IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 4 ORIGINAL

STATE OF NEW YORK
Complainant,

against

STATE OF ILLINOIS and SANITARY DISTRICT OF CHICAGO,
Defendants.

BRIEF IN SUPPORT OF MOTION BY THE STATE OF NEW YORK FOR LEAVE TO FILE A SUPPLEMENTAL AND AMENDED COMPLAINT

LOUIS J. LEFKOWITZ,
Attorney General of the State of New York,
State Capitol, Albany, New York

PAXTON BLAIR,
Solicitor General of the State of New York,

RICHARD H. SHEPP,
Assistant Attorney General of the State of New York,

RANDALL J. LE BOEUF, JR.,
Special Assistant Attorney General of the State of New York.

Albert Ottinger

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Statement

This motion by the State of New York for leave to file a supplemental and amended complaint in the above-entitled action is made pursuant to the terms of an order of this Court made in this action in 1927, and is further grounded upon the terms of the decree of this Court entered herein on April 21, 1930, upon Rule 15(d) of the Federal Rules of Civil Procedure as made applicable to Original actions by Rule 9(2) of the Supreme Court Rules, and upon the inherent powers of a court of equity to consider changes and circumstances arising following the entry of a decree by such court.

The original complaint in this action was filed by the State of New York on October 18, 1926. Such complaint contained a paragraph "III" which, among other things, alleged:

> "The residue of the water available for power belongs to the State and the citizens of the State ad-

> joining that particular part of the waterway where power may be developed. A flow of ten thousand cubic feet per second of water through the Niagara river and the international section of the St. Lawrence river is capable of developing approximately four hundred thousand horse power. The right to use this water for the development of power is a property right of the State of New York and its citizens, which property right neither the defendants nor the Congress of the United States has a right to destroy or impair by abstracting or diverting water from Lake Michigan or any other part of the Great Lakes and St. Lawrence waterway into the Mississippi waterway."

On May 31, 1927, this Court ordered such allegation stricken from the original complaint on the ground that such allegation did not

> "show that there is any present use of the waters for such purposes which is being or will be disturbed; nor that there is any definite project for so using them which is being or will be affected." (274 U. S. 488, 489.)

This Court at that time, however, expressly noted that its decision was

> "without prejudice, so that the plaintiff State, if later on in a position to do so, may be free to litigate the questions which the paragraph is intended to present." (274 U. S., at p. 490.)

In its decision herein on January 14, 1929 (278 U. S. 367), this Court held that the diversion of waters by the defendants in excess of that needed to preserve navigation on the Chicago River was without legal justification and in violation of the rights of this complainant and the

other Great Lakes states, but because of the danger which would ensue to the health of the people of Chicago, the Court did not order immediate cessation of such diversion, but rereferred the matter back to the Special Master to determine the necessary steps which would lead so far as possible to a restoration of the complainants' riparian rights. Following the report of the Special Master on rereference, this Court determined (281 U. S. 179) that under the then existing facts and circumstances, and in light of the limitations upon the efficiency of sanitary methods, the Court in equity should enter a decree providing for a reduction in the diversion by gradual stages, until diversion should be no more than 1,500 cubic feet per second ("cfs") plus "domestic pumpage". The Court did not at that time feel that on the record before it, it could properly enjoin such pumpage, which had not been complained of in the pleadings then in issue. The Court, however, specifically provided that the decree should contain a provision

> "That any of the parties hereto, complainants or defendants, may, irrespective of the filing of the above-described reports, apply at the foot of this decree for any other or further action or relief, and this Court retains jurisdiction of the above-entitled suits for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy." (281 U. S., at p. 202.)

A decree in accordance with the decision was entered on April 21, 1930 (281 U. S. 696).

As appears from the proposed supplemental and amended complaint and the motion for leave to file such complaint, there has within the past few years been com-

pleted upon the St. Lawrence River hydroelectric works built jointly by Power Authority of the State of New York (hereinafter the "Power Authority") and The Hydro-Electric Power Commission of Ontario, and there is now under construction by the Power Authority (to deliver first power in 1961, full capacity in 1962 and to be completed in 1963), hydroelectric works on the Niagara River. As is more fully developed elsewhere, both the works on the Niagara River and the works on the St. Lawrence River are of such capacity as to be fully capable of utilizing the flow now being diverted by the defendants, if it were made available by a modification of the decree of this Court, and in addition, such works will suffer direct loss if such diversion is increased under the guise of "domestic pumpage". Accordingly, there is a present and immediate injury to complainant, State of New York, arising out of the loss of such waters for hydroelectric uses, which raises questions which New York should now be allowed to set forth in the pleadings, pursuant to the terms of this Court's ruling of May 31, 1927.

