In the Supreme Court of the United States

States of Wisconsin, Minnesota, Ohio, and Pennsylvania, *Complainants,* vs. State of Illinois and the Sanitary District of Chicago, *Defendants.*	No. 5, Original.
State of Michigan, *Complainant,* vs. State of Illinois and the Sanitary District of Chicago, *Defendants.*	No. 8, Original.
State of New York, *Complainant,* vs. State of Illinois and the Sanitary District of Chicago, *Defendants.*	No. 9, Original.

REPLY BRIEF OF THE STATES OF WISCONSIN, MINNESOTA, OHIO AND MICHIGAN.

(Names of Solicitors for the Complainants on inside of front cover)

Dated April 17, 1933.

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In the Supreme Court of the United States

STATES OF WISCONSIN, MINNESOTA, OHIO, AND PENNSYLVANIA, *Complainants,* vs. STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, *Defendants.*	No. 5, ORIGINAL.
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REPLY BRIEF OF THE STATES OF WISCONSIN, MINNESOTA, OHIO AND MICHIGAN.

The defendants, the State of Illinois and the Sanitary District of Chicago, have filed separate briefs totaling nearly 250 pages. These briefs abound in inaccurate and misleading statements of the record as shown by the transcript on the present Reference and as shown by the Reports of the former Special Master on the two References which preceded the entry of the decree of April 21, 1930. Self-serving statements and conclusions of the defendants' officers and engineers are quoted, when a reading of the entire examination, and particularly the cross examination

of such witnesses, establishes that such statements and conclusions are without basis in fact. Manifestly it is impossible to point out and discuss these inaccuracies in detail. The defendants in substance challenge all of the findings of fact made by the Special Master on this Reference. The findings of the Special Master are abundantly supported by the evidence recited in his Report. However, the recitals in the Report of the Special Master by no means exhaust the evidence in the record which sustains his findings. If, therefore, the court should decide to examine the sufficiency of the evidence to support the findings of fact made by the Special Master, we respectfully submit that such an examination will necessarily require the reading of the whole of the record before the Special Master both because the references to the record contained in the defendants' brief are so frequently inaccurate and because a reading of the whole record is necessary to an adequate appreciation of how overwhelmingly the Master's findings are supported. Indeed, such an examination will disclose that no other findings than those attacked by the defendants would be possible on this record.

Our principal brief, in our view, fully answers and refutes the factual contentions and points of law asserted in defendants' briefs. The principles of law in our principal brief are controlling. The defendants have not even attempted to distinguish or refute them. Nevertheless, we will briefly review the factual and legal contentions advanced by the defendants.

I.

THE DEFENDANTS' ATTACK UPON THE FINDINGS OF THE SPECIAL MASTER AS TO THE CAUSES OF THE COMPLETE FAILURE OF THE DEFENDANTS TO DO ANYTHING ABOUT CONTROLLING WORKS AND AS TO THE STEPS NOW TO BE TAKEN TO SECURE THEIR PROMPT CONSTRUCTION IS WITHOUT MERIT.

The defendants first contend that application to the Secretary of War after the decree of April 21, 1930 for approval of controlling works would have been futile. (Sanitary District Brief, pp. 12, *et seq.*) On April 25, 1929, General Jadwin, Chief of Engineers, testified that while the War Department would not require the construction of controlling works, the Department would "consider any *application* for the approval of plans for controlling works to be constructed by the Sanitary District or other agency, and may be expected to approve those plans if the works are shown to be necessary, to be effective and to be the minimum detriment to navigation." (Report of Special Master on 1929 Re-Reference, p. 109.) This position of the War Department was reaffirmed by General Brown, Chief of Engineers, in a statement to Special Master McClennen in January, 1933. (R. 33.)

It is thus manifest that the position of the War Department was, and continued to be that, since controlling works were not required as an aid to navigation and since the interests of navigation were the only ones with which the Department was officially concerned, the Department would impose no mandatory requirement for the construction of controlling works, but that the Department stood ready to consider an application and approve plans for controlling works if properly designed, as a sanitary measure, the responsibility for which rested upon the defendants. This position of the War Department was never changed during the interim. (Weeks, R. 709, 488, 493, 494.)

It is thus clear that the contention that a formal application for approval of controlling works would have been futile is contrary to the facts. The contention is not only unsupported by the record, but it is in direct contradiction of the clear statements of General Jadwin in 1929 and of General Brown in 1933. But in any event, it is unthinkable that this Court or these complainants should be required to speculate whether an application by the defendants, had it been filed, would have been approved. The obligation of the defendants was to file and press their application. If the War Department ever refused their application they could report that fact to this Court. We respectfully submit that the failure to file an application was not because of fear that the War Department would not approve, but because of fear that it would approve.

With the inconsistency which characterizes all of the excuses of the defendants on this subject, the defendants further contend that casual and off-hand conversations had with the District Engineer as an incident to other business, was equivalent to an "informal application" for controlling works. If, in fact, defendants believed that they had made an application and been refused, it was their duty to report that circumstance to this Court. The omission of any such report is eloquent of the consciousness of the defendants that they had taken no such action and obtained no such result. The testimony of Colonel Weeks discloses that there is no such thing as an "unofficial" application. (Weeks, R. 770-1, 773-5.) The so-called "unofficial" or "informal" application relates to preliminary and informal conversations, constituting no part of an application, which it should be beneath the dignity of a great State and a great City to put forward as an honest and *bona fide* attempt to make an application and comply with the decree of this Court. We suppose that every person and every municipality that has had occasion to apply for a permit

from the War Department for any purpose, has engaged in preliminary discussions with the District Engineer, not because they supposed that to be an application, but because they desired to shape their application, so far as the exigencies of their requirements would permit, to meet the views of the local representative, with the thought that there would be less likelihood of delay or of ultimate rejection by the Chief of Engineers and the Secretary of War. However, here the casual and off-hand conversations relied upon by the defendants were not even incidental to any application made, or to be made. (Report of Special Master McClennen, p. 17.)

Not only is the attempt to construe these off-hand and casual conversations, incidental to other matters, with a subordinate officer either as an "informal" or "unofficial" application for controlling works or as an excuse for failure to perform on the theory that the filing of the application would be futile so transparently without substance as to require a belief that they cannot be seriously advanced, but the references to the testimony of Colonel Weeks upon which the argument is based are so unfair and inaccurate as to furnish confirmation, were it needed, for that conclusion. It would manifestly be an unwarranted trespass upon the time of this Court to point out those inaccuracies in detail. We merely illustrate them.

