IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

STATES OF WISCONSIN, MINNESOTA, OHIO and PENNSYLVANIA, *Complainants,*

vs.

STATE OF ILLINOIS and THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, *Defendants,*

No. 2 Original.

STATE OF MICHIGAN, *Complainant,*

vs.

STATE OF ILLINOIS and THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, et al., *Defendants,*

STATES OF MISSOURI, KENTUCKY, TENNESSEE, LOUISIANA, MISSISSIPPI and ARKANSAS, *Intervening Defendants,*

No. 3 Original.

STATE OF NEW YORK, *Complainant,*

vs.

STATE OF ILLINOIS and THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, et al., *Defendants,*

No. 4 Original.

BRIEF IN OPPOSITION TO THE MOTION OF THE STATE OF NEW YORK AND TO THE APPLICATION OF THE STATES OF WISCONSIN, MINNESOTA, OHIO, PENNSYLVANIA, MICHIGAN, AND NEW YORK.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The State of Illinois and The Metropolitan Sanitary District of Greater Chicago submit that the motion of the

State of New York for a modification of the decree of April 21, 1930 and the application filed by the States of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan, and New York, for a reopening and amendment of the decree so as to require the return to Lake Michigan of the water taken therefrom as domestic pumpage, or, in the alternative, for the appointment of and reference to a Special Master, should be denied. The facts set forth in the motion and application, together with indisputable facts of public record, show that no ground exists for a modification, reopening, or amendment of the decree or for other relief.

INTRODUCTORY STATEMENT.

On April 21, 1930, this Court entered a decree in these causes which enjoined the defendants on and after December 31, 1938 from diverting any of the waters from the Great Lakes-St. Lawrence System or watershed through the Sanitary and Ship Canal, known as the Drainage Canal, in excess of an annual average of 1500 c.f.s. (cubic feet per second) in addition to domestic pumpage. (*Wisconsin* v. *Illinois,* 281 U. S. 179, 201 (1930).)

To carry out the provisions of the decree, The Metropolitan Sanitary District of Greater Chicago (formerly the Sanitary District of Chicago) has completed construction of vast sewage treatment projects, consisting of sewage treatment plants, intercepting sewers, and sewage pumping stations, at a cost of $316,935,000. (Hearings, Subcommittee of Senate Committee on Public Works on H. R. 3210, S. 1772, S. 2250, 84th Cong. Second Sess. pp. 18-19.)

Paragraph 4 of the decree provides (*Wisconsin* v. *Illinois,* 281 U. S. 179, 201 (1930)):

> That the provisions of this decree as to the diverting of the waters of the Great Lakes-St. Lawrence system or watershed relate to the flow diverted by the defendants exclusive of the water drawn by the City

> of Chicago for domestic water supply purposes and entering the Chicago River and its branches or the Calumet River or the Chicago Drainage Canal as sewage. The amount so diverted is to be determined by deducting from the total flow at Lockport the amount of water pumped by the City of Chicago into its water mains and as so computed will include the run-off of the Chicago and Calumet drainage area.

Water taken by the City of Chicago, and other municipalities in the drainage district, for domestic and sanitary purposes, and turned into the canal after treatment through sewers operated by the Sanitary District, is known as "domestic pumpage." (Report of Special Master Charles E. Hughes, filed November 23, 1927, p. 75; Report of Special Master Charles E. Hughes on Re-Reference, filed December 17, 1929, pp. 91, 120, 143; *Wisconsin* v. *Illinois,* 281 U. S. 179, 199 (1930).) Domestic pumpage includes water used by the inhabitants for drinking, cooking, washing, sanitation and other household uses, fire fighting, and industrial uses.

The Drainage Canal, which reversed the flow of the Chicago River so that it flowed away from Lake Michigan instead of into the Lake, was opened in 1900. (Master's 1927 Report, 18; *Wisconsin* v. *Illinois,* 278 U. S. 367, 403.) The cost of the Drainage Canal was approximately $82,000,000. (Hearings, Subcommittee of Senate Committee on Public Works on H. R. 3210, S. 1172, S. 2250, 84th Cong. 2nd Sess. 18, (1956).)

Between 1910 and 1923, intercepting sewers were constructed, at a cost of $109,021,613, to discharge the sewage from the area into the Chicago River instead of Lake Michigan. (Master's 1927 Report 20-21; *Wisconsin* v. *Illinois,* 278 U. S. 367, 404 (1929).)

The complainants, in the motion and application now on file, do not challenge the diversion of 1500 c.f.s. or the

reversal of the flow of the Chicago River. (Application IX, 17, Argument, 38.) But they attack that part of the decree of April 21, 1930 which authorizes the discharge of water used for domestic pumpage into the Chicago River and thence into the Drainage Canal, instead of Lake Michigan.

The motion and the application differ in their allegations and in their prayers for relief, but they are alike in their demand that the defendants discontinue discharging domestic pumpage, *i. e.*, any of the treated effluents emanating from the Sanitary District sewage treatment facilities, into the Drainage Canal. They demand that such treated sewage effluent be dumped into Lake Michigan, the source of Chicago's water supply.

The effect would be not only to risk the pollution of the water on Chicago's lake front and of Chicago's water supply, complete purification of sewage effluent not being presently possible, but to compel the Sanitary District and the City of Chicago to rearrange its sewage facilities and construct new works and tunnels at tremendous cost. Regardless of cost and inconvenience to the defendants, and regardless of the threatened pollution of the lake, the complainants, after long acquiescence in the present program, now ask the Court to make a revolutionary change in the decree and order the defendants to undo portions of vast and costly projects undertaken and completed both before the 1930 decree and thereafter in compliance with its terms. (Application p. 36.)

In paragraph 7 of the decree (281 U. S. 179, 202), this Court retained jurisdiction of the suits for the purpose of any order or direction, or modification of the decree, or any supplemental decree, which it might deem at any time to be proper in relation to the subject matter in controversy.

At the time the decree of April 21, 1930 was entered, Congress had not legislated on the subject of the diversion

and this Court in its 1930 opinion (281 U. S. at pp. 198-199) stated that its action and all action of the parties would "be subject, of course, to any order that Congress may make in pursuance of its constitutional powers and any modification that necessity may show should be made by this Court."

A short time after the decree was entered, Congress, on July 3, 1930, passed the Rivers and Harbors Act (c. 847, 46 Stat. 929) which expressly authorized for navigation purposes of the Illinois Waterway the withdrawal by the defendants of water from Lake Michigan, including water for domestic pumpage, which was allowed by the decree of April 21, 1930. This affirmative action by Congress is now in full force and effect.

The defendants contend that the pending motion and application are fatally defective and should be denied and dismissed on the grounds that they do not present a matter of which the Court can take judicial cognizance for the following reasons:

(1) In retaining jurisdiction of the "subject matter in controversy", this Court did not intend to invite a rehearing of issues of law or fact which were adjudicated in its 1930 decision; the right of the defendants to withdraw water from Lake Michigan for domestic purposes and discharge the effluent into the Chicago River and the Drainage Canal was finally adjudicated by the 1930 opinion.

(2) Neither the motion nor the application present material facts which were not before the Court in 1930. The population growth was projected with reasonable accuracy in the hearings before the Special Master in 1929. The amount of water withdrawn from Lake Michigan for domestic pumpage is substantially the same today as it was in 1930 when the decree was entered. No changed conditions or circumstances unforeseen in 1930 are presented by the complainants which warrant a reopening, amendment, or modifica-

tion of the decree, or the appointment of a Special Master.

