Supreme Court of the United States

OCTOBER TERM, 1925

No. 16 [redacted] 7

STATES OF WISCONSIN, MINNESOTA, OHIO AND PENNSYLVANIA,
Complainants,
against
STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,
Defendants.

Brief and Argument Filed by the State of New York by Permission of this Court as *Amicus Curiae.*

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STATES OF WISCONSIN, MINNESOTA, OHIO AND PENNSYLVANIA,
Complainants,

vs.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,
Defendants.

BRIEF AND ARGUMENT FILED BY THE STATE OF NEW YORK BY PERMISSION OF THIS COURT AS *AMICUS CURIAE*.

Statement of the Case.

The Sanitary District of Chicago was organized under the provisions of a statute of the State of Illinois, approved May 29, 1889; in force July 1, 1889. The title of this statute reads as follows: "An Act to Create Sanitary Districts and to Remove Obstructions in the Desplaines and Illinois Rivers."

The reason for this statute appears on page 6 of the brief of the Attorney General of Illinois in this case in his statement: "By 1884, the rapid growth of the city had created, in the lake, the

canal (the old Illinois and Michigan canal) and the two rivers (Illinois and Desplaines rivers) just mentioned, a dangerous condition, resulting from sewage disposal;" and further appears on page 11 of the brief of the Sanitary District in this case in the statement: "The primary purpose of the Act of 1889 as construed by the highest courts of Illinois is to provide a method of disposing of the sewage of the City of Chicago and contiguous territory." It is obvious that this statute was enacted for the purpose of enabling the City of Chicago and certain adjacent municipalities to organize themselves into a body corporate with the power to construct and build up a sewage disposal system by which the sewage of the City of Chicago and adjacent territory should be run off through an enlarged canal into the Desplaines River.

The purpose of the organization of the Sanitary District of Chicago has been effectuated by the construction of the present sewage disposal system. The Sanitary Canal was opened in 1900. Prior to the opening of the canal and on the 8th day of May, 1899, the Secretary of War issued a temporary and conditional permit for the diversion of water from the Chicago River through the Sanitary Canal. The permitting paragraph and conditions in said permit read as follows:

> "Now, therefore, the Chief of Engineers, having consented thereto, this is to certify that the Secretary of War hereby gives permission to the said sanitary district of Chicago to open the channel constructed and cause the waters of Chicago River to flow into the same, subject to the following conditions:

"1. That it be distinctly understood that it is the intention of the Secretary of War to submit the questions connected with the work of the sanitary district of Chicago to Congress for the consideration and final action, and that this permit shall be subject to such action as may be taken by Congress.

"2. That if at any time it becomes apparent that the current created by such drainage works in the South and Main Branches of Chicago River be unreasonably obstructive to navigation or injurious to property, the Secretary of War reserves the right to close said discharge through said channel or to modify it to such an extent as may be demanded by navigation and property interests along said Chicago River and its South Branch.

"3. That the sanitary district of Chicago must assume all responsibility for damages to property and navigation interests by reason of the introduction of a current in Chicago River."

This permit was modified by the Secretary of War from time to time and on the 17th day of January, 1903, he further modified the permit by limiting the amount of water to be diverted to 250,000 cubic feet per minute or 4,167 cubic feet per second. (Amended Bill of Complaint, pp. 19–25.)

In 1912 the Sanitary District applied to Secretary of War Stimson for permission to withdraw from Lake Michigan 10,000 cubic feet of water per second. Exhaustive hearings were held on this application and on the 8th day of January,

1913, Secretary Stimson denied the application and wrote an opinion of some length setting forth the reasons for his denial of the application and also pointing out minutely the great damage which would be inflicted upon navigation and other interests on the Great Lakes and St. Lawrence River and connecting waterways if such increased diversion were permitted.