The Sanitary District Brief (p. 13) states that Colonel Weeks testified:

> "After having submitted a number of plans to the Chief of Engineers, to my mind it put the matter of deciding upon which of the numerous plans the Department would be willing to receive an application for * * *. My judgment would be that after having submitted the plans to the Department, I would do nothing to urge action on the part of the Department. (Weeks, Rec. 804-805.)"

The incomplete sentence quoted before the asterisks was stricken out and is not part of the evidence. (R. 804.) The last sentence quoted is an answer to a different question. Both sentences had to do with whether Colonel Weeks could fix the date of his so-called tacit agreement with Mr. Wisner, and had nothing to do with what Colonel Weeks told any of the engineers of the defendants. And further, incidentally, Colonel Weeks stated that his tacit agreement with Mr. Wisner may have been reached any time after his report of March 11, 1925. (R. 805.) Were it material, as it is not, it would be reasonable to assume that the so-called tacit agreement was reached during 1929, both before the entry of the decree of March 21, 1930 and before the expiration of the Permit of March 3, 1925, which expired December 31, 1929. That this would naturally follow was evident from the statement of General Jadwin before the former Special Master on April 19, 1929, that the War Department had decided to waive this requirement of the Permit of 1925 as a non-navigational matter, and would not take the initiative in the matter of controlling works.

Defendants claim at various places in their brief that the Sanitary District was justified in believing that Colonel Weeks spoke for the Department, and the Sanitary District states in its brief, (p. 18): "There is no evidence whatever to the effect that Colonel Weeks told the Sanitary District Engineers that he was giving them his personal opinions only." Colonel Weeks testified:

> "The Master: When you made that statement to Mr. Ramey, were you expressing merely your own views, or transmitting something that you had been authorized specifically to say?
>
> A. I was transmitting my own views.
>
> * * * * *

The Master: When you made your statement to Mr. Ramey, did you put it in the form that you have summarized, that the War Department was no longer interested in that subject, or did you put it as the statement of your own attitude on the subject?

A. I put it as a statement of my own attitude on the subject." (R. 488.)

See also Record, page 496. That Colonel Weeks could not have undertaken to state any changed position on the part of the War Department, unless he were to be unjustifiably charged with usurpation of authority in defiance of his superior officers, is shown by his testimony that he was never advised of any change in the position of the War Department, as stated by General Jadwin, and never received any official communications in regard to that subject for communication to the Sanitary District. (Rec. 709.)

Examples of inaccurate and misleading references to the record could be multiplied indefinitely. If the Court should conclude to reexamine the evidence supporting the finding of fact of the Special Master with reference to the causes of delay as to controlling works, it will be necessary to read the whole of the testimony of Colonel Weeks and Mr. Ramey. If that is done, it will be apparent that no other finding than that made by the Special Master was possible upon this record.

It is contended that the filing of an application is not necessary but only the submission of plans. (Sanitary District Brief, p. 27.) Since the Sanitary District neither filed an application nor submitted plans subsequent to the submission of a plan in 1926-7 for a pontoon gate, in the mouth of the Chicago River (which the District knew had been disapproved by the War Department), the contention, if sound, would be irrelevant for lack of factual basis. However, we know of no way of seeking the approval of the War Department for a permit without making some request, whether it be called an application or something

else. Under condition 6 of the Permit of March 3, 1925 the War Department imposed a mandatory requirement upon the Sanitary District to prepare and submit plans for controlling works at the mouth of the Chicago River. It is, of course, manifest that no *application* was necessary to comply with this condition of the Permit of March 3, 1925. It is equally clear that the War Department subsequently waived this mandatory requirement and that thereafter there was substituted an obligation of the defendants to this Court to file an application *forthwith.* The argument that under the circumstances hereinbefore recited it was unnecessary or futile to submit any application is so baseless as to refute itself. The defendants say that the statement of General Jadwin did not constitute an "invitation" to file an application. (Sanitary District Brief, pp. 28-29.) The statement expressed the readiness of the War Department to receive and pass upon an application favorably, if the plans were proper. However, conscientious litigants do not wait for an "invitation" to perform an obligation under a judgment of this Court.

The Sanitary District repeatedly states in its brief that the War Department had passed unfavorably upon every possible scheme for controlling works. That statement is wholly without basis in fact. This statement appears to be based upon the circumstance that in December 1928 the Chief of Engineers directed the District Engineer to make a study and report on the various types of controlling works (other than those forming a complete barrier to navigation like the only plan ever submitted by the Sanitary District) which might be installed to meet Condition 6 of the Permit of March 3, 1925 (Report of Special Master McClennen, p. 8); that in compliance with this direction Colonel Weeks submitted his report of March 11, 1929, and that thereafter the War Department did not enforce Condition 6 of the Permit of March 3, 1925. But

thereafter, and on April 19, 1929, General Jadwin, after having the benefit of Colonel Weeks' report, did advise the former Special Master that the Department stood ready to receive and pass upon an application for controlling works favorably, if properly designed. (Report of Special Master on Re-Reference, p. 109.) In that statement General Jadwin made it clear that the War Department had concluded that, since controlling works were not required as an aid to navigation and since the interests of navigation were the only ones with which the Department was officially concerned, the Department would enforce no mandatory requirement for the construction of controlling works, but, controlling works being a sanitary measure, would leave the initiative on that subject upon the defendants. The complete records of the War Department on this subject are in evidence (R. 32-120) and they may be searched in vain for evidence to support this repeated statement of the defendants.

The utter lack of basis for the contention is further shown by the fact that the present Chief of Engineers, General Brown, advised the Special Master that "the Department is prepared to approve plans for any controlling works presented by the Sanitary District, provided these plans do not constitute unreasonable obstruction to navigation." The defendants omit to state that Colonel Weeks' report of March 11, 1929, recommended a type of controlling works for which the defendants have never made application, and further, that Colonel Weeks' report found that the present method of control (continuing large diversions with control only at Lockport) is unsatisfactory; that the chief advantage of the present method is that it involves no expense for new construction; that it has large disadvantages both to the Illinois Valley and the Great Lakes region, and that its disadvantages greatly outweigh its advantages. (R. 108.)