(3) The amount of water now being withdrawn from Lake Michigan by the defendants, including domestic pumpage, has been authorized by Congress for the Illinois Waterway. This Congressional action, to which complainants do not refer, authorizes the discharge of domestic pumpage into the Drainage Canal, as a part of the Lakes to the Gulf waterway, for navigation purposes pursuant to its paramount power over navigable water of the United States.

Because the foregoing points can be established by the record as it now stands, and by public records of which this Court may take judicial notice, no purpose will be served by referring these causes to a Master.

A decree in which jurisdiction is retained should not be modified without a showing of changed conditions or the springing up of unforeseen circumstances, or a showing that the modification would effectuate the basic purpose of the decree. (*United States* v. *Swift & Co.*, 286 U. S. 106 (1932); *Chrysler Corporation* v. *United States*, 316 U. S. 556 (1942); *Donaldson, Postmaster General* v. *Read Magazines, Inc.*, 333 U. S. 178, 184 (1948); *U. S. Gypsum Co.* v. *National Gypsum Co.*, 352 U. S. 457, 463, 464, 474 (1957).) The motion and application have not met that burden.

In support of the reasons above set forth for denial of the pending motion and application, the defendants respectfully submit the following argument.

ARGUMENT.

I.

The Right to Discharge Domestic Pumpage Into the Drainage Canal Was Expressly Upheld in the 1930 Decision, and the Issue Raised in the Motion and Application Is Not Within the Framework of Matters Left Open for Consideration.

New York's motion asserts (p. 3):

> The original complaints in these actions did not demand that the water taken from Lake Michigan as domestic pumpage be returned to the Lake. This Court, therefore, rejected the demands which complainants made upon the argument for such return.

Significantly, the application now filed by all the original complainants, including the State of New York, does not contain a similar representation concerning the reason for the rejection. The fact is that such demands were not rejected because of a failure to include them in the original bills of complaint.

Referring to the prayers in the bills of complaint in the original suits, Mr. Chief Justice Taft said (278 U. S. 367, 399, 400):

> These are amended bills by the States of Wisconsin, Minnesota, Michigan, Ohio, Pennsylvania and New York, praying for an injunction against the State of Illinois and the Sanitary District of Chicago from continuing to withdraw 8,500 cubic feet of water a second from Lake Michigan at Chicago.
>
> * * * The bills prayed that the defendants be enjoined from permanently diverting water from Lake Michigan or from dumping or draining sewage into its waterways which would render them unsanitary

> or obstruct the people of the complainant States in navigating them.

The Special Master in his 1927 Report summarized the prayers of the amended bills of complaint of the States of Minnesota, Ohio, and Pennsylvania, filed October 5, 1925, as follows (p. 7):

> The amended bill seeks an injunction restraining the defendants from causing any water to be taken from Lake Michigan, in such manner as permanently to divert the same from the lake. There is a further prayer that, if the Sanitary and Ship Canal shall be used as a navigable waterway of the United States and be subject to the same control on the part of the United States as other navigable waterways, the defendants shall be restrained against permanently diverting any water from Lake Michigan in excess of the amount which the Court shall determine to be reasonably required for navigation in and through said canal and the connecting waters to the Illinois and Mississippi Rivers, without injury to the navigable capacity of the Great Lakes and their connecting waters. It is also prayed that the defendants be restrained from dumping or draining into the Sanitary District Canal any sewage or waste in such quantity and manner as excessively to pollute and render the canal, the Chicago, Des Plaines and Illinois Rivers, unsanitary and injurious to the people of the complainant States navigating said waterways.

The State of Michigan in its bill of complaint, filed in this Court on March 8, 1926 and the State of New York in its bill filed October 22, 1926 prayed for the same relief. (Master's 1927 Report, 9.)

In discussing the demands of the complainants, at the hearings, as distinguished from the prayers of the bills of complaint, the Special Master in his 1929 Report after thorough consideration made all-important findings and reached certain conclusions which the State of New York

fails to include in Appendix A of its motion. Movant's Appendix A purports to contain the pertinent portions of the Special Master's Report, but the following findings on domestic pumpage, at pages 120-122, are omitted:

> *Pumpage.* The complainants ask that all flow at Lockport be enjoined from the date fixed for the completion of the sewage treatment works. This would mean not only the entire cessation of the diversion by the Sanitary District, in the sense in which that term is used by the War Department, but also the termination of the discharge at Lockport of the pumpage, that is, of the water taken by the City of Chicago from Lake Michigan and entering the Chicago River and the Drainage Canal as sewage.
>
> So far as this pumpage is concerned, the question is merely incidental to that relating to the diversion by the Sanitary District. These bills were brought to restrain the abstraction of water from Lake Michigan by the Sanitary District, not to challenge the right of the City of Chicago to take water from the Lake for its water supply. Nor can the bills be regarded as presenting a cause of action based on the charge that the City of Chicago was taking more water from the Lake for appropriate domestic uses than it was entitled to take. The City of Chicago was not made a party to these suits, its entry as a party has been successfully resisted by the complainants, and whatever may be the effect of the proceedings against the State of Illinois, as the responsible creator and governor of the municipal corporation, that State has not been called upon to answer on the theory that the mere taking of water by the city for the ordinary uses of its inhabitants constituted an actionable wrong. In its opinion, this Court described these bills as brought "for an injunction against the State of Illinois and the Sanitary District of Chicago from continuing to withdraw 8,500 cubic feet of water a second from Lake Michigan at Chicago" (278 U. S. 367, 399). This amount of 8,500 c.f.s. is the diversion by the Sanitary District allowed by the permit of March 3, 1925, exclusive of pumpage.

Furthermore, it is not regarded as open to serious question that the City of Chicago, under authority of the State, has the riparian right to take water from Lake Michigan for the ordinary uses of its inhabitants. That would not be, *per se,* an unreasonable use. And if it were sought to prevent an abuse of that right through the taking of an unreasonable amount, it would be necessary to present that issue in an appropriate manner. (*City of Canton* v. *Shock,* 66 Ohio State, 19; *Minneapolis Mill Co.* v. *Board etc. of St. Paul,* 56 Minn. 485; *City of Philadelphia* v. *Collins,* 68 Pa. 106; *City of Auburn* v. *Union Water Power Co.,* 90 Maine, 576; *Barre Water Co.* v. *Carnes,* 65 Vt. 626; *Fisk* v. *Hartford,* 70 Conn. 720.)

If the City of Chicago is entitled to take its water supply from Lake Michigan for the ordinary and reasonable uses of its inhabitants, it cannot be said that the State or the City is subject to any established rule of law which requires it to turn into the Lake what is no longer water but sewage or the effluent of sewage treatment plants. If there were a way of destroying the sewage or sewage effluent altogether, or evaporating it, it does not appear that the State or the City would violate any right of the complainants in doing so (*Fisk* v. *Hartford,* 69 Conn. 375). The question in these suits concerns the diversion by the Sanitary District and not the pumpage independently considered.

But, as there is no means known at present of otherwise disposing of the effluent from the sewage treatment plants, when the sewage disposal program has been fully carried out, it is assumed that the effluent must be turned into the Drainage Canal and Chicago River, thence to be discharged at Lockport, the western terminus of the Canal, or be carried into Lake Michigan. The question of the disposition of the effluent from the sewage treatment plants thus demands consideration in connection with the award of relief as to the diversion by the Sanitary District.