In addition to compliance with the provisions of this Court's 1927 ruling, a supplemental and amended complaint is further desirable because of other major changes which have occurred since the 1930 decree. Principal among these is the St. Lawrence Seaway Project, which opened in June of 1959. As stated in the motion and the proposed supplemental and amended complaint, the Seaway has opened the Great Lakes to ocean going vessels of 27 foot draft, and has changed the nature of commerce upon the Great Lakes and the nature as well as the extent of the damage suffered by the State of New York from the diversion by the defendants.

In addition, public recreational uses by the people of the State of New York of the shores and waters of the

Great Lakes have become a factor of sufficient importance so that the injury to such present recreational uses should be set forth with greater particularity.

Finally, this Court stated in its decision in 281 U. S. 179, at page 200, that whether domestic pumpage becomes excessive may be subject to further complaint and that the inclusion in such pumpage of the use by industrial plants "may be open to consideration at some future time." This complainant now contends that, in view of the increased damage to complainant and its citizens arising out of any diversion, and in view of the increasing domestic and industrial use of water in Chicago which aggravates such injury to the State of New York and its citizens solely in the economic interest of Illinois, the time has arrived when the propriety of permanently enjoining the diversion of such domestic and industrial use should be considered. It would be appropriate that the pleadings reflect this issue.

Argument

I

A Supplemental and Amended Complaint is a procedurally proper method to raise issues arising out of changes and events occurring since the date of a prior decree.

Rule 15(d) of the Federal Rules of Civil Procedure which is made applicable to original proceedings in this Court by Rule 9(2) of the Supreme Court Rules provides:

> "(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since

> the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor."

Aside from such Rule, it is a recognized equity procedure to file a supplemental pleading to bring to the Court's attention facts arising after the entry of a decree. (See Story's Equity Pleading, 10th edition, section 338.) Such procedure has been recognized as proper by this Court.

In *Independent Coal Co.* v. *U. S.*, 274 U. S. 640 (1927), the Court noted at page 647:

> "The suit is in the nature of a supplemental bill in aid of the former decree and is an appropriate method of securing the benefit of the first decree when subsequent events have made necessary some further relief in order that the plaintiff may enjoy the full fruits of the victory in the first suit. Cf. *Root* v. *Woolworth,* 150 U. S. 401; *Shields* v. *Thomas,* 18 How. 253, 262; *Thompson* v. *Maxwell,* 95 U. S. 391; Story, Equity Pleading, 10th ed., §§338, 339, 345, 351(b), 353, 429, 432. Cooper, Equity Pleading, 74, 75."

In *Osage Oil & Refining Co.* v. *Continental Oil Co.,* 34 F. 2d 585 (10th Cir., 1929), the Court stated at page 588:

> "Where, by reason of events occurring subsequently to the decree, the further aid of the court is necessary to settle the rights of the parties and carry out the decree, a supplemental bill should be filed asking for an adjudication of the new issues and a decree to enforce the original decree." (Citing *Root* v. *Woolworth,* 150 U. S. 401 (1893).)

See also, to the same effect, *Connett* v. *City of Jerseyville,* 96 F. 2d 392 (7th Cir., 1938).

As has been noted above, this Court in striking from the original complaint the allegations relating to hydroelectric uses (274 U. S. 488) specifically provided that New York would be free to litigate questions intended to be raised by the paragraph then stricken if subsequent facts left it in a position to do so. It would appear that the most orderly procedure for litigating such questions would be by restoring such allegations, brought up-to-date, to the pleadings.

The filing of the supplemental and amended complaint herein would create no delay and occasion no surprise to the defendants. The issues raised therein were mentioned in the Amended Application of the State of New York and the other Great Lakes States to reopen the April 31, 1930 decree; and such matters are in fact already in issue by virtue of the Answer and Counterclaims of the State of New York in Original No. 12, which has been referred for hearing by this Court to Special Master Albert B. Maris together with Original Nos. 2, 3 and 4. Such issues were taken notice of by Illinois in its "Reply to Counterclaims" in No. 12 and by Illinois and the Sanitary District in their "Answer to Amended Application" in Nos. 2, 3 and 4. Hearings have begun before the Special Master on October 19, 1959, but are presently limited to pre-trial procedures, opening statements and the presentation by the State of Illinois of its direct case in Original No. 12.

II

New York's Rights in the Flow of the Watershed.