In this connection defendants say that when they filed their brief in this Court (quoted, Report of Special Master McClennen, pp. 15-16) they did not know the contents of the report of Colonel Weeks. (Sanitary District Brief, p. 31.) Since they did not know the contents of that report until January 12, 1933 (Ramey R. 398) it is difficult to understand how the contents of that report controlled their action subsequent to April 21, 1930.

Defendants advance the further contention that controlling works are not necessary until the flow is reduced below 5,000 second feet. (Sanitary District Brief, p. 32.) This question was settled in the Re-Reference of 1929. The then Special Master found that controlling works should be built before the interim reduction to 5,000 second feet. This Court did not refer that question for reexamination. It directed the Special Master to determine (1) the causes of the delay, and (2) steps which should now be taken to secure the prompt construction of controlling works. The defendants throughout this Reference have sought to relitigate the whole case. The defendants in effect assert that the Special Master erred because he did not undertake to overrule this Court. The failure of the complainants to offer evidence on this subject is not because of a concession that the opinion of the Sanitary District Engineers (which throughout this litigation seems to change as the aims and desires of the District change in the varying positions in which it finds itself), is correct, but because the question had already been decided by this Court. However, if there had been any change in circumstances which justified a conclusion by the defendants that controlling works would not be necessary for the reduction of December 31, 1935, they should have reported that supposed fact to this Court and prayed for a modification of the decree. This clearly is an afterthought born of the necessities of the District in this Refer-

ence. As stated by the Special Master on the Re-Reference of 1929, it was the universal testimony of the sanitary experts that no reduction beyond the initial one could be had prior to the final completion of the whole sewage treatment program without control of the Chicago River to prevent substantial reversals in time of storm. (Report of Special Master on 1929 Re-Reference, pp. 106-107.) The finding of the former Special Master that controlling works were necessary was based upon the testimony of Mr. Ramey, Horace W. King, Professor of Hydraulic Engineering at the University of Michigan, and Sherman M. Woodward, Professor of Mechanics and Hydraulics at the University of Iowa. (Report of Special Master on 1929 Re-Reference, p. 107.) The former Special Master had also heard the testimony of Major General William Sibert on the subject. (Report of Special Master on 1929 Re-Reference, p. 106.) The present Special Master incorrectly assumes (because the facts were not brought to his attention) that there has been experience with a substantially reduced flow since the decree of April 21, 1930, upon which to base a new hydraulic opinion. The average flow at Lockport since the entry of the decree has been 6500 second feet plus the domestic pumpage, or in excess of 8,000 second feet. (Semi-Annual Report filed Jan. 1, 1931, p. 14; Semi-Annual Report filed Jan. 1, 1932, p. 13; Semi-Annual Report filed Jan. 1, 1933, p. 15.) The average annual flow at Lockport did not exceed 8,000 second feet until 1916; and in many years thereafter, because of low lake levels, was only slightly in excess of 8,000 second feet. (Report of Special Master on 1929 Re-Reference, p. 104.)

It is thus evident that any contention that there has been new experience with a substantially reduced flow at Lockport since the entry of the decree of April 21, 1930, upon which to base a new hydraulic opinion upon this point is without basis in fact. When this is considered, the diver-

gence of Mr. Ramey's testimony with that offered by the defendants in 1929 is difficult to explain.

Defendants criticise the Master's finding that the Sanitary District "was not justified in lying back silently and unadvised on any such doubt" whether the decree required the construction of controlling works. (Sanitary District Brief, p. 45.) The District says that it did not lie back silently because it talked to the local District Engineer. Did these defendants believe that the proper way to resolve any doubt and the proper place to report any doubt as to their duty under the decree was by way of casual conversations with a subordinate Engineer of the War Department rather than by report to this Court? Did these defendants believe, in view of the requirement of the decree that they file semi-annual reports as to their progress, that their reports were to be made to the District Engineer at Chicago? The District's statement in its brief (p. 45) in this Court to the effect that they have not claimed any doubt on the subject but were definitely of the opinion that the decree did not require controlling works, is a new shift in position and contradicted by the record. (Ramey R. 399, 661-674.)

The contention that the Special Master misconstrues the effect of the Rivers & Harbors Act of July 3, 1930 is so fully refuted in the Report of the Special Master, the Complainants' Brief filed on the hearing on Defendants' Return to the Order to Show Cause and in our original brief on this hearing, that further discussion seems unwarranted. A brief statement of a few incontrovertible facts clearly shows the untenable character of the argument advanced. The Federal project for the Illinois River from Utica to its mouth is the identical project which was in effect when the hearings were had on the Re-Reference of 1929, and when the decree was entered on April 21, 1930. The question of whether Congress had undertaken to appropriate

any water to that improvement was not and is not affected by whether the water to be used for that improvement first flows through a non-Federal channel or through a Federal channel. That Congress had not undertaken to appropriate water for that purpose, if it had any power, has been adjudicated. That the Rivers and Harbors Act of July 3, 1930, applying only to the Illinois Waterway extending from Utica to the Drainage Canal and taking over supervision of the Drainage Canal to the Chicago River, does not attempt to appropriate any water in excess of this Court's decree is manifest from the analysis of the Special Master. (Report of Special Master McClennen, pp. 19-35.) It was also shown in the Complainants' Brief filed December 5, 1932, pp. 39-47.

On January 12, 1933 the so-called Mississippi Valley States filed an application for a modification of the decree and an enlargement of the present Reference on the ground that the Rivers and Harbors Act of July 3, 1930 had changed the situation by undertaking to appropriate water in excess of this Court's decree. The complainants filed an objection that that Act created no change. On January 16, 1933, this Court denied that application. It is therefore also adjudicated that no such question is in this reference. We agree with Special Master McClennen that the Act does not even indicate a possibility that the Congress may attempt to take such action, but it has already decided that the possibility of congressional action cannot be urged, conceding congressional power which complainants deny, to defeat complainants' rights. (*Wisconsin v. Illinois,* 281 U. S. 179, 197-8.) That attempt has been made throughout this litigation. Many of the statements with reference to the projects on the Illinois River and the Illinois Waterway are incorrect. For the reasons stated, it seems unnecessary to review them in detail.