The Master thus decided (1) that the prayers of the bills of complaint, as distinguished from the demands

made by the complainants at the hearings, did not challenge the right of the City to take water from the Lake; (2) that the City has a right to take water from the Lake for the ordinary uses of its inhabitants; (3) that neither the State nor the City is required by law to return sewage effluent to the Lake; (4) that if it were sought to prevent an abuse of the right to the water through the taking of an unreasonable amount, it would be necessary to present that issue in "an appropriate manner"; and (5) that the question of the disposition of the effluent from domestic pumpage after treatment had to be disposed of.

This Court in its 1930 decision, reported in 281 U. S. 179, adopted the Master's conclusions and went two steps further. Its decision *did not* turn on the point, as stated in the New York motion, that the return of domestic pumpage to the Lake was not demanded in the bills of complaint. Rather, the Court held squarely (1) that the demands of the complainants were excessive upon the facts in the case, and (2) that the demands should not be pressed "without regard to relative suffering and the time during which the complainants have let the defendants go on without complaint." These holdings are contained in the following salient portion of the Court's opinion (281 U. S. 179, 199), immediately preceding the excerpt quoted at pages 3 and 4 in the motion of the State of New York:

> The complainants demand that this diversion cease, and the canal be closed at Lockport, with an incidental return of the Chicago River to its original course. *They also argue that what is called the domestic pumpage after being purified in the sewage works be returned to the Lake.* These demands seem to us excessive upon the facts in this case. The Master reports that the best way of preventing the pollution of navigable waters is to permit an outflow from the Drainage Canal at Lockport, and that the interests of navigation in the Chicago River as a part of the port of Chicago will require the diversion of an annual average of from 1,000 c.f.s. to 1,500 c.f.s. in addition

> to domestic pumpage after the sewage treatment program has been carried out. The canal was opened at the beginning of the century, thirty years ago. In 1900, it already was a subject of litigation in this Court. The amount of water ultimately to be withdrawn unless Congress may prescribe a different measure is relatively small. We think that upon the principles stated in *Missouri* v. *Illinois,* 200 U. S. 496, 520, *et seq.,* the claims of the complainants should not be pressed to a logical extreme without regard to relative suffering and the time during which the complainants have let the defendants go on without complaint. (Emphasis added.)

The foregoing statement from this Court's opinion, to which the State of New York does not refer, shows conclusively that the Court fully considered and rejected the contention, now being reasserted, that all water used for domestic pumpage should be returned to Lake Michigan.

If protracted acquiescence by the complainants in the Sanitary District sewage disposal system constituted a bar to their demand in 1929 and 1930 that the effluent from all domestic pumpage should be returned to the Lake, such acquiescence is even more clearly a bar today.

Earlier in the opinion the Court had said, at page 199, that its action would be subject to any modification that "*necessity* may show should be made." And in the portion of the opinion quoted in the New York motion (pp. 3-4) the Court said, "If the amount withdrawn should be *excessive,* it will be open to complaint"; also, that "whether the right for domestic use extends to great industrial plants within the District has not been argued but may be open to consideration at some future time." (Italics supplied.)

The matters left open to "complaint" and "consideration at some future time" are thus clearly defined, but defendants submit that the right to "domestic pumpage"

for ordinary use and the discharge of the effluent into the canal, is settled by the opinion and decree of this Court.

Examples of "necessity" that may be shown and acted upon appear in the orders of this Court entered on December 17, 1956 and January 28, 1957. In the first order, additional diversion was allowed for 45 days, until January 31, 1957 "in view of the emergency in navigation caused by low water in the Mississippi River." (*Wisconsin* v. *Illinois,* 352 U. S. 945.) The second order extended the period for additional diversion not to exceed an average of 8,500 c.f.s., for the same reason, to and including February 28, 1957. *Wisconsin* v. *Illinois,* 352 U. S. 983.

But the relief sought in the motion and application now on file extends far beyond the modification or supplementation contemplated by the decree of 1930. The complainants do not charge an *abuse* of the defendants' right to domestic pumpage nor do they ask for a consideration of the right as applied to "great industrial plants," separate and apart from pumpage for "domestic" purposes. Instead they seek a *cessation* of *all* domestic pumpage which is not returned to the Lake, contrary to the basic purpose and intent of the decree and the final determination on this phase of the suits as contained in paragraphs 1, 2, 3 and 4 of the decree of 1930.

Of significance, also, is the fact that the Special Master's recommendation that provision should be made for "further examination," referred to in paragraph 8 of the motion, relates only to the amount of "diversion" allowed—*not to domestic pumpage.* (Appendix A, Motion pp. 17-18.) The term "diversion" as used by the Special Master and by the Court in its final opinion and decree does not include domestic pumpage which is allowed in addition to the direct diversion. (Appendix A, Motion p. 16, pars. 10, 11; p. 21, par. 11.)

Defendants therefore respectfully submit that the is-

sue raised in the motion and the application, is not within the purview of those matters not finally resolved by this Court in 1930. Rather, the right of the defendants to withdraw water for domestic purposes and discharge the effluent into the Drainage Canal has been litigated and finally decided and should not be relitigated 28 years after that decision.

II.

Congress Has Authorized the Discharge of Domestic Pumpage Into the Canal for the Illinois Waterway.

Contrary to the statement in paragraph V of the application (p. 11), the amount of withdrawal allowed by the 1930 decree of this Court pertained only to the navigation needs of the Chicago River as a part of the Port of Chicago and did not pertain to the Illinois Waterway. (278 U. S. 367, 418; Master's 1929 Report, 126.)

But the Congress, shortly after the entry of the 1930 decree, passed the Rivers and Harbors Act of July 3, 1930 (c. 847, 46 Stat. 929) which deals with the waterway. The Act expressly authorizes, by reference to the 1930 decree, the withdrawal of 1500 c.f.s., in addition to domestic pumpage, for navigation purposes of the through Illinois Waterway. The pertinent portion of the Act is as follows:

> Illinois River, Illinois, in accordance with the report of the Chief of Engineers, submitted in Senate Document Numbered 126, Seventy-first Congress, second session, and subject to the conditions set forth in his report in said document, but the said project shall be so constructed as to require the smallest flow of water with which said project can be practically accomplished, in the development of a commercially useful waterway: Provided, That there is hereby authorized to be appropriated for this project a sum not to exceed $7,500,000: *Provided further, That the water authorized at Lockport, Illinois, by*

the decree of the Supreme Court of the United States, rendered April 21, 1930, and reported in volume 281, United States Reports, in Cases Numbered 7, 11, and 12 Original—October term, 1929, of Wisconsin and others against Illinois, and others, and Michigan against Illinois and others, and New York against Illinois and others, according to the opinion of the court in the cases reported as Wisconsin against Illinois, in volume 281, United States, page 179, is hereby authorized to be used for the navigation of said waterway; Provided further, That as soon as practicable after the Illinois waterway shall have been completed in accordance with this Act, the Secretary of War shall cause a study of the amount of water that will be required as an annual average flow to meet the needs of a commercially useful waterway as defined in said Senate document, and shall, on or before January 31, 1938, report to the Congress the results of such study with his recommendations as to the minimum amount of such flow that will be required annually to meet the needs of such waterway and that will not substantially injure the existing navigation on the Great Lakes to the end that Congress may take such action as it may deem advisable. (Italics supplied.)

