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,
No. 1 Original

STATE OF MICHIGAN,
Complainant,
v.
STATE OF ILLINOIS and the METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,
Defendants,
UNITED STATES OF AMERICA,
Intervenor.
No. 2 Original

STATE OF NEW YORK,
Complainant,
v.
STATE OF ILLINOIS and the METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,
Defendants,
UNITED STATES OF AMERICA,
Intervenor.
No. 3 Original

RESPONSE TO MOTION FOR LEAVE TO FILE PETITION FOR MODIFICATION OF DECREE AND RESPONSE TO PETITION FOR MODIFICATION OF DECREE

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The STATE OF WISCONSIN, by BRONSON C. LA FOLLETTE, Attorney General of the State of Wisconsin, responds to the Motion of the State of Illinois for Leave To File its Petition for Modification of Decree in this cause as follows:

1. This Court has original and exclusive jurisdiction of this case pursuant to Article III, § 2 of the United States Constitution and Title 28 U.S.C. § 1251(a)(1).

2. The State of Illinois has properly invoked the jurisdiction of this Court to modify the decree entered herein on June 12, 1967, (388 U.S. 426) pursuant to paragraph 7 of said decree, which provides:

> "Any of the parties hereto may apply at the foot of this decree for any other or further action or relief, and this Court retains jurisdiction of the suits in Nos. 1, 2, and 3, Original Docket, for the purpose of making any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy."

IN RESPONSE to the Petition of Illinois for Modification of the Decree, Wisconsin hereby states its opposition to entry of the decree as proposed for the following reasons:

1. The proposed decree is insufficient for failure to insure, as promised in petitioner's brief, that Illinois will substantially reduce its need for discretionary dilution and navigational makeup water by funding and constructing sewage treatment and water pollution abatement facilities to free large quantities of diverted Lake Michigan water for domestic use.

2. The proposed decree eliminates the requirement in the existing decree that Illinois account for its pumpage of ground and surface waters originating from outside the Lake Michigan watershed and which discharge to the Illinois waterway, thereby sanctioning the continued excessive pumpage by Illinois of the deep sandstone aquifer which underlies both Wisconsin and Illinois.

3. The proposed decree is incomplete in its omission of the requirement in the existing decree that Illinois account for its pumpage of ground water supplied by infiltration, rather than direct diversion, from Lake Michigan.

4. The proposed decree fails to account for Lake Michigan water diverted from the Indiana Harbor Canal to the Illinois waterway via the Grand Calumet River.

5. The proposed decree and supporting materials fail to adequately demonstrate Illinois' efforts to identify and correct sources of waste and leakage of the Lake Michigan water that is presently being diverted.

6. The proposed decree fixes the previously flexible storm runoff figure at 550 cubic feet per second (cfs) for purposes of calculating the total diversion which must be kept below 3,200 cfs; the estimates of Illinois' own consultants, however, as well as projected effects of increased urbanization in the Chicago metropolitan area suggest that the 550 cfs figure is too low.

7. The proposed decree erroneously incorporates a provision of the existing decree, paragraph 3, which provides for a five-year average of 3,200 cfs diversion but also permits an annual diversion of 110% of the maximum diversion amount to allow for year-to-year variability in the amount of storm run-off. If storm water runoff is fixed as proposed, the 110% leeway is unnecessary.

8. Wisconsin does not oppose modification of the decree if the result is to better quantify and conserve Lake Michigan diversion water. The decree as proposed, however, fails to adequately protect the interests of all parties in the best use of available water resources.

WHEREFORE, the STATE OF WISCONSIN requests:

1. That this Court grant the motion of the State of Illinois for Leave to File its Petition for Modification of Decree; and

2. That this Court dismiss the Petition for Modification of Decree on its merits or, alternatively, appoint a special master to consider the objections to the proposed decree submitted by Wisconsin and other parties to this cause.

Respectfully submitted,

Bron C. La Follette

BRONSON C. LA FOLLETTE
Attorney General of the
State of Wisconsin

MEMORANDUM OF AUTHORITIES

I. Supplemental History Of The Case.

Although Illinois' brief adequately outlines the historical background essential to an understanding of this controversy, three matters of particular relevance to the petition now before this Court deserve amplification.