In criticising the Special Master for referring to the Great Lakes-St. Lawrence Deep Waterway Treaty now pending before the Senate, the Sanitary District attacks the report of General Brown, Chief of Engineers, quoted in Special Master McClennen's Report, pp. 32-35. (Sanitary District Brief, p. 73.) The District's attempt to distinguish conditions on the Monongahela River, the Ohio River, and the Panama Canal set forth in General Brown's report (Report of Special Master McClennen, p. 34) is not only without basis in the record, but without basis in fact. There are no storage reservoirs to impound water for use in low water periods on any of these waterways. The fact is that the commerce is greatest during low water periods. On the other hand the flow at Lockport will always be larger during the summer season, when navigation is most active, for sanitary reasons. The locks on the Ohio are identical in size with those on the Illinois Waterway, and much larger than those on the Illinois River. The locks at Panama are larger than both. There is a vast pollution at the head of the Ohio, both from domestic and industrial wastes, coming from the Pittsburgh district.

Both the Sanitary District and the State of Illinois repeatedly assert (1) that in view of the direction for a survey in the Rivers and Harbors Act of July 3, 1930 the Congress may attempt some time in the future, if it has the power, to authorize a larger diversion than provided by this Court's decree, and (2) that compensating works may be built in the critical channels of the Great Lakes.

The lack of basis for the first assertion is fully established in the Special Master's Report. (Report of Special Master McClennen, pp. 19-35.) Moreover at most it is only the suggestion of a speculative possibility of congressional action, if Congress has any power. That such a possibility does not affect the rights of these complainants has been

adjudicated by this Court. (*Wisconsin v. Illinois,* 281 U. S. 179, 197-8.)

In support of their assertion with reference to compensating works the defendants (1) quote that portion of the Rivers and Harbors Act of July 3, 1930 which provides for new project depths in the principal Federal channels of the Great Lakes, the new depths to be in part dependent upon the construction of compensating works (Sanitary District Brief, pp. 51-52) and (2) that the pending Great Lakes-St. Lawrence Deep Waterway Treaty contemplates the construction of compensating works. (Illinois Brief, p. 16; Sanitary District Brief, pp. 72-73.) In urging this matter the defendants in effect ask this Court to modify or set aside its decree of April 21, 1930. There is no such issue on this Reference. Had the defendants applied for a modification and had the Court deemed any basis to be shown for a hearing looking to a modification, the Court would have directed a Reference on that issue and proper evidence would have been taken.

However, there is no basis for the contention of the defendants on this point. *First,* compensating works can not be constructed in the St. Clair, Detroit and Niagara Rivers without the consent of Canada. It is safe to say that that consent will never be given so long as the United States permits the State of Illinois to abstract large quantities of water from the Great Lakes-St. Lawrence watershed for sanitation and power purposes. This conclusion is confirmed, were confirmation necessary, by the terms of the pending Great Lakes-St. Lawrence Deep Waterway Treaty under which Canada has indicated a willingness to give that consent only upon condition that the United States agree to restrict the diversion at Chicago in accordance with the decree of this Court; *Second,* it is certain that conditions on the Great Lakes will be better with compensat-

ing works and the diversion at Chicago reduced to the amount fixed by the decree, than with compensating works and a continuance of the present diversion at Chicago. *Third,* compensating works are a matter of national benefit, if they are successful at all, and the complainant States can no more be required to surrender in effect their share of that national benefit for the profit of the State of Illinois, either by way of sewage disposal or water power, than they could be required to pay to the State of Illinois the equivalent of any funds which might be appropriated by the Federal Government to improve the outer harbors at any of the ports of the Great Lakes. The evidence on the original Reference established that there are over 400 ports and landings on the Great Lakes, many of which, though usable, have no Federal improvements, and as to which any increase in depths, either with or without compensating works, determines the feasibility from an economic standpoint of water-borne traffic both interstate and intrastate. The record on original Reference also establishes that Federal improvements on the Great Lakes consist of making a channel from deep water to the entrance of the local harbors, and that all of the local or inner harbors and navigation facilities have been and are provided either at the expense of the local municipality or at the expense of private industries, and usually both. Moreover, compensating works in themselves produce certain harmful effects on the vast navigation of the Great Lakes by creating high velocities in the critical channels, and the greater the amount of compensation required (and the requirement is principally produced by the Chicago diversion) the greater such harmful effects.

The attack made upon the recommendations of the Special Master as to the steps which should now be taken to secure the prompt construction of controlling works is not upon the reasonableness of the recommendation for secur-

ing performance, but upon the grounds, (1) that the Master should have overruled this Court and found that controlling works are not necessary, (2) that the defendants hope that Congress, if it has the power, will sometime validate their illegal diversion so that they will never have to comply with the decree of this Court, and (3) an unreported statement that if at some undefined time in the future all hope of the defendants of being able to avoid performance of the decree, through congressional action or otherwise, should vanish, it must be assumed that the Sanitary District would itself take the steps it promised this Court to take at the time of the entry of the decree of April 21, 1930, but has ever since ignored. The only hydraulic testimony on this Reference is that of Mr. Ramey, who also testified on the Re-Reference of 1929. Mr. Ramey is contradicted by all of the testimony before the former Special Master in 1929. The repeated statement that the complainants do not challenge Mr. Ramey's specious conclusion is without foundation in fact. It was already refuted by the record of this case when made. This was not a Reference to determine whether the requirement of controlling works should be eliminated from the decree. No evidence on that subject from the complainants would have been pertinent. The suggestion that the complainants' rights should not be restored because the defendants have not given up hope of getting Congress, if it has any power, to validate their illegal diversion, does not require comment. It is clearly shown, both in the Special Master's Report and in our principal brief that reliance upon the Sanitary District for performance would be wholly unjustified.

II.

THE DEFENDANTS' ATTACK UPON THE FINDINGS OF THE SPECIAL MASTER AS TO THE CAUSES OF DELAY ON THE SOUTHWEST SIDE TREATMENT WORKS AND THE STEPS WHICH SHOULD NOW BE TAKEN TO BRING ABOUT ITS CONSTRUCTION, IS WITHOUT MERIT.

