureau. May, 2008. Available online at: <http://www.census.gov/prod/2008pubs/fhw06-wi.pdf>

⁷ Peterson, C. and B. Eggold. 2009. Wisconsin's 2008 open water sportfishing effort and harvest from Lake Michigan and Green Bay. Wisconsin Department of Natural Resources Publication FH-830-09. July, 2009. Published online at: <http://dnr.wi.gov/fish/lakemich/Lake Michigan Sport Harvest Report 2008.pdf>

⁸ Zunker, C. 2009. Wisconsin's 2008 Lake Superior Creel Survey Report. Wisconsin Department of Natural Resources. April, 2009. Published online at: <http://dnr.wi.gov/fish/lakesup/documents/2008LakeSuperiorCreelReport.pdf>

⁹ Southwick Associates 2007. Sportfishing in America: An Economic Engine and Conservation Powerhouse. Produced for the American Sportfishing Association, January 2008. Published online at: <http://asafishing.org/images/statistics/resources/Sportfishing%20in%20America%20Rev.%207%202008.pdf>

Wisconsin waters of Lake Michigan and Lake Superior support active state and tribal commercial fisheries of significant economic and cultural value. There are ten commercial fishing licenses on Lake Superior and sixty-five on Lake Michigan. Commercial species in Lake Superior are lake trout, lake whitefish, lake herring, bloater chubs, and rainbow smelt. Commercial species taken from Lake Michigan include lake whitefish, rainbow smelt, yellow perch, bloater chubs, and round whitefish. The combined annual harvest from Lake Superior in recent years has exceeded 1,000,000 pounds. The combined annual harvest from Lake Michigan is currently around 2,000,000 pounds, but has exceeded 5,000,000 pounds in some recent years.^{10,11}

Estimates of the economic value of commercial fishing in Wisconsin vary with the market value of the catch, but the 2007 Wisconsin commercial harvest was worth \$3.0 million for Lake Michigan and \$651,000 for Lake Superior based on estimates compiled by the United States Geological Survey Great Lakes Science Center (*see n.10*).

¹⁰ WDNR 2009. Lake Michigan Management Reports 2009. Wisconsin Department of Natural Resources. December, 2009. Published online at: http://dnr.wi.gov/fish/lakemich/GLFC_Report_2009.pdf;

¹¹ USGS 2007. Commercial Fishing Reports: Total Pounds and Dollar Value of Commercial Catch in U.S. Waters of the Great Lakes by Year, State, Lake and Species. United States Geological Survey, Great Lakes Science Center. Maintained online at: http://www.glsc.usgs.gov/main.php?content=products_data_fishingreports&title=Data0&menu=products

The popular and economically valuable sport and commercial fisheries described above will be significantly and adversely impacted should bighead and silver carp become established in Wisconsin waters of Lake Michigan and Lake Superior. The Wisconsin Department of Natural Resources has developed comprehensive fisheries management plans for Lake Michigan¹² and Lake Superior.¹³ The State continues to invest significant resources in helping the fisheries of both lakes recover from past pollution and overfishing, and from ongoing infestations of aquatic invasive species. The addition of large bodied, planktivorous invasive fish species such as bighead or silver carp could well be the "last straw" for many valuable fisheries.

Bighead and silver carp survive and thrive in the lake habitat types found in Wisconsin waters of the Great Lakes. The most likely Wisconsin waters include bays, harbors and drowned river mouths, many of which contain extremely valuable fisheries such as Milwaukee Harbor, Green Bay,

¹² WDNR 2004. Lake Michigan Integrated Fisheries Management Plan 2003-2013. Wisconsin Department of Natural Resources, Bureau of Fisheries Management Administrative Report No. 56. January, 2004. Published online at: http://dnr.wi.gov/fish/lakemich/LMIFMP_2003-2013.pdf

¹³ WDNR 1988. Lake Superior Fisheries Management Plan 1988-1998. Wisconsin Department of Natural Resources, Bureau of Fisheries Management Administrative Report No. 28. September, 1988. Published online at: [http://dnr.wi.gov/fish/lakesup/documents/Lake Superior Fisheries Management Plan_1988-1998.pdf](http://dnr.wi.gov/fish/lakesup/documents/Lake_Superior_Fisheries_Management_Plan_1988-1998.pdf)

Chequamegon Bay, Kakagon Sloughs, and Duluth-Superior Harbor.¹⁴

Asian carp are most likely to sustain natural reproduction when they have access to rivers with 100 km. (62 miles) or more of undammed flowing water (*see* n.13). This includes twenty-two river systems on the United States side of the upper Great Lakes, including the Sheboygan, Manitowoc, Bad and Nemadji Rivers in Wisconsin. In addition, Wisconsin has a number of Great Lakes tributary streams of shorter length which could serve as spawning habitat.