Subsequent to the decision of this court in January, 1925, affirming the injunction decree of the District Court, which restrains the Sanitary District from withdrawing from Lake Michigan water in excess of 4,167 cubic feet per second (*Sanitary District* v. *U. S.*, 266 U. S. 405), the Sanitary District again applied to the Secretary of War for permission to withdraw 10,000 cubic feet per second of water from Lake Michigan, and on the 3rd day of March, 1925, a permit was issued to the Sanitary District, signed by Major General Taylor, Chief of Engineers, and Hon. John W. Weeks, Secretary of War, a copy of which permit appears in the amended bill of complaint at pages 30–32.

It should be noted at this point that in each and every one of the permits issued to the Sanitary District, prior to the permit of March 3, 1925, it was expressly stated by the Secretary of War that the diversion of water by the Sanitary District was a question to be dealt with by Congress, and it will be further noted that, after the oral decision of Judge Landis in 1920, upholding the contention of the Government, several bills were presented in Congress, some of which would, if enacted into law, undertake to authorize the diversion of 10,000 cubic feet per second of water from Lake Michigan, while others are drafted as meas-

ures to improve navigation on the Illinois River and for other purposes, such other purposes being the withdrawal of an increased amount of water from Lake Michigan by the Sanitary District. Extensive hearings were held in March and April, 1924, on these bills before the Committee on Rivers and Harbors in the House of Representatives, and other hearings were held in January, 1925, before a special committee of the Senate known as the McCormick Committee. In all of these hearings it was disclosed that the Chief of Engineers had reported time and again that the amount of water necessary to be diverted from Lake Michigan for navigation purposes to afford a nine-foot waterway between Chicago and the Mississippi River would not exceed 1000 cubic feet per second; and on the 20th day of January, 1925, Major General Taylor, Chief of Engineers, testified before the McCormick Committee that 1000 cubic feet per second would be adequate for such nine-foot waterway. (Vol. 2, p. 141, McCormick Committee Report.)

There has been pending in Congress at all times during the last five years one or more of these bills intended to authorize the Sanitary District to withdraw not less than 10,000 cubic feet per second of water from Lake Michigan. While hearings have been held on these bills as above stated Congress has shown no disposition to approve them. It cannot be fairly stated that Congress by any affirmative act or by acquiescence has assented to the withdrawal of water from Lake Michigan by the Sanitary District.

The claimed right of the Sanitary District to withdraw water from Lake Michigan for sewage purposes and not return the same to the lake, a

most extraordinary and unreasonable use thereof, presents a question concerning which there has been serious controversy for a quarter of a century. This controversy has been carried on before the Secretary of War, committees of both branches of Congress, and in the federal courts. All of the Great Lakes States, the Canadian Government and a large number of commercial bodies, municipalities and individuals have taken part therein. It has also been the subject of diplomatic correspondence between this Government and Great Britain.

The great damage to navigation interests on the Great Lakes and the St. Lawrence River, and to adjoining states, their citizens and the municipalities therein, due to the Chicago diversion has been established and is well understood. The damage already caused is small in comparison with the damage which will be caused in the future if this diversion is continued. The freight tonnage on the Great Lakes above the Niagara River in 1923 amounted to more than one hundred million tons; it was more than double the combined tonnage passing through the Suez and Panama Canals; and it exceeded the foreign commerce of all the Atlantic, Gulf and Pacific coast harbors in 1920. (Marine Review, January, 1925.)

The effect of this diversion on the levels of the Great Lakes was fully set forth in the memorandum of Secretary of War Stimson in 1913. He stated that from the evidence before him it appeared that the water surface of the Great Lakes would be reduced about 6 inches and the permissible load of one of the large modern vessels would be reduced by from 300 to 550 tons with a consequent loss of from $5,600 to $7,500 in freight for

such vessel per season; that the loss to navigation interests resulting from a reduction of 6 inches in the depth of water would amount to $1,500,000 per annum, or a sum which, capitalized at 4 per cent would amount to a loss of $37,500,000; and that the lowest careful estimate of injury to American vessels alone is reported by the Chief of Engineers at $1,000,000 per year. Since 1913 shipping on the Great Lakes has increased so rapidly that now the annual loss to navigation interests alone amounts to more than $3,500,000. These facts, and others showing further damage and loss to the downstream states, are also established in the case (*Sanitary District* v. *U. S.*, 266 U. S. 405).