In their attack upon the Special Master's finding that the planned postponement of the beginning of construction of these works left an inadequate time for their completion before December 31, 1938, at the rate of progress expected or to be expected, the defendants assert that the Special Master improperly accepted the findings of the former Special Master that five and one-half years would be a reasonable period of time to allow for the physical construction of this plant. (Sanitary District Brief, pp. 91-101.) The former Special Master heard the most exhaustive testimony upon this subject. The order of Reference in this case neither contemplated nor authorized the present Special Master to reexamine and overrule the finding of the former Special Master. To reexamine this question would have required the most voluminous testimony. The defendants proceed here, as at all points, upon the assumption that the case is to be tried over again. Since the defendants are in substantially the same position as to performance in which they were in 1929, they apparently think that all aspects of this litigation must be in the same situation.

Before the former Special Master, the defendants contended that seven years and nine months would be required for the physical construction of this plant. They adopted their plan a few months after this evidence had been offered and this argument had been made. If the defendants urged a wholly unnecessary time on the former Special Master, that was a fraud on this Court. If the time so sought and allowed was and is wholly unnecessary, the date of the final restoration of complainants' rights should be accelerated.

Defendants can not say that they sought an unjustifiable and unnecessary period of time for the construction of the Southwest Side Treatment Works, which was the determining factor in fixing the time for ultimate restoration of complainants' rights, and that therefore they could properly do nothing while they seek to persuade Congress, if it has any power, to take some action through which they hope to avoid the performance of this decree.

The defendants quote excerpts from the testimony of Ramey and Pearce. These are the self-serving assertions and conclusions of the witnesses. A reading of their whole testimony will clearly establish that there could have been no *bona fide* hope or expectation that the Southwest Side Treatment Works could or would be physically constructed within the time allowed therefor in the plan adopted by the Sanitary District after the entry of this decree. Moreover, the testimony of these witnesses is properly subject to the severest scrutiny. A comparison of their testimony on this Reference with their testimony on the same subjects before the former Special Master, as stated in his Report on the 1929 Re-Reference, will disclose, to say the least, the most glaring inconsistencies. These inconsistencies are so grave as to raise serious doubt of the sincerity and credibility of their testimony on the present Reference. Thus, the witness Ramey testified categorically on the 1929 Re-Reference that the assessed valuation of property in the Sanitary District was one hundred per cent of the actual value (Report of Special Master on 1929 Re-Reference, p. 78); but it is established and admitted on the present Reference that the assessed value of property in the Sanitary District is not, and never has approached, one hundred per cent of the actual value. On the contrary it appears to have been thirty-seven per cent or less of the actual value.

The Sanitary District states that financial difficulties in connection with the $29,000,000 bond issue interrupted con-

struction from December 1928 until September 1929, and that this interruption was not considered by the former Special Master. (Sanitary District Brief 103-4.) Of course this had nothing to do with the Southwest Side Treatment Works, which even defendants will scarcely contend was then under construction, but the fact is that all of the evidence about the difficulties with the $29,000,000 bond issue were before the former Special Master, considered by him, and covered in his Report. (Report of Special Master on 1929 Re-Reference, pp. 45-6, 72.) The testimony about these financial difficulties was also before the present Special Master.

The defendants' criticism of the Master's finding that a further cause of delay on the Southwest Side Plant was the failure to proceed to a definite decision as to a site and the acquisition of the site so chosen, justifies little comment. If the defendants can postpone performance on the plea that some property owner, rightly or wrongly, objects to the District's selection of the site, there can be no hope of performance of the decree. The District describes with wearisome minutiae the trifling details of the paper work said to have been performed in contemplation of condemning a site. If the District is incompetent to institute and carry forward a condemnation suit, it is certain that performance of this decree ought not to be left to their halting and feeble efforts. Even the defendants' selected excerpts of testimony establish the stubborn fact that over three and one-half years after the former Special Master found that the selection of a site should be promptly made, the District is today no nearer the definite selection of a site and its acquisition than in 1929. Were it material complainants could refer to testimony in this record which, in their opinion, conclusively establishes that the Southwest Side Treatment Works could at all times have been built on the West

Side area owned by the Sanitary District. While the defendants would not be justified in postponing the restoration of complainants' rights until, if ever, the art of sewage disposal no longer embodies the possibility of future inventions and improvements, the Sanitary District in its brief asserts that its investigations and experiments, whether justified or not, have caused no delay on the Southwest Side Treatment Works. In short they never intended to do anything on the Southwest Side Treatment Works, at least for three and one-half years, whatever may be their future intentions.

In criticising the finding of the Special Master that another cause of delay was the failure to proceed with reasonable diligence to prepare designs, plans and specifications for the West Side Treatment Works, the defendants proceed with a minute statement of irrelevant and insignificant details. This is well illustrated by the reference to tests of the Stockyard wastes. This subject was exhaustively investigated before the former Special Master and he found that a few months at most would be adequate to secure any additional information which might be needed. To refute the defendants' specious contentions on this point it is enough to say that the total expenditures on the Southwest Side project from the entry of the decree to date have been $87,306.65. (Report of Special Master McClennen, p. 56.) These expenditures were in efforts at acquisition of the site, reinvestigation of the Stockyards waste and some studies for the Southwest Side Plant. The preliminary layouts mentioned in the defendants' brief are nothing more than drawings like the ones offered before the former Special Master in 1929. (Exhibit No. 246.) They are mere studies of space requirements and plant arrangements. There is not today a single contract plan prepared or in preparation for the Southwest Side Treatment Works. The Sanitary District budget for 1933 provides $57,580.00

for engineering and designing of the Southwest Side Work. (Report of Special Master McClennen, p. 64.)

The reasons advanced why the Special Master's recommendation for steps which should now be taken to secure construction of the Southwest Side Treatment Works should not be approved are (1) that the Sanitary District will construct the Works in any event if someone gives it the money, and (2) that the defendants again hope that Congress will pass a statute, if it has the power, which will validate a larger diversion, and that in such an event defendants will not have to construct the Southwest Side Treatment Works. (Sanitary District Brief, pp. 120-2.) At every stage the hope, and we think it may fairly be said the purpose, of these defendants to avoid performance of the decree is made manifest by their own words. The illusory character of the first point urged by the District is thoroughly established by the Report of the Special Master. That the second point should be made at all is unexpected frankness. In this connection we invite the Court's attention that one of the arguments advanced by the District why they think that Congress might undertake, if it has the power, to authorize a larger diversion is in order to mitigate a possible nuisance created by these defendants. Apparently the defendants wish to delay installation of sewage disposal works to make sure of the creation of the nuisance in the hope that this may move Congress to take an action which the defendants have so far sought in vain.

