IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

No. 14 Original 11

STATE OF NEW YORK,
Complainant,

vs.

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

MEMORANDUM OF DEFENDANTS IN OPPOSITION TO MOTION OF COMPLAINANT FOR LEAVE TO PARTICIPATE IN WISCONSIN SUIT.

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These defendants object to the said motion of the said complainant and assign the following reasons:

First. The issues in this case are neither the same nor "practically the same" as the issues in the Wisconsin case. The issues in this case and the issues in the Wisconsin case are entirely separate, different and distinct issues. The issues in the Wisconsin case and in the Michigan case, referred to in said motion, are confined entirely to the alleged rights of said complaining states as *quasi-sovereigns* to restrain the diversion at Chicago to the extent *only* that such diversion is alleged to impair the *navigable capacity* of the Great Lakes and to the extent *only* that such diversion is "*not reasonably necessary*" for the *purposes of navigation* on the Lakes-

to-the-Gulf Waterway. The Bill of Complaint in this case (see Paragraph III) alleges that such diversion results in an injury to New York in its *proprietary* capacity, as the alleged owner of water and water-power rights in the flow of the Niagara and St. Lawrence Rivers. The other States, which are complainants in the Wisconsin and Michigan cases, have no justiciable interest in these alleged water and water-power rights. Therefore, the New York case involves entirely separate, different and distinct questions of fact and raises entirely separate, different and distinct principles of law and the causes of action, sought to be joined or consolidated, *are not joint.*

Second. The said motion seeks to permit New York to participate in the said Wisconsin suit "in like manner and with like effect as if" this suit "had been consolidated with" said Wisconsin suit. The said motion is, therefore, equivalent to a motion on behalf of New York to *join* in said Michigan and Wisconsin suits. The right of New York to so "participate" and so join *has been adjudicated adversely to New York,* upon the recent motion of New York to join in said Michigan suit, which motion was denied by this Court upon October 11th, 1926.

Third. The allowance of the said motion "to participate" would be equivalent to allowing New York *to join* in the Michigan and Wisconsin cases and, therefore, would violate Rule 26 of the Federal Equity Rules, which provides that "Where there is more than one plaintiff, the causes of action joined must be joint."

Fourth. The issues in this case are not settled. These defendants were not served with process in this case until October 25th, 1926. These defendants now, in good faith, desire, by demurrer or motion to dismiss, to test the sufficiency of the Bill of Complaint in this case and,

particularly, that part (Paragraph III) thereof, which sets up the alleged water and water-power rights of the said complainant in its *proprietary* capacity, to the full flow of the Niagara and St. Lawrence Rivers and an alleged injury to such alleged rights.

Fifth. These defendants have at all times desired, and now desire, to have consolidated and heard together all of the suits of the said complaining States, with reference to the said diversion, which can properly and expeditiously and without serious and vital prejudice to these defendants, be so consolidated and heard together and, as evidence of such desire on the part of these defendants, they have heretofore presented their motion to consolidate the said Michigan suit with the said Wisconsin suit and, as a result of such motion, Michigan has been permitted, if it so elected, "to participate in the taking of evidence and in the hearing before the Special Master, *in like manner and with like effect as if that suit had been consolidated with this cause by the Court's order*" and Michigan has heretofore elected to so participate, so that *a virtual consolidation* of the said Wisconsin suit and the said Michigan suit has been effected, *at the instance, and upon the motion, of these defendants.*

Sixth. That the taking of testimony before the said Special Master in the said Michigan and Wisconsin cases has been set to begin on the 8th day of November, 1926, and that these defendants are not now prepared, and by that time cannot possibly be prepared, to meet the new issues and questions of law and of fact, which would necessarily be injected and brought in to the said hearing before the said Special Master, if the said motion of New York to participate is allowed.

CONCLUSION.

Wherefore these defendants respectfully submit that the said motion of New York should be denied and request that a reasonable time be given to these defendants to answer or make other defense to the said Bill of Complaint.

Respectfully submitted,

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