One of the primary purposes of the amended and supplemental complaint is to bring before the Court and Special Master a pleading clearly presenting those issues arising out of the construction of hydroelectric facilities

capable of utilizing the flow now being diverted at Chicago. It is anticipated, based upon prior proceedings, that the defendants will claim that New York has no status to raise this issue. (See Illinois' "Reply to Counterclaims" in Original No. 12 at p. 9.)

In substance, the defendants' apparent argument is that since the Federal government has a navigation servitude in the Niagara and St. Lawrence Rivers, and can and does require the obtaining of a Federal permit as a condition to the construction of any hydroelectric project upon such rivers, New York can only have a right to the extent of such permit as has been issued; and that the permits pursuant to which New York is constructing its projects allegedly only authorize it to use the flow after the diversion at Chicago has been taken into account. While the issue of law is one which could more properly be reviewed by this Court following a full development of the facts on the hearings before the Special Master, complainant feels it may be desirable at this time to outline the basis of its position.

The legal and factual premises upon which the defendants' argument is founded are erroneous. New York's rights exist independent of Federal permit; and the Federal permits which have been issued would, without further amendment, allow the use of the additional flow which would result if the Chicago diversion were terminated.

A. New York has a usufructuary property right in the flow of the St. Lawrence and Niagara Rivers, independent of Federal permit, which right is being usurped by Illinois.

The defendants' presumed position amounts to a contention that there exists no property or usufructuary rights

in the flow of a navigable stream independent of Federal authorization. In fact, the law is clearly to the contrary: private property rights in the flow of a navigable stream exist, although subservient to a dominant servitude in favor of the United States for navigational purposes. In certain circumstances, such property rights may be destroyed without compensation by the United States acting in the interests of navigation; however, the United States has taken no such action here. The present controversy in no way involves the rights of the United States.

A direct refutation of the defendants' position is the Court's decision in *FPC* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239 (1954). The Supreme Court's opinion in that case begins with the following statement:

> "The most significant issue raised by this case is whether the Federal Water Power Act of 1920 has abolished private proprietary rights, existing under state law, to use waters of a navigable stream for power purposes. We agree with the Court of Appeals that it has not." (Pp. 240-241.)

The Court went on to say at pages 248-249:

> "We conclude, as did the Court of Appeals, that, even though respondent's water rights are of a kind that is within the scope of the Government's dominant servitude, the Government has not exercised its power to abolish them.
>
> "While we recognize the dominant servitude, in favor of the United States, under which private persons hold physical properties obstructing navigable waters of the United States and all rights to use the waters of those streams, we recognize also that the exercise of that servitude, without making allowances for preexisting rights under state law, requires clear authorization."

Then, after citing *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53 (1913), as a "classic example of such a clear authorization" (347 U. S., at p. 249), the Court said:

> "That decision is not applicable here. The issue here is whether the much more general and regulatory language of the Federal Water Power Act shall be given the same drastic effect as was required there by the language of the Act of March 3, 1909. We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use waters of the Niagara River. Unlike the statute in the *Chandler-Dunbar* case, the Federal Water Power Act mentions no specific properties. It makes no express assertion of the paramount right of the Government to use the flow of the Niagara or of any other navigable stream to the exclusion of existing users. On the contrary, the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties." (Pp. 250-251.)

United States v. *Twin City Power Co.*, 350 U. S. 222 (1956), involved a statute containing the "clear authorization" which the Court in the *Niagara Mohawk* case held was necessary but lacking in the Federal Water Power Act. That case involved a taking of property by the United States, under Section 10 of the Flood Control Act of 1944, for navigational purposes. In holding that as against the United States exercising its "dominant servitude" for navigation pursuant to the Flood Control Act, the riparian owner had no compensable right in the value of his property for hydroelectric purposes, the Court said at page 225:

> "The legislative history and construction of particular enactments may lead to the conclusion that

> Congress exercised less than its constitutional power, fell short of appropriating the flow of the river to the public domain, and provided that private rights existing under state law should be compensable or otherwise recognized. Such were *United States* v. *Gerlach Live Stock Co., supra,* and *Federal Power Commission* v. *Niagara Mohawk Power Corp., supra.* We have a different situation here, one where the United States displaces all competing interests and appropriates the entire flow of the river for the declared public purpose."

It may be noted that in that case the issue was not whether there was a property right, but rather whether such right had to be compensated for by the Federal government in exercising its dominant navigational servitude. The issue in the present case does not involve the rights of the State of New York as against a diversion of water for navigational purposes by the Federal government. It is a suit between riparian or littoral proprietors against a diversion of water for sanitary and power purposes by the upstream proprietor, State of Illinois.