The defendants refer to the act of Congress of March 2, 1827 (4 U. S. Stat. at L. 234), by which Congress granted to the State of Illinois certain lands in that state for the purpose of "aiding said state in opening a canal to unite the waters of the Illinois River with those of Lake Michigan." This Court considered the statute of 1827 (*Sanitary District* v. *U. S.*, 266 U. S. 405), and disposed of the contention that the act of 1827 is any basis of authority whatever for the withdrawal of water from Lake Michigan by the Sanitary District.

There are other facts in the case which might be stated and undoubtedly will be stated by the parties to the suit, but the foregoing statement of facts is deemed sufficient for the following argument by the State of New York.

ARGUMENT.

THE SANITARY DISTRICT OF CHICAGO HAS NO RIGHT TO WITHDRAW WATER FROM LAKE MICHIGAN, UNLESS THE AMOUNT WITHDRAWN IS RETURNED TO THE LAKE, UNDER ANY EXISTING STATE OR FEDERAL LAW, NOTWITHSTANDING THE PERMIT OF THE SECRETARY OF WAR, DATED MARCH 3, 1925.

I.

Natural Rights of the State of Illinois, the City of Chicago, and the Sanitary District in Lake Michigan and Its Waters.

It is unnecessary for the purpose of this argument to discuss the question of the rights of the defendant State of Illinois in Lake Michigan and its waters. That right has been defined by this Court. (*Illinois Cent. R. R. Co.* v. *Illinois,* 146 U. S. 387.) The important question here is to what extent may the Sanitary District lawfully go in making use of the waters of this lake for domestic and sanitary purposes—in short may the Sanitary District in disposing of its sewage and trade wastes lawfully withdraw from Lake Michigan this large volume of water and discharge the same through the Sanitary Canal into the Desplaines River which lies in another watershed? It is not contended here that the Sanitary District or the City of Chicago may not use the waters of Lake Michigan for domestic and sanitary purposes in any ordinary and reasonable way; but it is contended that the withdrawal of water from Lake Michigan and the discharge of the same into the Mississippi watershed, as is

now being done by the Sanitary District, a most unusual and extraordinary use of said waters, is unlawful, notwithstanding the permit issued by the Chief of Engineers and the Secretary of War in March, 1925.

The Great Lakes and St. Lawrence River and connecting waterways constitute a national as well as an international waterway and the rules of international law apply to this waterway in the relations of the United States with the several states and with a friendly foreign nation and also apply in the relations of the State of Illinois with all of the other Great Lakes states. Prior to the adoption of the federal constitution each state possessed all of the attributes of sovereignty. Touching upon this question in the case of *Martin* v. *Wadell,* 16 Pet. 367, this Court held (page 410) as follows:

> "For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government."

The several states are the original reservoirs of power and retain all of the rights and powers of sovereignty except such as were surrendered to the General Government by the commerce clause of the constitution. (Art. 1, Sec. 8, Clause 3.) In considering the rights of the State of Illinois and the Sanitary District in the Great Lakes and St. Lawrence waterway and the limitations under

which such rights may be exercised the complainant states and other states adjoining this waterway are not fettered by the provisions of the commerce clause of the constitution but may consider each state sovereign in itself and subject to the rules of international law. The question is then what rights do the State of Illinois and the Sanitary District possess and within what limits must they act in exercising such rights having in mind the rights of the other states adjoining this waterway. We quote from Oppenheim on International Law (3rd Ed. Vol. 1, p. 211):

> "Just like independence, territorial supremacy does not give a boundless liberty of action. * * * Thus, to give another and fifth example, a state is, in spite of its territorial supremacy, not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighboring state—for instance, to stop or to divert the flow of a river which runs from its own into neighboring territory."