III.

THE DEFENDANTS' ATTACK UPON THE SPECIAL MASTER'S FINDING AS TO FINANCIAL MEASURES WHICH ARE REASONABLE AND NECESSARY ON THE PART OF THE STATE OF ILLINOIS IN ORDER TO CARRY OUT THE DECREE OF THIS COURT CAN NOT BE SUSTAINED.

The Sanitary District devotes Section VI of its brief (pp. 122-137) and the State of Illinois devotes the whole of its brief to an attack upon this finding. This finding is fully supported by the Report of the Special Master. It is supported by the considerations set forth in our principal brief. (Complainants' Principal Brief, pp. 54-70.) We shall therefore review only briefly the contentions advanced in the defendants' briefs. We first consider the arguments advanced by the Sanitary District.

The first contention advanced by the Sanitary District is that some of the works involved in the program of the defendants need not be constructed. This contention of the District illustrates the position of both defendants throughout this Reference. They have constantly sought to persuade the Master, and now seek to persuade this Court, to treat this Reference as a trial *de novo* of the original litigation. Thus, on this point and others, as shown in previous sections of this brief, they assert that substantial parts of the program need not be carried out, and that what measures should be carried out is still an open question.

In *Wisconsin v. Illinois,* 278 U. S. 367, this Court adjudicated that the defendants were doing a wrong to the complainants, but in keeping with the principles upon which Courts of equity conditioned their relief, granted the defendants a reasonably practicable time within which to provide some other means of sewage disposal. "To determine the practical issues needed to effect the object just

stated'' (278 U. S. 367, 421) these causes were again referred to the former Special Master. After an exhaustive hearing the former Special Master determined the practical measures necessary to effect the object of the Court. That question was then settled and adjudicated. The defendants thereafter never applied to this Court for any modification of the decree. No such issue is included in this Reference. It is idle for this Court to adjudicate any issues in these causes if the defendants, whenever cited for failure of performance, may, for purposes of delay, relitigate such issues *de novo*.

This and similar suggestions throughout the defendants' briefs that substantial parts of the sewage disposal program may be omitted or indefinitely postponed is especially significant, since the defendants, throughout their briefs express the hope that, if given enough time, they may be able to obtain congressional action, if Congress has any power, to validate their illegal diversion, and the principal ground assigned for this hope is that they may cause such a nuisance by pollution as to persuade Congress to attempt such action. An omission or postponement in the construction and placing in operation of parts of the sewage disposal program would, of course, tend in the direction of the creation of a nuisance.

The second contention of the District is the assertion of a speculative possibility that Congress may, at some future date, take action, if it has any power, which will relieve the defendants from performance of the decree. The third contention of the District is that the State of Illinois lacks financial capacity to perform the decree. Both of these contentions are also advanced by the State of Illinois, and we will discuss them hereinafter under that portion of this section devoted to the State's brief.

The fourth contention of the District is that the recommendation of the Master should not be approved because

the Sanitary District, if all hope of relief from performance fails, may be expected to construct works when and if it provides funds. This contention is contradicted both by the defendants' past failure of performance and by the whole record in this case. That to hazard the restoration of complainants' just rights, adjudged to them by this Court, upon such an illusory expectation would be but a mockery, and a pretense, is overwhelmingly established by the Report of the Special Master. The Sanitary District made no adequate performance even before the financial difficulties arising out of the obstacles created by the State of Illinois and its officers arose. The total funds raised by the Sanitary District since the entry of this decree are approximately $10,000,000. (Complainants' application, p. 8.) The decree required an average annual expenditure of $20,000,000. The record on this Reference discloses, were it material, that the financial policy of the Sanitary District is not only inadequate, but was based upon the principle of placing all hazard of delay from future financial difficulties upon the complainants, who are the injured parties, on the justification of a trifling benefit in interest charges to the defendants, who are the wrongdoers.

The State of Illinois boldly attempts to relitigate every issue of law and many of the issues of fact heretofore determined and settled in this litigation. It seeks to misconstrue and pervert the purposes of this Reference. This Reference is not to adjudicate the rights of the parties. They have heretofore been determined and fixed by this Court. The question now is, what steps should be taken to restore to the complainants their just rights at the times and in the manner fixed by this Court. Were any confirmation necessary, as it is not, of the justness of the complainants' apprehension that these defendants intend to avoid performance of the decree of this Court by every means within their power, the argument of the de-

fendants in their instant briefs in this Court would conclusively establish that fact.

The State of Illinois first asserts that this recommendation of the Special Master should not be approved because, as it contends, under the provisions of the Rivers and Harbors Act of July 3, 1930 and the Great Lakes-St. Lawrence Deep Waterway Treaty, compensating works may, at some future date, be built in the Great Lakes to restore their levels. We have already shown the lack of substance in this contention. (See pp. 14-16, *supra.*) As there stated, the construction of compensating works in the critical channels of the Great Lakes depends upon the consent of Canada. Indeed, the State's brief says (p. 16)

> "Upon the adoption of this treaty (Great Lakes-St. Lawrence Deep Waterway Treaty) the appropriation made for the project authorized in the Rivers and Harbors Bill of 1930, including compensating works, by the War Department Appropriation Bill of 1931, becomes immediately available for carrying out this treaty requirement."