United States v. *Gerlach Live Stock Co.,* 339 U. S. 725 (1950), held that a riparian owner had a compensable right in the flow of a navigable river even as against the United States, when the United States was taking such rights for non-navigational purposes (in that case reclamation). Thus, although it is not here in issue, it would seem clear that even the United States could not divert waters for sanitary purposes without paying for downstream riparian rights. Illinois can be in no better position.

United States v. *Appalachian Electric Power Co.,* 311 U. S. 377 (1940), contains a statement that

> "there is no private property in the flow of the stream." (p. 427.)

However, the context of this quotation is in a discussion of the constitutionality of the recapture provisions of the Federal Power Act, and the quoted matter clearly referred to the Constitutional rights of private property in the stream as against the Federal navigational servitude, which is not here in issue. Any broader reading of this phrase taken out of context is precluded by the subsequent *Gerlach* and *Niagara Mohawk* decisions.

B. The existing permits allow use of the total possible flow of the Great Lakes watershed.

Even if the law were to the contrary, that Federal permits were required before New York could establish a property right as against the State of Illinois in the flow of the Great Lakes and St. Lawrence River, New York's agency, the Power Authority, holds such permits.

1. Existing permits authorized works capable of utilizing the entire flow.

The conclusion that the Power Authority has been licensed only to utilize the flow available after the diversion by Illinois could only be drawn if it is assumed that the various permits which the Power Authority has obtained for the Niagara and St. Lawrence hydroelectric works are in terms of the amount of flow which can be utilized in such works.

Actually, the permits authorize the Power Authority to construct, maintain and operate project *works,* which the Power Authority has done at St. Lawrence and is doing at Niagara. Such permits authorized the construction, maintenance and operation of works capable of utilizing the water now being diverted out of the watershed by Illinois.

With respect to the works on the St. Lawrence River, the F.P.C. license for Project No. 2000 authorizes the "construction, operation, and maintenance" of such Project: it does not authorize, restrict or mention any use of any quantity of flow. Similarly, the Order of Approval of the International Joint Commission ("I.J.C.") of October 29, 1952 approved the "construction, maintenance and operation * * * of certain works". In each case, what was authorized was, not a use of water, but construction and operation of a physical structure of a designed capacity capable of utilizing the Illinois diversion if and when this Court made it available.

It is true that the order of the I.J.C. was conditional upon the project works being operated in accordance with certain controls relating to maintenance of water levels and flows, and that the F.P.C. license requires compliance with the requirements of the I.J.C. Order of Approval. However, while these conditions permit I.J.C. regulation, they are not limitations on the scope and extent of the license and approval.

In its Order of October 29, 1952, the I.J.C. retained jurisdiction to make such further orders as it might deem necessary. Pursuant to that retention of jurisdiction, the I.J.C. on July 2, 1956 entered a "Supplemental Order to Order of Approval dated 29 October, 1952" determining that "Method of Regulation No. 5", which it had prescribed in its October 29, 1952 order, was impracticable, and amended the order by substituting "Plan of Regulation No. 12-A-9, as prepared by the International Lake Ontario Board of Engineers, dated 5 May 1955."

Pursuant to the order of July 2, 1956, the International St. Lawrence River Board of Control, which had been created by the 1952 Order of Approval, made further studies of river regulation and on May 14, 1958 recom-

mended to the I.J.C. a new plan of regulation known as "Plan 1958-A" based upon the same criteria as Regulation 12-A-9. The I.J.C. accepted the Board of Control's recommendations, but instead of issuing instructions directly, requested that the United States State Department and the Canadian government issue orders to their respective entities putting the plan into effect. The State Department asked the Federal Power Commission to take such action as it deemed necessary to assure operation in accordance with the I.J.C. orders. In response to such request, the Federal Power Commission on April 10, 1959 issued an order requiring the Power Authority to comply with Regulation 1958-A. On rehearing, the Federal Power Commission rescinded that order and issued one which required that

> "In the maintenance and operation of the project covered by this license, the licensee shall comply with all applicable provisions and requirements of the Order of Approval (I.J.C. Docket No. 68) issued October 29, 1952, by the International Joint Commission to the Governments of the United States and Canada for the construction of certain works for the development of power in the International Rapids section of the St. Lawrence River, as amended by its Order of July 2, 1956. In complying with these requirements, the licensee shall be deemed to have accomplished such compliance if it follows Regulation Plan 1958-A or any supplementary or superseding plan of regulation approved by the International Joint Commission, under the supervision of the International Saint Lawrence River Board of Control in accordance with paragraph (h) of the October 29, 1952 Order of Approval." (Order on Rehearing, August 3, 1959.)