And from Hyde on International Law (Vol. 1, Sec. 183) on the subject of "Diversion of Waters" as follows:

> "The diversion of the waters of an international stream for any purposes, such as those of sanitation, navigation, power or irrigation, tends to interfere with the fullest use of the river by all riparian proprietors. There may be said to be an essential conflict between the interest of the stream as a whole, and that of the particular State diverting its

waters. Where a river traverses or serves as the boundary of the territories of several States, the existence of the river interest, as such, becomes the more apparent, because of the common concern of all in its welfare."

* * *

"In the case of a navigable river a special element projects itself which at once opposes any unrestricted taking of water serving to diminish the depth of channels of navigation and thus to impair their value. Any duty imposed upon a riparian State, either by international law or by contract, to maintain the navigability of an international river, implies an obligation also to check within places subject to the control of such State the commission of any acts which, unless restricted, would prove injurious to navigation generally."

Illinois like New York is a common-law state. She has not legislated in derogation of the common law. There are no conditions in Illinois which compels or justifies her departure from the common-law rule. There are no lands to be irrigated or arid lands to be reclaimed within her borders as there are in many of the states west of the Mississippi river. Therefore the common law is applicable to questions relating to the interior streams of the state and is applicable in determining the question of what use may be made of the waters of Lake Michigan. This lake is not an interior body of water. It is one of the bodies of water constituting the Great Lakes and St. Lawrence Waterway. It is a boundary water of the

State of Illinois and other states. A great volume of commerce has been built up on this waterway. The cities of Milwaukee, Detroit, Cleveland, Buffalo and many smaller cities lie along its shores, all of which are seriously menaced by the Chicago diversion. The Sanitary District (virtually the City of Chicago) to the great damage of commerce on the Great Lakes and to the great damage of all the downstream states and their citizens demands the right to continue the withdrawal of this large volume of water from this waterway for what—not for navigation purposes,—not for any purpose for which there are no other adequate means—but for a system of sewage disposal by means of dilution, a great open sewer, unscientific to the extreme, offensive, and destructive of fish life in the Desplaines and Illinois Rivers, and inflicting great property damage along the same. There are other and better ways of disposing of Chicago's sewage. This has been demonstrated beyond any question. Chicago started wrong in this matter, and has continued wrong for twenty-five years and in open defiance of the rights of the other states and a friendly foreign nation and also in open defiance of the duly constituted authority of the General Government. The basis of her claim is a wrongful and unlawful appropriation of the waters of this great waterway and her unwillingness to spend the necessary money to correct this wrong to say nothing of her unwillingness to compensate for the great damages which she has inflicted upon navigation interests and upon the downstream states and their citizens. Consequently there is a dispute between Illinois and the Sanitary District on the one hand and the other Great Lakes States on the other and this Court is called upon to settle this dispute.

In the settlement of this dispute the Court will apply the rules of law which have been adopted by the State of Illinois. Since Illinois is a common-law State the rules of the common law should be applied. Each state is free to determine whether it will apply the rules of the common law or some other law, but when it has made its decision it is bound by the rules of the law which it has adopted. As said by Mr. Justice Brewer in the case of *Kansas* v. *Colorado* (206 U. S. 46) at page 94: "It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control," and again at pages 97 and 98:

> "One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri* v. *Illinois*, 180 U. S. 208, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law."

What then is to be the rule of interstate law to be applied in this case. There is no question here of conflict of authority between the State of Illinois and the General Government nor conflict of authority between the other Great Lakes States and the General Government. The question presented is clearly a question of interstate rights. The complainant states and the other Great Lakes States have no controversy with the General Government; their controversy is with the State of Illinois and the Sanitary District of Chicago. While Illinois and the Sanitary District have repeatedly challenged the right of the General Government to prohibit the diversion of water through the Sanitary Canal, the other Great Lakes States have taken the position that the General Government has the power to prohibit this diversion and further that it is its duty to prohibit it. It is our position that the rule of interstate law to be applied in this case should conform to the rules of the common law and those general rules of international law which have been in effect in Illinois since her organization as a state and are generally in effect in the other Great Lakes States.