The State thus concedes, as it must, that even the *possibility* of construction of compensating works is dependent upon the ratification of the Great Lakes-St. Lawrence Deep Waterway Treaty. But that treaty embodies the decree of this Court for the termination of the diversion, and this Court has adjudicated that the termination of the defendants' illegal diversion requires the construction of the sewage disposal works which the State seeks to avoid. It will not be denied that since the close of the hearings on this Reference the Governor of Illinois in a public address urged the representatives of Illinois and the Congress to exercise every effort to defeat the ratification of this treaty. Yet the State asks this Court to refuse to enforce complainants' rights upon the basis of this treaty. In any event it is manifest that when, if ever, compensating works will be constructed is unknown. Of course, as hereinbefore pointed

out, these complainant States are not required to surrender the general benefits, if any, of compensating works provided for the nation to satisfy either the sewage disposal or water power desires of the State of Illinois. (See p. 16, *supra.*)

The second contention of the State is that, because the Rivers and Harbors Act of July 3, 1930 provides that the Secretary of War shall make a survey and report to Congress, the Congress or the Secretary of War may at some future date attempt to authorize a larger diversion than that provided by this Court's decree, and that therefore the defendants should not be required to perform the decree, because of this speculative possibility. It is difficult to be patient with this sort of argument when this Court has twice adjudicated in this very litigation that the possibility of future congressional action, if Congress has any power in the premises which complainants deny, can not be urged to defeat complainants' rights. (*Wisconsin v. Illinois,* 281 U. S. 179, 197-8.) The suggestion that the Secretary of War might undertake to authorize some diversion in violation of the decree of this Court is amazing. Not only has it been determined that the Secretary of War has no power under Section 10 of the Rivers and Harbors Act of 1899 to authorize a diversion from the Great Lakes-St. Lawrence watershed for the real or fancied improvement of navigation elsewhere, but the Rivers and Harbors Act of July 3, 1930 expressly provides that the Secretary shall submit his recommendations to Congress "to the end that Congress may take such action as it may deem advisable." Of course, the possibility of future action by the Secretary, even if it existed, could no more be urged to defeat complainants' rights than the possibility of future action by Congress.

The third argument of the State is that this Court must not exercise its power to enforce its decree and order the State of Illinois to carry out the decree, because the State of Illinois threatens to defy this Court. Indeed, the State

in its brief asks this Court to consider this case upon the assumption that the State of Illinois will defy any order directed to it. While it is a shocking thing that a great State would assume such a position in this Court, these complainants would likewise be lacking in proper respect were they to assume that any discussion on their part is necessary to demonstrate the futility of such an argument in this Court.

The State next contends that the provisions of the Illinois Constitution are such as to render the State of Illinois immune to compulsion to perform a decree of this Court or to right a wrong to its sister States. In our principal brief we have discussed the only provisions of the Illinois Constitution which could have any conceivable relevancy, and have shown them to be inapplicable. However, as there stated, we confidently assert that no State, by its constitutional provisions, can nullify and set at naught the jurisdiction of this Court under the Federal Constitution over controversies between states. If this is not so, the most important jurisdiction of this Court, from the standpoint of the preservation of the nation, will be nullified. The most important provision of the Federal Constitution for preserving peace and amity among States will be rendered a mere scrap of paper.

The next contention of the State is that it lacks financial capacity to perform the decree. In attacking the finding of the Special Master on this point the State relies upon the testimony of Rice, State Director of Finance, and the so-called "testimony" of Governor Horner, and ignores both Mr. Rice's admissions and all the competent evidence in the record on the saleability of Illinois bonds and the State's financial capacity. The Report of the Special Master fully sustains his finding. In our principal brief we have cited the material evidence establishing that the past and present financial resources of Illinois have been and are more than adequate to finance performance of this de-

cree. (Complainants' Principal Brief, pp. 58-59.) Mr. Gordon, who testified that the bonds of Illinois have been at all times since the entry of the decree and are now readily marketable as triple A investments in any amount which can be validly issued, was a witness produced by the defendants. Mr. Gordon is Vice-President of the First National Bank of Chicago and of the First Union Trust and Savings Bank of Chicago. He has been connected with that bank for forty years. He has charge of the Bond Department. He is President of the Investment Bankers Association of America. (R. pp. 715-6.) His qualifications and lack of any bias in favor of the complainants can not be challenged.

On the other hand the testimony of Rice and the so-called "testimony" of Gov. Horner was offered long after the testimony had been closed and the causes submitted to the Master. It was offered after counsel and witnesses for the State of Illinois had seen a tentative draft of the Master's Report and the testimony was preferred for the purpose of attempting to attack the Master's tentative conclusions. (R. pp. 1866-8.)

The State of Illinois contends that this Court should accept the self-serving conclusions of the witnesses so produced, as against the other testimony in the record. Mr. Rice had been appointed Director of Finance on January 26, 1933. (R. pp. 1875, 1923.) He testified on February 27, 1933. Neither his experience as Finance Director nor as an expert in municipal bonds is impressive. However, Rice admitted that if the State of Illinois issued $35,000,000 of bonds and levied a tax to provide for the payment of interest and sinking fund requirements, as they might fall due, such bonds could be marketed in 1933 (R. pp. 1918-9). He admitted that the State of Illinois in January 1933 sold a bond issue of $20,000,000 to a syndicate at a premium, and that the syndicate re-sold the bonds to the public at a larger premium. They were 4½% bonds. (R. pp. 1919-1920.) Mr. Rice admitted that on the day he testified the bonds of the

State of Illinois were selling on the market to yield from 3.8 to 4 per cent. (R. pp. 1920-1921.) He admitted that, as of the day he testified, the bonds of the State of Illinois would command a higher price on the market than the bonds of any other State except those of New York. (R. p. 1921.)

The statement that the State began the year 1933 with a cash deficit of slightly exceeding $8,000,000 and that its cash deficit at the end of 1933 would be $15,000,000 is based upon an exhibit produced by the witness Rice and is entirely misleading.

The statement of Finance Director Rice with reference to the cash on hand on December 31, 1932 can not be reconciled with the report of the State Treasurer of Illinois. (Report of Special Master McClennen, pp. 115-16.) However, the alleged shortage of December 31, 1932 and the predicted shortage at the end of 1933 are bookkeeping shortages. That is, they represent transfers between various accounts of the State. They do not represent any debt of the State. No state tax anticipation warrants have been sold to the public. (R. p. 1937.) The state tax anticipation warrants represent interfund transfers of the State.

All of the present and estimated bookkeeping deficiencies arise from delinquencies and tardiness in tax collections in Cook County. (Rice R. pp. 23-4, Horner R. p. 2014.) The estimated future bookkeeping deficiencies are arrived at in the following way. The expenditures for 1933 are based upon estimates of the department heads, notoriously excessive, and not upon appropriations of the State Legislature. (Rice R. pp. 1944-1946.) Rice's financial statement shows the tax anticipation warrants purchased by the State from itself as a liability, but gives no credit for the taxes against which the warrants are issued. (Rice R. pp. 1942-3.) The estimated receipts of the State for 1933 are based upon an estimate of only 40 per cent collection of

the taxes, going into collection in Cook County this year, and with no allowance for any collection of the large delinquent taxes in Cook County for the three preceding years. (Rice R. p. 1934.) In our principal brief we have shown that the tardiness of tax collections in Cook County are due to negligence or mal-administration and not to the depression. There are no unusual delinquent taxes in Illinois outside of Cook County. In our principal brief we cite the evidence which shows that the tax situation in Cook County is not due to the depression. We will not repeat that evidence here.