The decree entered in 1930 established the accounting procedure by which Illinois calculates the Lake Michigan diversion flow using a system of deductions from the total flow measured at Lockport, Illinois. The decree also set a timetable requiring Illinois, over an eight-year period, to reduce its diversion for sewage dilution purposes from 8,500 cfs to 1,500 cfs and to construct sewage treatment facilities to reduce the amount of Lake Michigan water needed for sewage dilution. *Wisconsin v. Illinois*, 281 U.S. 179 (1930). The order to construct sewage treatment plants was premised on this Court's decision in 1929 that diversion for purposes other than maintaining navigation in the Chicago River has no legal basis, the Court concluding:

> " ... The Sanitary District authorities, relying on the argument with reference to the health of its people, have much too long delayed the needed substitution of suitable sewage plants as a means of avoiding the diversion in the future. Therefore they can not now complain if an immediately heavy burden is placed upon the district because of their attitude and course. The situation requires the District 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.
>
> "Though the restoration of just rights to the complainants will be gradual instead of immediate it must be continuous and as speedy as practicable, and must include everything that is essential to an effective project." *Wisconsin v. Illinois*, 278 U.S. 367, 420-421 (1929).

In 1932, on petition of Wisconsin, Minnesota, Ohio and Michigan, this Court directed Illinois and the Sanitary District of Chicago to show cause why steps had not been taken to comply with that portion of the 1930 decree requiring construction of sewage treatment plants. Acting on the findings and recommendation of the Special Master, this Court enlarged the 1930 decree to require the State of Illinois to provide necessary funds to enable the Sanitary District to complete the sewage treatment works mandated by the 1930 decree. *Wisconsin v. Illinois*, 289 U.S. 395, 411 (1933).

Second, Illinois' chronology of this controversy omits any reference to the petition of Illinois in 1940 seeking modification of the 1930 decree to extend the time for meeting the 1,500 cfs limit until December 31, 1942, because the system for sewage treatment had not been completed. The Court denied Illinois' petition for temporary injunctive relief, stating:

> "The State of Illinois has failed to show that it has provided all possible means at its command for the completion of the

> sewage treatment system as required by the decree as specifically enlarged in 1933 ... . No adequate excuse has been presented for the delay. ..." *Wisconsin v. Illinois*, 309 U.S. 569, 571 (1940).

Illinois' petition for modification was subsequently dismissed on the recommendation of the Special Master, 313 U.S. 547 (1941).

Third, Illinois' synopsis of the 1967 decree (*Wisconsin v. Illinois*, 388 U.S. 426) properly notes that this Court retained jurisdiction to consider requests for the diversion of additional water, but omits the decree's specific condition requiring consideration of "water resources available to the region, including both ground and surface water" as well as Lake Michigan diversion water, before any modification can be granted, 388 U.S. at 429. This condition is particularly significant for Wisconsin, since Special Master Albert Maris' findings of fact, which were adopted by the Court, 388 U.S. 427, foresaw the potential for depletion by Illinois of the deep sandstone aquifer beneath Wisconsin and Illinois (Findings XV-36 through XV-59, pp. 377-384, "Report of Albert B. Maris, Special Master," December 8, 1966).

Additional facts as are necessary to an understanding of this controversy appear in the following argument.

II. This Court Has Jurisdiction To Modify The 1967 Decree.

The threshhold question on Illinois' motion for leave to file the petition for modification of decree is whether this Court's original jurisdiction is properly invoked. *Idaho v. Oregon*, 429 U.S. 163 (1976); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 494, 496 (1971).

Wisconsin concurs with Illinois that the Court's retention of jurisdiction to modify the 1967 decree confers jurisdiction upon this Court to consider Illinois' petition for modification. Moreover, since this is a controversy between two or more states, the Court's original and exclusive jurisdiction is properly invoked pursuant to Art. III, § 2, cls. 1 and 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1).

III. Wisconsin's Objections To The Proposed Decree Must Be Addressed In The Exercise Of This Court's Equity Jurisdiction.

Illinois proposes to change the accounting procedure by which it measures the 3,200 cfs of Lake Michigan water allotted by the 1967 decree. The proposed formula fixes the presently variable storm runoff figure at 550 cfs, measures the direct diversion water at lakefront intake points instead of deducting from the total flow at Lockport, Illinois, and alters the annual accounting period. Illinois contends that the modification "would enhance water conservation and prevent an impending water shortage in Northeastern Illinois, without causing any harm to the Great Lakes or to any parties in this case," Petition for Modification of Decree, p. 12.