In *Wisconsin* v. *Illinois,* 289 U. S. 395, 403-404 (1933), the Court held that by this Act the Congress took no action which affected the operation of the 1930 decree. Nevertheless, the Court recognized that the Congress had authorized for the Illinois Waterway the withdrawal permitted by the decree for the Port of Chicago.

The Rivers and Harbors Act of 1930 was the culmination of a series of Acts which made the Illinois Waterway from the Port of Chicago to Grafton, Illinois, a federal navigation project. When completed with federal funds, the waterway was opened for navigation on March 1, 1933. (House Document 184, 73rd Cong. 2nd Sess., pp. 3, 35, 39.)

A sketch of the Illinois Waterway is included as Appendix A in the appendix attached for the convenience of the Court.

Because no study had been made of the annual average flow required to meet the needs of the Illinois Waterway, as distinguished from the Chicago River as a part of the Port of Chicago, Congress in the Rivers and Harbors Act of 1930, above quoted, authorized a study to be made to determine the amount of water required. In the meantime, pending the study to be made, Congress authorized the withdrawal of water from Lake Michigan allowed by the decree in these causes entered on April 21, 1930, and this authorization is now in force.

The Constitution of the United States provides that "the Congress shall have power * * * to regulate commerce with foreign nations and among the several States * * *." (Article I, Sec. 8, cl. 3.) *Gibbons* v. *Ogden,* 22 U. S. (9 Wheat.) 1, 196, 197 (1824), held that the power of Congress, then, comprehends navigation within the limits of every State in the union; so far as that navigation may be, in any manner, connected with commerce among the several States; that the power of Congress is complete in itself and may be exercised to the utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. Such a limitation is found in the Fifth Amendment, that private property shall not be taken for public use without just compensation, but the limitation is not infringed unless there has been an "actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property." (*Sanguinetti* v. *United States,* 264 U. S. 146, 149.) Riparian owners have no ground for complaint by reason of actual but incidental damage sustained, because their ownership is subject to the servitude of the exercise of governmental power. (*United States* v. *Com-*

modore Park, Inc., 324 U. S. 386 (1945), and authorities cited in the 1927 Report of the Special Master in these causes, p. 151.)

The Special Master, in rejecting the contention of the complainants, in the hearings before him, that it is beyond the power of Congress to authorize the transfer of water of Lake Michigan from the Great Lakes-St. Lawrence watershed to the Mississippi watershed, said (1927 Report, 153):

> The power to control navigation, comprehended within that commerce, is a national power, and for the purposes of this control navigable waters are the public property of the nation (*Gilman* v. *Philadelphia*, 3 Wall. 713, 725) and subject to such restraint as Congress may deem expedient from a national point of view, not limited by the interests of any particular port, harbor, state or States, watershed, or any territorial division within the national jurisdiction. As Chief Justice Marshall said in *Gibbons* v. *Ogden*, 9 Wheat. 1,197: "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

As stated by the Special Master in his 1927 Report (p. 157), the recognition of the power of Congress to control the diversion of water from Lake Michigan to

the Mississippi watershed necessarily underlay the decision in *Sanitary District* v. *United States,* 266 U. S. 405, 426 (1924). The power of Congress to authorize the withdrawal of water from Lake Michigan for navigation purposes was recognized in *Wisconsin* v. *Illinois,* 278 U. S. 367, 417 (1929), and in *Wisconsin* v. *Illinois,* 281 U. S. 179, 198, 200 (1930).

It is of the essence of the power of Congress that it has the final determination of matters pertaining to navigation. (Master's 1927 Report, 161.)

A river is a navigable water of the United States within the meaning of the acts of Congress. It is patent that the Illinois Waterway is a waterway of the United States. The power of the Congress over it is absolute and "plenary". (*United States* v. *Appalachian Electric Power Co.,* 311 U. S. 377, 427 (1940); *United States* v. *Twin City Power Co.,* 350 U. S. 222 (1956); *First Iowa Coop.* v. *Power Comm'n.,* 328 U. S. 152, 182 (1946); *United States* v. *Willow River Co.,* 324 U. S. 499, 509 (1945); *United States* v. *Commodore Park, Inc.,* 324 U. S. 386 (1945); *Oklahoma* v. *Guy F. Atkinson Co.,* 313 U. S. 508 (1941).)

Congress alone has dominion over navigable waters. In authorizing the withdrawal from Lake Michigan allowed by the 1930 decree, Congress stated the purposes to be "for the navigation of said waterway." (p. 15, *supra.*) The Court cannot inquire into the motives of the members of Congress in passing the Act. The fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred by the Act, even if those other purposes, standing alone, would not have justified an exercise of Congressional power. (*Arizona* v. *California,* 283 U. S. 423, 455-456 (1931).)

It is therefore submitted that the Rivers and Harbors Act of 1930 settles beyond all dispute the right of the defendants to discharge the effluent from domestic pumpage into the Chicago River, instead of Lake Michigan, for navigation purposes of the Illinois Waterway.

The words of the Special Master in his 1927 Report (p. 154) on this precise issue are particularly apt.

> If Congress decided that it was in the interest of the country as a whole to open and improve a waterway from Lake Michigan to the Mississippi River and the Gulf of Mexico, and for that purpose diverted water from Lake Michigan to the Mississippi watershed, there would seem to be no constitutional difficulty so far as the diversion is concerned. Its practicability, its amount, the effect on the Great Lakes-St. Lawrence watershed, and on the States bordering on the Great Lakes, the question where the balance of national interest lay after appropriate appraisal of all local interests and of international relations, would be matters for the consideration of Congress exercising the sovereign power of the nation in determining national policy.

Congress, having so decided, has put an end to the matter.

III.

Assumed Population Growth Is Not Ground for the Relief Asked and, on the Basis of Experience, Will Result in an Insubstantial Increase in Domestic Pumpage and an Insignificant Reduction in Lake Levels.

In its motion (par. 9) the State of New York charges that the amount of water now withdrawn from the Lake for "domestic pumpage is excessive" because of population and industrial growth and of a projected increase in growth within the next 20 years. The application (par. VI) specifi-

cally charges that the population will reach 15 or 20 millions within the next 20 years and that domestic pumpage will become "more and more excessive." No charge is made that more water is used for domestic pumpage than is needed to serve the area, nor do complainants charge the defendants with waste or with using an unreasonable amount of water for domestic pumpage. Their charges are based solely on population projections into the future and potential industrial development. An increase in demand for water is assumed by the complainants, but "excessive" use, in the sense of unreasonable use, is not alleged or assumed.

Of material importance is the fact that the amounts of water used for domestic pumpage as shown in the complainants' application (par. V, p. 11) for the years 1939, 1954, and 1956 are not substantially greater than the amount (1700 c.f.s.) used in 1930. The amount of water withdrawn from the Lake for domestic pumpage in the three years mentioned, as derived from paragraph V of the application and page 31 of Complainants' Argument, is as follows:

	Total Withdrawal	Direct Diversion	Domestic Pumpage
1939	3110 c.f.s.	1500 c.f.s.	1610 c.f.s.
1954	3205 c.f.s.	1500 c.f.s.	1705 c.f.s.
1956	3500 c.f.s.	1700 c.f.s.*	1800 c.f.s.