Reference is made to taxes for poor relief. The estimates of receipts from the sales tax appearing in the record were based upon a two per cent sales tax. The State has adopted a three per cent sales tax. Illinois had a three cent gas tax for many years. One cent of the gas tax goes to counties. They have the option to use it for poor relief, or in the diminution of other taxes. (Horner pp. 2008-9.) Very large sums are available from the two cent gas tax. These are being used to extend the very extensive system of concrete and brick roads in Illinois. The road contracts mentioned in the State's brief were let in December 1932 or early in January 1933, after this Reference had been directed by the Court. (Horner R. p. 2002.) Many other facts could be cited to show that the State's contentions based on the testimony of Mr. Rice are without foundation.

We say only a word about the so-called testimony of Governor Horner, who had been in office less than fifty days. Governor Horner gave no testimony. He read an argument which he had prepared in collaboration with attorneys for the State. (R. p. 1988.) As stated by the Special Master it was in substance the same argument which counsel for the State had already presented to the Special Master. (R. p. 1986; Illinois Brief, Appendix p. IX.) There is not a sentence of the statement that would be competent as evidence. The Governor undertook to ex-

press opinions and conclusions of fact and of law. He undertook to give opinion evidence on all kinds of subjects upon which he had no expert qualifications. He undertook to give opinion evidence upon all sorts of subjects which are not susceptible of opinion evidence. The attempts to quote these arguments as *evidence* is a concession of desperation.

The State next contends that Illinois has no responsibility for the wrong inflicted upon the complainant States. The primary liability of Illinois is adequately shown both by the Report of the Special Master and by complainants' original brief. Briefly the primary and direct liability of the State of Illinois is *res judicata.* It is surprising that the State should contend that this Court would direct a reference to determine what financial measures should be required of it for the performance of a decree for which the State has no responsibility. Had not the question been decided the primary liability of the State would be incontestable from the fact that it directed and commanded the wrong to the complainant States. Moreover we submit that a State, even without a command, could not create a subordinate political agency with power to do a thing which would necessarily inflict a tortious wrong upon other States and their citizens and claim immunity from liability upon the ground that it had merely licensed the despoilation. This conclusion applies with peculiar force when the agency so created asserts that the State which gave it power to inflict the wrong has not conferred powers adequate to remedy it.

The next contention of the State is that Illinois acted within its rights in authorizing the commission of the wrong upon the complainant States. It is contended that *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, establishes that prior to the Rivers and Harbors Act of March 3, 1899 state authority was adequate to authorize an

obstruction to navigation. The case is scarcely authority for the proposition that a state could lawfully authorize the commission of a tortious wrong upon other states and their citizens. It is said that the State had a legal right to an equitable apportionment of the waters in question. Of course this question is *res judicata.* The consideration granted the State of Illinois by way of the diversion permitted after December 31, 1938 was based upon the doctrine of equitable apportionment. (Report of Special Master on 1929 Re-Reference, pp. 139-140.) Moreover the mean annual, average contribution of the State of Illinois to the Great Lakes-St. Lawrence watershed is 503 second feet. (Report of Special Master on Original Reference, p. 23.) Under the decree of this Court after December 31, 1938 the State of Illinois is permitted to divert 1500 second feet plus the domestic pumpage of 1700 second feet. It thus will take over six times its *total contribution* to the waterway. If inequity results, it is not to the State of Illinois.

The State further contends that it has done everything to facilitate the performance of the decree which its Constitution permits. This is, of course, manifestly untrue as applied to the State of Illinois, for it has done nothing. It has not even done the things which it could have done to enable the Sanitary District to perform the duty which the State sought to delegate to it, as is shown in our principal brief.

The State finally contends that this Court is without jurisdiction to enforce a judgment against the State of Illinois in the exercise of the original jurisdiction conferred upon this Court over controversies between States. This has been fully covered in our principal brief. Nothing appearing in the State's brief suggests the necessity of further argument.

CONCLUSION.

Both the defendants complain because the complainants' Application filed with this Court, after reciting facts appearing in the records before this Court, largely in the Reports of the Special Master and in the Semi-Annual Reports filed by the defendants, asserted that such facts justified a conclusion that the gross inadequacy and failure of performance thus made evident must be due to negligence, incompetence or bad faith and a lack of a sincere and *bona fide* effort to comply with the decree. This conclusion rested upon the whole record of these defendants throughout this litigation. Considering only the matters referred to the Special Master, he has found that the complainants were justified in charging bad faith. We think he would have been justified in finding bad faith. However, we made no point of that question before the Special Master, and make none here, because the complainants are not interested in condemnation of past delinquencies but in securing the aid of this Court for future action to secure to them their just rights. But, were the question at issue, the nature of the contentions advanced by the defendants on this Reference and in their voluminous briefs before this Court would alone justify the conclusion that it is their purpose to evade performance of the decree of April 21, 1930 by every means within their power. The evidence, the contention of the defendants and the attitude of the defendants on this reference alike establish that the further intervention of this Court is essential to secure to the complainants their just rights as adjudicated by this Court.

In this reply brief the complainants have endeavored merely to point out a few of the many inconsistencies of position and inaccuracies both in statements of fact and in arguments on the law which are found in defendants' briefs. Obviously a detailed analysis of the evidence in these causes would be unwarranted both because it has

been carefully weighed by the Special Master and because this brief is addressed to a court wholly familiar with what has preceded the present Reference. Nevertheless what we have said, in our brief, fully establishes that the findings made by the present Special Master, which are attacked by the defendants, must be confirmed and, that the legal contentions of the defendants are without merit.

We respectfully submit, therefore, that the Special Master's findings should be confirmed and that his recommendations for enlargement of the decree should be followed, with, however, the inclusion of the suggestions proposed by the complainants in their principal brief.

Respectfully submitted,

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April 17, 1933.