There can be no absolute property in flowing water, nor is it the subject of absolute dominion or control. Like air, light, or the heat of the sun, it has none of the attributes commonly ascribed to property. It was observed by Blackstone (2 Bl. Com. 18): "Water is a movable, wandering thing and must of necessity continue common by the law of nature; so that I can have only a temporary, transient, usufructuary property therein." The

right to its use as it flows along is a property right, but the use must be an ordinary and reasonable use and one that will not deprive downstream proprietors of an equal use and one that will not seriously diminish the flow of the stream. (3 Kent's Com., 439, 440.) The maxim, *aqua currit et debet currere ut currere solebat,* expresses the general rule of law which governs the rights of owners of property on water courses. Bearing on this principal of law we quote from the opinion of Mr. Justice Brewer (page 100) in the case of *Kansas* v. *Colorado, supra:*

> "Suppose the controversy was between two individuals, upper and lower riparian owners on a little stream with rocky bank and rocky bottom. The question properly might be limited to the single one of the diminution of the flow by the upper riparian proprietor. The lower riparian proprietor might insist that he was entitled to the full, undiminished and unpolluted flow of the water of the stream as it had been wont to run. It would not be a defense on the part of the upper riparian proprietor that by the use to which he had appropriated the water he had benefited the lower proprietor, or that the latter has received in any other respects an equivalent. The question would be one of legal right, narrowed to place, amount of flow and freedom from pollution.
>
> "We do not intimate that entirely different considerations obtain in a controversy between two States. Colorado could not be upheld in appropriating the entire flow of the Arkansas River, on the ground that it is will-

> ing to give, and does give, to Kansas something else which may be considered of equal value. That would be equivalent to this court's making a contract between the two States, and that it is not authorized to do."

The State of New York, injured by the Chicago diversion, to protect its rights as a state, which are directly affected, and in its capacity as *parens patriae,* trustee, guardian, and representative of its citizens, asks this Court to stop this diversion—this unlawful appropriation of the waters of Lake Michigan—which seriously diminishes the flow of this great waterway with its consequent damage; and to consider the greater interest of the stream as a whole which outweighs the local interest or benefits derived by Chicago, and to prevent this great and continuing wrong.

II.

The Commerce Clause of the Constitution.

Article 1, Clause 8, Section 3, of the Constitution confers upon Congress the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." It is not our purpose to question the power of Congress to regulate and control navigable waters under this section of the Constitution. This power of Congress has been clearly defined in the case of *Gibbons* v. *Ogden* (9 Wheaton 1) and later cases; but we do contend that Congress in exercising this power must act within certain limitations; that whatever Congress does must be in aid of navigation and not destructive of navigation; that Congress must act within certain pre-

scribed rules of law. The existence of this great waterway is a permanent provision of nature. The right to regulate commerce presupposes that commerce exists and it goes without saying that whatever Congress may do it must be something in aid of commerce and not something that will seriously impair commerce or destroy it. We quote from the opinion of Mr. Justice McKenna (page 259) in the case of *Greenleaf Lumber Co.* v. *Garrison* (237 U. S. 251): "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation." And also from the opinion of Mr. Justice Van Devanter (page 47) in Second Employers' Liability Cases (223 U. S. 1): "To regulate," in the sense intended, is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large."

The Act of Congress of March 5, 1899, provided "that the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited; * * * and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the chief of engineers and authorized by the Secretary of War prior to beginning the same." The diversion of water from Lake Michigan by the Sanitary District affects the navigability of the Great Lakes and is an obstruction to navigation and comes

within the prohibition of the Act of 1899. The Secretary of War is the agency of the government whose duty it is to protect the navigable capacity of the navigable waters of the United States and we submit that he has no power to give any valid permit to do any act which will seriously impair or destroy the navigable capacity of such waters.

III.

The Permit of the Secretary of War Issued March 3, 1925.