If the amount of domestic pumpage in 1939 was 1610 c.f.s., and 1705 c.f.s. in 1954, as stated in the application (par. V. p. 11) the increase over this 15 year period was 95 c.f.s. On page 31 of their argument the complainants

* The direct annual average diversion of 1500 c.f.s. was increased in 1956 as a result of the order of this Court entered on December 17, 1956 (*Wisconsin* v. *Illinois*, 352 U. S. 945). While that order authorized an average increase of 8500 c.f.s., an increase of only 8000 c.f.s. was reached, according to the Army Engineers, as reported by the Solicitor General in his memorandum to the Court in January, 1957.

assert that at the present time approximately 1800 c.f.s. is extracted for domestic pumpage. This means that in the 19 year period the domestic pumpage, on complainants' own statements, has increased only 190 c.f.s. But even that increase is more apparent than real. A summary of the annual pumpage and diversion, as measured by the Sanitary District and the Army Engineers from 1930 through 1956, shows an average annual pumpage of 1643 c.f.s. (See Appendix E.)** This summary is graphic proof that the complainants' claim lacks factual basis. The summary shows that the amount of domestic pumpage used annually goes up and down; that it was 1700 c.f.s. in 1930 and reached a low point of 1507 c.f.s. in 1945, and that in 1939 it was 1582 c.f.s. (not 1610 c.f.s.), the third lowest annual withdrawal in the 27 year period. It seems improper to advance an argument based on the difference between one of the lowest years in the 27 year period and the highest year in the period, which was 1956. The difference between 1930 and 1956 was only 105 c.f.s. (Appendix E, *infra,* p. 43.) But no matter how the comparison be made, from the complainants' own figures and the actual figures, it is obvious that there has been no consequential increase.

Colonel Dan I. Sultan, in a report made in 1933 pursuant to the Rivers and Harbors Act of 1930 (House Document 184, 73rd Congress, 2nd Session, par. 16, p. 11; pars. 90 and 94, pp. 48-49), estimated an average of 1700 c.f.s. for domestic pumpage "for some years to come."

** The data compiled on Appendix E showing the annual average amounts of diversion and pumpage for the years 1930 to 1956, inclusive, are as contained in the official records of the United States Army District Engineer at Chicago, as officially computed pursuant to the provisions of paragraph number 4 of the decree of April 21, 1930.

According to a report made in January 1957 by the Division Engineer, Brigadier General P. D. Berrigan, North Central Division Corps of Engineers, U. S. Army, submitted to the 85th Congress on H. R. 2, a withdrawal of 1,000 c.f.s. would reduce the levels of Lake Michigan and Lake Huron one inch in 15 years, and the levels of Lake Erie and Lake Ontario 5/8ths of an inch. On this basis, a withdrawal of 190 c.f.s. would result at the end of 15 years in a reduction of less than 1/5 of an inch for Lake Michigan and Lake Huron and about 1/8 of an inch for Lake Erie and Lake Ontario. But, again, even this reduction is purely fanciful because on the average there has not been such an increase in the 27 year period between 1930 and 1957, and if the difference of only 105 c.f.s. between 1930 and 1956 is taken as the criterion, the reduction in lake levels, using the same method of calculation, would be less than 1/10 of an inch for Lake Michigan and Lake Huron and less than 1/16 of an inch for Lake Erie and Lake Ontario.

This insignificant reduction is hardly that change in circumstance which would warrant the drastic revision of the decree requested by the complainants. To force an expenditure of hundreds of millions of dollars in rearranging the Sanitary District's facilities to extend tunnels miles out into the lake for the discharge of sewage effluent would appear to be grossly disproportionate to the benefit to be derived by the preservation of a conjectural 1/10 or 1/16 inch of lake levels. Moreover, this Court has said that before it can be moved to exercise the extraordinary power to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence. (*North Dakota* v. *Minnesota,* 263 U. S. 365, 374, 386 (1923).)

As pointed out in Point I above, it is the defendants' contention that their right to withdraw water from Lake Michigan and discharge the sewage effluent into the canal has been adjudicated, but if the defendants should be wrong in this contention, and if the complainants' own statements are taken at face value, the whole matter of additional domestic pumpage is *de minimis.*

The complainants also purport to rely on alleged inadequacies of the estimates made in 1930 of the Chicago area's future growth. It is said (Application, p. 25) that in the hearings before the Special Master witnesses estimated that in 1960 the population served by the Sanitary District would expand to 5,860,000, with an industrial waste equivalent of 2,300,000 more, whereas in fact the present human population is 4,600,000, and an industrial waste equivalent of 3,800,000. The total is thus now 8,400,000 instead of the 8,160,000 predicted in 1929 for the year 1960. The 1929 prediction was amazingly accurate and Chicago's actual growth has conformed closely to it. Again, there has been no change justifying a rewriting of the decree.

Complainants rely on a projected growth in population and industry within the next 20 years to 15 or 20 million persons (application VI). This projection is of course nothing more than surmise. Such speculation about the future would not warrant a drastic change in the 1930 decree (*Arizona* v. *California,* 283 U. S. 423, 462-464 (1930)) even if the Rivers and Harbors Act did not stand in the way of the modification requested by the complainants.

The fact remains that the Special Master referred to the "great and growing population" (Master's 1929 Report, pp. 136, 137) and the Court could not have been oblivious to it. If anticipated population and industrial

growth did not constitute a bar to the discharge of domestic pumpage into the Sanitary Canal in 1930, it should not constitute a bar now, particularly in view of the fairly accurate projected increase in population and the insignificant (100 c.f.s.) increase, on the basis of complainants' own averments, in "domestic pumpage" in 1956 as compared to 1930, when the decree was entered.

IV.

The Application Is Predicated on the Erroneous Assumption That Recent Studies Have Established a Diversion of 1500 c.f.s. Without Domestic Pumpage To Be Adequate for Navigation in the Illinois Waterway.

The complainants contend (Application, 17, 39) that recent studies made by the United States Corps of Engineers have established that a diversion of 1500 c.f.s. is adequate to maintain navigation in the Port of Chicago and the Illinois Waterway "without additional water in the form of 'domestic pumpage'."

In their argument (p. 39) complainants rely upon and quote from paragraph 184 of the report made in January, 1957 by the Division Engineer, Brigadier General P. D. Berrigan, North Central Division Corps of Engineers, United States Army. The report is entitled "Effect on Great Lakes and St. Lawrence River of an Increase of 1,000 Cubic Feet Per Second in the Diversion at Chicago," and was prepared at the request of the Director of the Budget following the President's memorandum of disapproval of H. R. 3210, 84th Congressss. This report on its face dealt with an increase in the diversion at Chicago. It did not purport to discuss the possibility of a reduction in the total withdrawal of water from Lake Michigan by the elimination of domestic pumpage. The report was submitted to the

Secretary of the Army on January 29, 1957 by Major General E. C. Itschner, Chief of Engineers, and later submitted to the 85th Congress at the House Hearing on H. R. 2, to be discussed under Point VII, *infra.*

Paragraph 184 includes this statement:

> * * * Recent studies of present and prospective water requirements for navigation on the Illinois Waterway show that the authorized diversion of 1,500 cubic feet per second from Lake Michigan is adequate to meet those requirements.

The quoted statement itself belies the interpretation placed upon it by the complainants. Manifestly, the term "authorized diversion" as used in paragraph 184 means the diversion authorized by the decree of 1930 and the Rivers and Harbors Act of 1930, discussed under Point II, *supra,* namely 1500 c.f.s. "in addition to domestic pumpage." And it is a clear fact that the Corps of Engineers, United States Army, has always used the term "diversion" as not including domestic pumpage, that is, to mean the gross flow at Lockport less the amount of water used for domestic purposes. (Master's 1927 Report, 75; Master's 1929 Report, 120.) The Special Master also adopted this definition of the term "diversion". (Special Master's 1929 Report, 143.)