II. MICHIGAN IS LIKELY TO SUCCEED ON THE MERITS, THE BALANCE OF EQUITIES TIPS IN FAVOR OF MICHIGAN, AND AN INJUNCTION WOULD BE IN THE PUBLIC INTEREST.

The jurisdictional, legal, and factual basis of Michigan's request for supplemental relief are set forth in Michigan's Motion to Reopen and for Supplemental Decree, Petition, and supporting Brief. The State of Wisconsin is in agreement with the facts and law set forth in those pleadings. In its earlier Decree in this matter, the Court expressly authorized any party to apply for further action or relief and retains jurisdiction in these cases for the purpose of further orders or directives.¹⁵ Given the current threat to the

¹⁴ Kolar, C.S., D.C. Chapman, W. R. Courtenay, Jr., C.M. Housel, J.D. Williams and D.P. Jennings. 2005. Asian Carps of the Genus *Hypophthalmichthys* (Pisces, Cyprinidae) – A Biological Synopsis and Environmental Risk Assessment. Report to the U.S. Fish and Wildlife Service per Interagency Agreement 94400-3-0128. April 2005. Available at:

<http://www.fws.gov/contaminants/OtherDocuments/ACBSRAFinalReport2005.pdf>

¹⁵ *Wisconsin v. Illinois*, 281 U.S. 696, 698 (1930).

health of the Great Lakes and related waterways by silver or bighead carp, and given that the threat is a direct result of the authorized diversion project at issue in the Court's earlier Decree, Michigan's motion to reopen is warranted and this Court retains jurisdiction. It is anticipated that fishery and natural resource experts in each of the affected states will provide compelling evidentiary support regarding the biological impact on the waterways of each state by the imminent threat of the carp invasion.

As noted in Michigan's motion, the U.S. Army Corps of Engineers is concerned that ecological disaster could result if the status quo is not maintained.¹⁶ The United States Environmental Protection Agency and the United States Fish and Wildlife Service have agreed that bighead and silver carp are a threat to the Great Lakes.¹⁷ Given the absence of dispute about the devastation these fish will cause if allowed to invade Lake Michigan, there is a substantial likelihood that Michigan will succeed on the merits of these claims.

Moreover, the State of Wisconsin agrees that the balance of equities tips in Michigan's favor. Although the commercial shipping industry might suffer from the impact of the remedies requested, there is little doubt that if the bighead and silver carp are allowed to invade Lake Michigan, the overall adverse environmental and economic impact to the Great Lakes system and

¹⁶ Appendix to State of Michigan's Motion to Reopen and for a Supplemental Decree, Petition, and Brief in Support of Motion ("Appendix"), App. 51a.

¹⁷ Appendix, App. 48a-49a; App. 15a.

related waterways is more substantial and of greater concern. Hence, the State of Wisconsin also agrees that an injunction is in the public interest.

CONCLUSION

The State of Wisconsin supports the request for a preliminary injunction set forth by the State of Michigan. The State of Wisconsin asserts that Michigan's request for a supplemental decree should be granted and that this Court has retained jurisdiction of the Decree. Even if this Court has not specifically retained jurisdiction, the nature and significance of Michigan's claims, including Michigan's request for a preliminary injunction, are within the Court's original and exclusive jurisdiction and warrant consideration by the Court.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

THOMAS J. DAWSON
Assistant Attorney General
State Bar # 1016134


CYNTHIA R. HIRSCH
Counsel of Record
Assistant Attorney General
State Bar # 1012870

Attorneys for Complainant,
State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3861
hirschcr@doj.state.wi.us

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