At the outset we desire to call the attention of the Court to that part of the Act of March 5, 1899, quoted under Point II of this brief, under which the Secretary of War, upon the recommendation of the Chief of Engineers, is authorized to permit certain work prior to the beginning of the same. When the application was made by the Sanitary District to the Secretary of War in February, 1925, for permission to maintain the work which it had constructed, to wit, the diversion of water from Lake Michigan through the Sanitary Canal, the Secretary of War had before him the findings made by himself (treating the office of Secretary of War as a continuing office without regard to the changes in its incumbency) dating from the year 1913, that the diversion, for which permission was asked by the Sanitary District, had seriously affected the levels of the Great Lakes and constituted an unlawful obstruction to navigation. He had before him also various uniform reports of the Chief of Engineers to the same effect, and he had before him the testimony of the then and present Chief of Engineers Major General Taylor, given before the McCormick Committee on the 20th day of January, 1925, that 1000 cubic feet

per second of water was all that was necessary for a nine-foot channel between Chicago and the Mississippi River. He had before him his own letter of January 26, 1922, addressed to the Chairman of the Committee on Rivers and Harbors of the House of Representatives, in which he referred to H. R. Bill 9046, introduced in the 67th Congress, 2nd Session and intended to authorize the Sanitary District to withdraw from Lake Michigan 10,000 cubic feet per second of water, in which letter he had advised the Chairman of the Committee on Rivers and Harbors in these words: "I am, therefore, unable to recommend the favorable consideration of the bill." There had been no reversal or modification of any of these findings. Every finding of fact was adverse to the Chicago Sanitary District. Congress had not and has not authorized a nine-foot channel from Chicago to the Mississippi River. Nothing was presented to the Secretary of War from which he or the Chief of Engineers could modify the findings of fact already made or the opinions already expressed. There was no change in conditions, unless it may be said that the wrong perpetrated by Chicago had continued for a greater duration of time. With this situation confronting him the Chief of Engineers and the Secretary of War issued the permit of March 3, 1925, authorizing the diversion of 8,500 cubic feet per second with an instantaneous diversion of 11,000 cubic feet per second. This permit we say was and is an unlawful permit and was beyond the power of the Secretary of War to grant. He attached certain conditions to the permit, which, if complied with, will reduce the diversion to 4,167 cubic feet per second by 1935. Another condition which he

attached to the permit requires that the Sanitary District shall post a guarantee in the way of a bond or certified check in the amount of $1,000,000 as an evidence of its good faith that it will pay its share of the cost of regulating or compensating works to restore the levels or compensate for the lowering of the Great Lakes system, if and when constructed. The term "compensating works" is a misnomer. There can be no such thing as compensating works. It has been agreed by engineers for a long time that regulating or control works at different points in this waterway are desirable and such regulating and control works are necessary regardless of the Chicago diversion. Such was the report of the Engineering Board of Review employed by the Sanitary District in 1924. (See paragraph 5 on page 2 of the Recommendations of this Engineering Board of Review.) Compensation might very properly be made to the states and citizens of the states which have been damaged by this diversion. Navigation interests alone have been subjected to and are now being subjected to great loss. These interests might properly be compensated. At any rate the condition is practically meaningless. The proposal for regulating or control works has been widely discussed but has never reached any further stage. Furthermore such works cannot be constructed without the consent of the Canadian government. This government has strenuously opposed the Chicago diversion and has shown no disposition to unite with our government on any plan for constructing such works. The imposing of this condition by the Secretary of War is equivalent to his making a contract between the State of Illinois or the Sanitary District and the other

Great Lakes States and we submit that he was not authorized to make any such contract. If there are to be any regulating or control works they should be constructed and paid for by the two governments as a navigation requirement and without reference to the Chicago diversion.