That General Berrigan used the term "diversion" as so defined is demonstrated conclusively by a reference to paragraph 183 of the same report relied upon by the complainants. In this paragraph reference is made to an earlier report by Colonel Dan I. Sultan made in 1933, in which General E. M. Markham, Chief of Engineers, concurred, pursuant to the Rivers and Harbors Act of 1930. Colonel Sultan and General Markham had reported (House Document 184, 73rd Congress, 2nd Sess., 6, 58) that a direct diversion of 1500 c.f.s. *in addition to domestic pumpage* was required to meet the needs of a commercially useful water-

way in the Illinois River, pending a conclusive determination after the completion of the sewage treatment works at Chicago. But in summarizing this report General Berrigan in paragraph 183 said that the report "found that 1500 second feet was the minimum flow required." He did not find it necessary to say that the 1500 c.f.s. was in addition to domestic pumpage.

Since the Division Engineer in paragraph 183 of his 1957 report did not expressly include domestic pumpage in summing up the earlier 1933 reports in which domestic pumpage was specifically included, as a component part of the water withdrawal, along with the 1500 c.f.s. directly diverted, it is obvious that the Division Engineer did not deliberately intend to exclude domestic pumpage in summing up the "recent studies" referred to in paragraph 184 of his report. Instead, in both paragraph 183 and paragraph 184 he took domestic pumpage for granted, in addition to the direct diversion, as a part of the water requirements for navigation in the Illinois Waterway.

Defendants know of no reports by the United States Corps of Engineers, past or present, since the entry of the 1930 decree, which show that 1500 c.f.s. without domestic pumpage is sufficient for the navigation needs of the Illinois Waterway. Defendants submit that the complainants' construction of paragraph 184 of General Berrigan's report of January, 1957 is patently untenable.

V.

Waterpower and Seaway Projects Authorized After 1930 Afford No Grounds for Abrogating the Provisions of the 1930 Decree and the Rivers and Harbors Act of 1930 Authorizing the Withdrawal of Water for Domestic Pumpage for Navigation Purposes in the Illinois Waterway.

Equally lacking in merit, for a number of reasons, is the reliance by the complainants upon the development of hydro-electric power in the St. Lawrence and Niagara Rivers and the St. Lawrence Seaway project. (Motion, par. 11; application pp. 13-17.)

(1) The first fallacy in the complainants' argument (application p. 35) lies in the assumption that these projects enlarge rights the complainants had in 1930 when the decree was entered authorizing a diversion of 1500 c.f.s. in addition to domestic pumpage. These projects could not create rights not existing before. If complainants' legal rights did not entitle them at that time to a cessation of the withdrawal of water from Lake Michigan by the defendants for domestic pumpage without returning the effluent to the Lake, they should not be entitled to it now.

(2) Most clearly, the St. Lawrence and Niagara projects, authorized by Congress in the 1950s, came long after this Court's 1930 decree and the Rivers and Harbors Act of 1930, and must be assumed to have taken into consideration the lakes and their levels as affected by that decree and the Congressional Act. The complainants have pointed to nothing—and can point to nothing—in the history of the enabling legislation or treaties which even remotely suggests that the projects were dependent in the slightest on reducing the amount of diversion permitted

to the defendants by the 1930 decree and Act. Certainly nothing in the equities of the situation requires the defendants in their right to prior use of water, pursuant to the decree of the Court and the Rivers and Harbors Act of 1930, to yield to New York's subsequent power projects. Unquestionably, the channel depths for the St. Lawrence Seaway project, as well as the power projects, have been predicated on the Chicago diversion as authorized by this Court and by Congress.

(3) The net loss of waterfall between Lake Erie and the sea attributable to defendants' increased domestic pumpage would be infinitesimal.

(4) If the question should become one of balancing equities, or one of broad public policy, the need for water for domestic and sanitary purposes is given preference over navigation and power in both the Canadian Boundary Waters Treaty of 1909 (36 Stat. 2448) mentioned in paragraph VIII (2) of the application and in the 1950 Treaty of Niagara, between the United States and Canada (TIAS 2130) referred to in paragraph VIII (11), (12) of the application. In his 1927 Report the Special Master in commenting on the 1909 treaty said (55):

> "* * * With reference to the use of boundary waters, it was provided that the following order of precedence should be observed among the various uses enumerated in the treaty for these waters, to-wit: (1) uses for domestic and sanitary purposes; (2) uses for navigation, including the service of canals for the purposes of navigation; (3) uses for power and for irrigation purposes. These provisions were not to "apply to or disturb any existing uses of boundary waters on either side of the boundary."

Article III of the 1950 Treaty provided that the amount of water available "shall be the total outflow from Lake Erie to the Welland Canal and the Niagara River (including the Black Rock Canal) less the amount of water used

for domestic and sanitary purposes and for the service of canals for the purposes of navigation."

(5) The State of New York has no "inalienable natural resources" in the St. Lawrence and Niagara Rivers as suggested in paragraph VIII (1), page 13, of the application. The rights of New York are inferior to the power of Congress over navigable waters (*Arizona* v. *California*, 283 U. S. 423, 451-452 (1931)). The rights of New York are also subject to the principle of "equitable division" which permits the removal of water to a different watershed (*New Jersey* v. *New York*, 283 U. S. 336, 342-344, 1931).

(6) As stated by the Special Master in his 1927 Report, page 154, quoted in Point II, *supra,* the appraisal of all local interests and of international relations, would be matters for the consideration of Congress exercising the sovereign power of the nation in determining national policy. Congress has exercised that sovereign power by the enactment of the Rivers and Harbors Act of 1930.

VI.

The Experience of Smaller Communities Which Have No Choice But to Return Water Used for Domestic Pumpage to Its Source Does Not Furnish a Standard for the Defendants to Follow.

In their application the complainants now contend that because other municipalities on the Great Lakes dump their sewage treatment effluents into the Great Lakes the City of Chicago should be compelled to do likewise. (Application X, pp. 18, 32.)

Special Master Hughes, 30 years ago in his Report on the original reference in 1927, disposed of an identical contention by stating (136):

> "The complainants point to conditions in other cities on the Great Lakes which take their water from the adjacent lake, into which also their sewage enters with a certain amount of treatment. These cities do not have the advantage of drawing off their sewage through a canal into another watershed. Thus, Milwaukee, Detroit, Toledo, Cleveland, and other communities must take their water supply from the adjacent waters, and at the same time use these waters as a receptacle for their sewage partially treated."

And in his report on re-reference in 1929 the Special Master said (136):

> "* * * The experience of very much smaller communities affords little aid in determining the effect of this enormous volume of effluent from the sewage treatment works, and the storm water run-off containing untreated sewage, flowing into the channels of the Drainage Canal and the Chicago River."

VII.

Complainants' Request for a Declaration by This Court Affecting Contemplated Congressional Action Should Not Be Granted.

The complainants refer to bills which have been or are now before the Congress which would authorize the temporary and experimental withdrawal of an additional 1,000 c.f.s. through the Illinois Waterway for a period of three years. (Application, 7-10, 41-42.) Two bills to that effect passed by prior Congresses have been vetoed. A third bill, H. R. 2, has passed the House in the present Congress and is now before the Senate. For the Congress to pass the bill would not be in derogation of this Court's authority or an affront to its dignity as complainants suggest. As the Court has always conceded, the Congress, not the Court, has been vested with paramount control over navigable waters of the United States.