Although Wisconsin commends Illinois' effort to take advantage of improved water management technology to aid water conservation, the proposed decree addresses only part of the northeastern Illinois' water problem. Even if the modified accounting method proves beneficial, the failure of the proposed decree to address the concerns expressed in Wisconsin's Response may indeed result in harm to citizens of the Great Lakes states. This Court should weigh the objections to the proposed decree in the interests of reaching the best possible allocation of water

resources and in the hope of deterring Illinois' recourse to this Court a few years hence to obtain a permanent and inflexible increase in the amount of Lake Michigan water it takes.

Wisconsin's objections to the proposed decree are set forth in the Response to Petition for Modification of Decree. Apart from errors and omissions in the proposed formula, Wisconsin believes that any decree entered in this cause must commit Illinois to the assurances in its brief that the completion of water pollution abatement and sewage treatment facilities will substantially reduce the need for discretionary dilution and navigational makeup water, which together currently account for approximately 502 cfs. Adequate sewage treatment of the water that is discharged into the Illinois waterway will mean that less Lake Michigan water is needed to maintain the waterway. This, in turn, will enable Illinois to apply more of its 3,200 cfs of Lake Michigan water to domestic purposes, and alleviate fears that ever-increasing amounts of Lake Michigan water will be needed to meet Illinois' demands.

Commitment to completion of promised sewage treatment facilities is further compelled by the application of strict federal and state water quality standards for the Illinois waterway. To meet those standards, Illinois must either purify the liquids presently being discharged into the waterway or flush out the waterway with more Lake Michigan water. The failure of the proposed decree to address these unpalatable alternatives can only invite future recourse to this Court as Illinois' need for water grows.

Moreover, the proposed decree offers nothing to assure that Illinois will cease its mining of the deep sandstone

aquifer beneath Wisconsin and Illinois; in fact, the proposed decree strikes all reference in the existing decree to ground and surface waters. In light of Special Master Maris' warning of the threat of over-pumpage of the deep sandstone aquifer in his 1966 Report, pp. 337-384, Wisconsin's concern is not illusory. The 1967 decree specifically requires consideration of available ground and surface water resources on a petition for modification. Thus, even though Illinois does not "at this time" seek additional Lake Michigan water, the parties and this Court should scrutinize Illinois' assertion that the modification of the accounting system to shift a mere 140 cfs to domestic use would insure that "the water supply in the area would be adequate now, and according to projections, for the foreseeable future" (Petition for Modification, p. 29).

It is evident from the history of this very case that the Court may, in furtherance of its power to equitably apportion interstate waters, impose the conditions which Wisconsin requests on the decree. Just as the Court ordered Illinois to complete its sewage treatment facilities in 1933, mandatory construction of sewage treatment facilities was coupled with a decree equitably apportioning Delaware River waters in *New Jersey v. New York*, 283 U.S. 805 (1931) both decrees recently discussed in *Vermont v. New York*, 417 U.S. 270, 275 (1974). In *Kentucky v. Indiana*, 281 U.S. 163, 176-177 (1929), this Court noted the broad compass of its jurisdiction to resolve disputes between states:

> "Where the States themselves are before this Court for the determination of a controversy between them, neither can determine their rights *inter sese*, and this Court must pass upon every question essential to such a determination, although

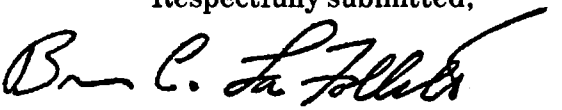
> local legislation and questions of state authorization may be involved."

Illinois correctly notes that the burden of proof on a state seeking relief in this Court is much higher than that borne by private litigants, citing *Colorado v. Kansas*, 320 U.S. 383 (1943). In recognition of that burden, and sharing Illinois' disdain for "quibbling over formulas," Wisconsin looks toward a decree that reflects a full exploration of the best uses of Lake Michigan water.

CONCLUSION

The State of Wisconsin respectfully requests that this Court grant the motion of the State of Illinois for leave to file its petition for modification of decree. Wisconsin further requests that this Court either appoint a special master as provided in Rule 53 of the Federal Rules of Civil Procedure to consider objections to entry of the proposed decree, or dismiss the petition on the merits.

Respectfully submitted,



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