The Secretary of War has resorted to the Act of Congress of March 5, 1899, for his authority to issue the permit under consideration. We submit that there is nothing in that act which authorizes him in any case to give permission to construct works in any of the navigable waters of the United States or to do any other act which will constitute an obstruction to navigation. He is authorized in certain cases to give permission where the work has been recommended by the Chief of Engineers prior to the beginning of the work. In this case the work had been completed before the permit was issued, March 3, 1925. The Chief of Engineers prior to that time had repeatedly recommended that the work should not be permitted for the reason that it constituted a serious obstruction to navigation and the Secretary of War had repeatedly refused to permit such work. A fair interpretation of this statute means that whenever an applicant for a permit desires to erect any structure in navigable waters or perform any other act affecting navigable waters, before the Secretary of War may grant the permit to the applicant, there must be an investigation by the Chief of Engineers and a determination by him that such work or act will not be an obstruction to the navigable capacity of the waters affected. The Secretary of War is the guardian of the rights of all the people in navigable waters and is the protector of such rights.

IV.

The Mississippi Valley States.

The position of the several Mississippi Valley States intervening and seeking to secure the continuance of the diversion of water from Lake Michigan is to say the least anomalous. They are intervening in a suit in equity and asking for a continuance of the enjoyment of property rights which they are now receiving at the hands of one who has wrongfully appropriated the same. They are the receivers and beneficiaries of property rights wrongfully appropriated and now come into a court of equity asking a judgment of the court that they may continue to enjoy the benefit of these property rights which have been wrongfully appropriated. The position of these several states was discussed by Mr. Justice Holmes in the case of *Sanitary District of Chicago* v. *United States* (266 U. S. 405), and it is sufficient to quote from the opinion in that case as follows:

> "States bordering on the Mississippi, allowed to file briefs as amici curiae, suggest that they were not heard and that rights have not been represented before the Secretary of War. The City of Chicago makes a similar complaint and argues that it is threatened with a loss of a hundred million dollars.
>
> "The interest that the river states have in increasing the artificial flow from Lake Michigan is not a right, but merely a consideration that they may address to congress if they see fit, to induce a modification of the law that now forbids that increase unless approved as prescribed. * * * It is doubtful at least

whether the secretary was authorized to consider the remote interests of the Mississippi states or the sanitary needs of Chicago."

V.

The Position of New York State as One of the Great Lakes States.

The State of New York has equal navigation rights with the other Great Lakes States on the Great Lakes, the St. Lawrence River and connecting waterways and it has another right appurtenant to the Niagara and St. Lawrence Rivers which the other Great Lakes States do not possess. It has the right to use the available waters of these two rivers for the purpose of developing power. The order of precedence in the use of the waters of this waterway is (1) domestic and sanitary purposes; (2) navigation; (3) development of power. The use of water for domestic and sanitary purposes must be the ordinary, reasonable and generally approved use. The use of the waters of this waterway for navigation purposes is general, each State possessing equal rights. The residue of the water available for power belongs to the State adjoining that particular part of the waterway where power may be developed. New York is the only one of these states adjoining that part of the waterway where power may be developed and is entitled to this residue of the water for that purpose. A flow of 10,000 cubic feet per second of water through the Niagara River and the international section of the St. Lawrence River is capable of developing about 400,000 horsepower. This is a property right of the State of New York which it is obligated to protect.

In Conclusion.

We believe that the complainant states in their amended bill of complaint present a case justiciable in this Court. They submit a dispute between the complainant states and the State of Illinois and the Sanitary District of Chicago which would seem to be a justiciable case under the authority of *Kansas* v. *Colorado, supra.*

If as defendants contend the United States or the Secretary of War is a necessary party defendant a dismissal of the amended bill of complaint is unnecessary. The Attorney-General may intervene, or the Secretary of War may be made a party defendant by amendment.

It is the position of the State of New York that an injunction should issue against the defendants restraining them from taking any water whatever from Lake Michigan in such manner as to permanently divert the same from the said lake agreeably to the provisions of the first paragraph of the prayer for relief on page 36 of the amended bill of complaint; but the State of New York does not agree to the alternative relief suggested in the subsequent paragraphs of the prayer for relief.

It is respectfully submitted that the motion to dismiss the amended bill of complaint should be denied.

February , 1926.)

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Deputy Attorney-General.