The relevancy of the pending legislation to the prayers of the motion and application to modify the decree is not discernible. This Court has expressly recognized the power of Congress to regulate the amount of water that may be diverted. (*Wisconsin* v. *Illinois,* 281 U. S. 179, 197, 198, 199.) If the Congress chooses to further exercise its authority, to that extent this Court's decree would be superseded.

The complainant states are not seeking an injunction against the passage of a law by the Congress. The Congress has not been made and could not be a defendant. Nor do complainants profess to be seeking an injunction against efforts to induce the Congress to pass such a law.

Indeed, complainants assure the members of Congress that they may introduce such bills in Congress as they see fit (*Id.* at 41). Nevertheless, they ask this court for an injunction perpetually enjoining the defendants from diverting any water for domestic pumpage from the Great Lakes Basin (*Id.* at 19) because of their fear that the defendants will continue to demand an increase in the amount of diversion. (*Id.* at 10.) They ask the Court "to make a clear and unmistakable declaration that such diversion for sanitation purposes, even though authorized and sanctioned by Congress, would avail the State of Illinois and the Sanitary District nothing." (*Id.* at 41.)

Thus the complainants ask this Court now to assume, in advance of the actual enactment of pending legislation, that the Congress will proceed in an unconstitutional manner in passing such legislation. They seek the aid of this Court to forestall action by the Congress. Complainants intimate that such a law would be unconstitutional. If so —and defendants think the claim frivolous,—the time to complain is after the law is passed.

Attached hereto, for the convenience of the Court, as Appendix B, is a copy of H. R. 2 (85th Congress); a history of previous bills in Congress as Appendix C;

and a report by the House Committee of the 85th Congress favorably reporting H. R. 3210 as Appendix D. These documents show that the studies proposed in H. R. 2 are merely the studies recommended to be made, after the completion of the Sanitary District's sewage treatment facilities, by the Corps of Engineers in 1933, pursuant to the Rivers and Harbors Act of July 1930. (House Doc. 184, 73rd Congress, 2nd Session, page 51, par. 103.) Authorizing such studies to be made by the Secretary of the Army and requiring a report and recommendation thereon to the Congress clearly are proper exercises of the constitutional powers of the Congress over navigable waters.

Conclusion.

In conclusion, the defendants urge the Court to enter an order denying and dismissing the motion of the State of New York and the application of all the complainant states on the ground that the motion and application do not state facts sufficient to warrant the appointment of a Master and do not present an issue of which the Court can take judicial cognizance under the 1930 decree.

The original litigation involved in these suits presented a new question for the Court. The decree of 1930 required the Sanitary District to take measures at a cost of millions of dollars for the construction of vast sewage treatment plants and sewage disposal facilities. The Sanitary District proceeded to comply with the decree. Complainants admit (p. 29) that the District operates several large sewage treatment plants and does a "reasonably efficient job at these works." The American Society of Civil Engineers in 1955 classified the Chicago sewage system as one of the seven engineering wonders of America (November 1955 issue of *Civil Engineering*: Hearings, Subcom-

mittee of Senate Committee on Public Works on H. R. 3210, S. 1772, and S. 2550, 84th Cong. 2nd Sess. 32-34 (1956)). The complainants' present request, after silence for more than 27 years, for a radical change in a basic provision of the decree is belated and unfounded and in derogation of the Rivers and Harbors Act of 1930.

Respectfully submitted,

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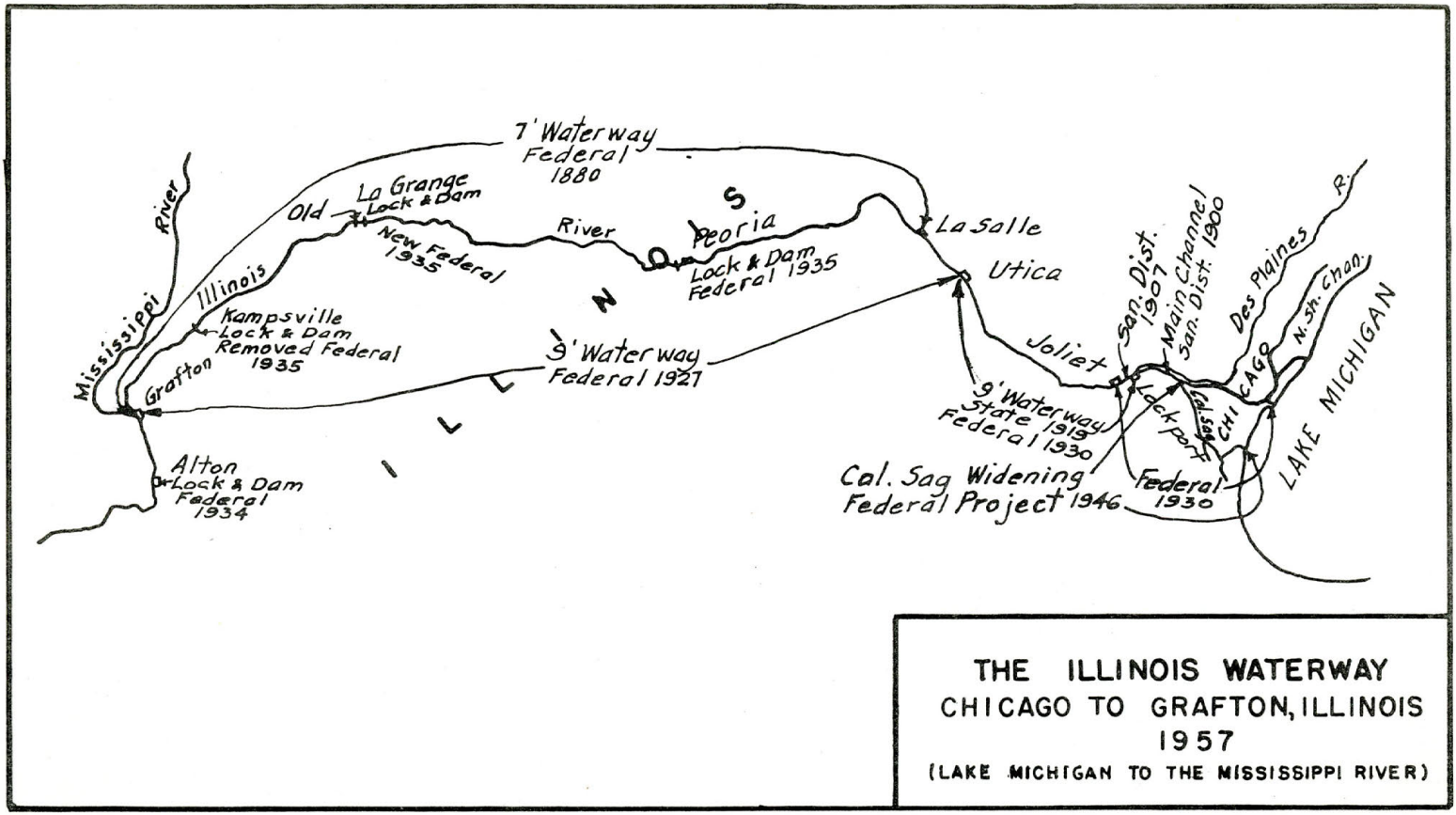

THE ILLINOIS WATERWAY
CHICAGO TO GRAFTON, ILLINOIS
1957
(LAKE MICHIGAN TO THE MISSISSIPPI RIVER)

APPENDIX B.

(H. R. 2, 85th Congress, 1st Session.)

A BILL

To authorize the State of Illinois and The Metropolitan Sanitary District of Greater Chicago, under the direction of the Secretary of the Army, to test, on a three-year basis, the effect of increasing the diversion of water from Lake Michigan into the Illinois Waterway, and for other purposes.

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

That, in order to provide a basis for a study of the effect of increased diversion of water from Lake Michigan upon the Illinois Waterway and the degree of improvement in such waterway caused thereby the effect of such increased diversion upon commerce among the several States and navigation on the Great Lakes and the Illinois Waterway and the extent to which such increased diversion may affect the level of Lake Michigan, authority is hereby granted to the State of Illinois and The Metropolitan Sanitary District of Greater Chicago, under the supervision and direction of the Secretary of the Army, to withdraw water from Lake Michigan, in addition to all domestic pumpage, at a rate providing a total annual average of not more than two thousand five hundred cubic feet of water per second, to flow into the Illinois Waterway during the three-year period which begins on the date of enactment of this Act, subject to the following limitations:

(1) The maximum direct diversion from Lake Michigan shall not at any time exceed a flow of five thousand cubic feet per second;

(2) The Secretary of the Army shall at all times have direct control and supervision of the amounts of water directly diverted from Lake Michigan; and

(3) The Secretary of the Army shall not allow any water to be directly diverted from Lake Michigan to flow into the Illinois Waterway during times of flood in the Illinois, Des Plaines, Chicago, or Calumet Rivers.

Sec. 2. As soon after the date of enactment of this Act as is possible, the Secretary of the Army shall cause a study to be made of the effect on Lake Michigan and on the Illinois Waterway of the increased diversion authorized by the first section of this Act, and the improvement in conditions along the Illinois Waterway which may result from such increased diversion. The Secretary of the Army shall report to the Congress on or before January 31, 1961, the results of such study. Such report shall contain recommendations with respect to continuing the authority to divert water from Lake Michigan into the Illinois Waterway in the amounts authorized by this Act, or increasing or decreasing such amounts.

APPENDIX C.

HISTORY OF PREVIOUS BILLS IN CONGRESS.

Congressman Blatnik, Chairman of the House Sub-Committee on Public Works, at the Hearing on H. R. 2 and others, March 26-27, 1957, presented the following summary, as reported on page 2 of the printed Committee Proceedings:

"SUMMARY OF PREVIOUS LEGISLATION.

The Chicago diversion was the subject of bills in the 83rd and 84th Congresses as well as the present Congress. The group of bills in the 83rd Congress, of which H. R. 3300 was the subject of hearings, were all similar. The bill was passed by the House and Senate and was vetoed by the President.

In the 84th Congress the bill on which hearings were held was H. R. 3210. It was substantially the same as H. R. 3300 in the 83d Congress. It passed the House on July 6, 1955, and was favorably reported by the Senate Committee on Public Works on July 14, 1956. It passed the Senate on July 27, 1956, and was vetoed by the President on August 9, 1956. In his memorandum of disapproval of H. R 3210, the President quoted his memorandum of disapproval of H. R. 3300, giving as reasons for the disapproval that all methods of control of lake levels and protection of property should be considered before proceeding with the increased diversion, that negotiations with Canada should be considered before diversions are authorized, and that the legitimate interests of other States may be adversely affected. He went on to say that a report by the Corps of Engineers was under way and he was asking that it be expedited.

With respect to the present session, 17 bills have been introduced, of which the first is H. R. 2. These bills are all the same, with the exception of a difference in one concerning regulation of the flow of the Illinois River at Pekin, Ill. The 16 identical bills are substantially the same as H. R. 3210 of the 84th Congress."

APPENDIX D.

HOUSE COMMITTEE REPORT ON H. R. 3210.

The House Committee on Public Works, 84th Congress (Report No. 1029), in favorably reporting H. R. 3210, stated:

> "The committee is aware that the diversion of water at Chicago from Lake Michigan through the drainage canal of the sanitary district has been the subject of considerable controversy. It will be noted, however, that H. R. 3210 differs from bills offered in previous Congresses in that it imposes certain limitations with respect to the maximum amount of diversion that could be effected at any one time. The bill expressly specifies that the maximum direct diversion from Lake Michigan shall not at any time exceed a flow of 5,000 cubic feet per second and provides that the Secretary of the Army shall at all times have direct control and supervision of the amounts of water directly diverted from Lake Michigan. Further, it provides that the Secretary of the Army shall not allow any water to be directly diverted from Lake Michigan to flow into the Illinois Waterway during times of flood in the Illinois, Des Plaines, Chicago, or Calumet Rivers. These are safeguards which the committee believes will meet some of the objections of residents and property owners of the downriver area.
>
> The committee believes that in view of the radically changed conditions since the 1933 report was made to Congress, that the Secretary of the Army should cause a new study to be made. Testimony of representatives of the Corps of Engineers indicated that such a study should extend over a period of approximately 3 years and also that experimental temporary increases in annual average diversion of not to exceed 1,000 cubic feet per second should be authorized during the course

of the study. This amount of diversion during the study could have little adverse effect on lake or river interests and would afford an opportunity to secure much valuable information on the exact effects of an increased flow. The 3-year study period would be a test period during which time the Corps of Engineers, together with the Public Health Service, would observe and evaluate the effects of the increased diversion. At the end of that period a report would be made to the Congress containing recommendations as to whether such diversion is beneficial and whether it should be decreased or increased. The effects of the temporary diversion would be incorporated into the Great Lakes Water Levels Report which will be submitted to Congress by the Secretary of the Army as a result of a study now under way by the Corps of Engineers.

The lowering effect on the lakes of the additional 1,000 cubic feet per second would be less than 1 inch on Lakes Michigan-Huron and about one-half inch on Lakes Erie and Ontario, and these effects would not be realized until several years after the increased diversion commenced.

The committee is of the view that the experimental increases and the study authorized in this bill will afford an opportunity to secure much valuable information on the exact effects of an increased flow through the Illinois Waterway."

APPENDIX E.

ANNUAL AVERAGE METRO PUMPAGE AND DIVERSION FROM LAKE MICHIGAN BY SANITARY DISTRICT OF CHICAGO

1930 to 1956 incl.

	Metropolitan pumpage cfs	Diversion cfs	Total diversion & pumpage from Lake Michigan cfs
1930	1700	6660	8360
31	1680	6500	8180
32	1650	6450	8100
33	1690	6270	7960
34	1692	6433	8125
35	1602	6484	8086
36	1712	4862	6574
37	1665	4989	6654
38	1604	4999	6603
39	1582	1499	3081
40	1589	1681*	3270*
41	1610	1496	3106
42	1575	1528**	3103**
43	1605	1500	3105
44	1606	1531**	3137**
45	1507	1498	3005
46	1600	1495	3095
47	1616	1500	3116
48	1640	1500	3140
49	1641	1493	3134
50	1607	1499	3106
51	1616	1490	3106
52	1633	1497	3130
53	1692	1499	3191
54	1708	1497	3205
55	1739	1500	3239
56	1805	1699*	3504*

* Increase authorized by order of U. S. Supreme Court.

** Increase authorized by order of War Department.

The foregoing figures are contained in the official records of the United States Army District Engineers at Chicago, as officially computed pursuant to the provisions of paragraph number 4 of the decree of April 12, 1930.