It is apparent from the foregoing recitation of the sequence of events and documents that neither the I.J.C.

nor the F.P.C. permits are in any way restricted in their scope or nature to the use of a limited flow of water which would exclude the Illinois diversion. The permits are absolute, providing for the construction, maintenance and operation of project works which, as appears from the motion and the supplemental and amended complaint, are fully competent to utilize one half of the total flow including that which would be available if there were no diversion at Chicago. While the right to regulate such use is retained for the protection of other interests in Lake Ontario and the St. Lawrence River, there is nothing in the license or the Order of Approval which requires that such regulation should preclude use of the waters presently diverted by Illinois if such waters are made available to the State of New York, and as is indicated below, the regulation presently in effect (1958-A) and the physical circumstances demonstrate that an assumption of such a requirement is wholly untenable.

Similarly, with respect to the project works on the Niagara River the Power Authority's license is for the "construction, operation and maintenance" of the project on the Niagara River

> "for the purpose of developing all of the waters of the Niagara River which it is permissible to divert for power purposes in the United States under the terms of the 1950 treaty * * * *"

This provision must be read in light of Public Law 85-159 (71 Stat. 401, 16 U.S.C. §836), which "expressly authorized and directed" the F.P.C. to issue a license to the Power Authority

> "for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted

> to be used by international agreement." (71 Stat. 401, §1(a); 16 U.S.C., §836(a).)

The international agreement, which under Public Law 85-159 is to fix the scope of the Power Authority's license, is the 1950 "Treaty Between the United States of America and Canada Concerning Uses of the Waters of the Niagara River." Article VI of this Treaty provides that

> "The waters made available for power purposes by the provisions of this Treaty shall be divided equally between the United States of America and Canada."

Reference must then be made back to Article V, which provides that

> "All water specified in Article III of this Treaty in excess of water reserved for scenic purposes in Article IV may be diverted for power purposes."

Article IV specifies that, in order to reserve sufficient amounts of water in the Niagara River for scenic purposes, no diversions of the water specified in Article III for power purposes will be made which will reduce the flow over Niagara Falls below certain specified *minimums*. Since no *maximum* restriction is made on the flow over the Falls it is apparent that action in either nation resulting in increasing stream flows would not be in violation of the Treaty.

Article III makes available for scenic and power purposes (and, since the scenic requirement is numerically specified, Article III is the ultimate measure of what is available for power purposes),

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

It is further provided that this language does not govern certain waters diverted into the Great Lakes watershed by Canada through the Long Lac-Ogaki works pursuant to prior exchanges of notes, which waters are reserved for Canada's use at Niagara.

It is clear that the Treaty, in allocating the "total outflow from Lake Erie", places no maximum restriction on such outflow, but rather that the sense thereof is to allow the maximum possible use of such outflow. It could not be seriously contended that elimination of the Chicago diversion by the United States would constitute a violation of this Treaty; on the contrary, the present diversion is a violation of the Treaty in as much as it is not necessary. If the diversion were enjoined, it is apparent that the additional waters, once they reached the points of outflow of Lake Erie, would become includible in measuring "the United States share of the water of the Niagara River permitted to be used by international agreement" for power purposes within the meaning of Public Law 85-159, *supra*. Under that statute and the license for Project 2216, the Power Authority has clear authorization as well as the physical capacity to use such additional flow.

2. Under present regulation, such flow could be utilized.

Even if New York's rights as against Illinois were dependent upon a Federal license, it would be the scope of such license and not the transitory regulations thereunder which would provide the measure of such rights. As has been indicated above, the scope of the licenses

contemplates construction, operation, and maintenance of project works capable of utilizing the entire flow from the Great Lakes available to the United States, including the waters which might become available upon a cessation of the Chicago diversion. Regulations thereunder, however, would have to be based upon the factual situation as it exists at the time of their promulgation, which situation presently includes a diversion at Chicago authorized by this Court's 1930 decree, and the fact of such diversion is recognized by the regulations. It may reasonably be assumed that such regulations, being subject to change, would similarly recognize the fact of the cessation of such diversion if this Court should so order. However, even measured by existing regulations, the Power Authority has authorization to utilize the additional flow which could be made available by the cessation of the Chicago diversion.

The present regulation with regard to the St. Lawrence Project works is, as has been noted, 1958-A. This plan, described more fully in 21 F.P.C. 480 (1959), provides for control of levels and flows from Lake Ontario within certain minimum and maximum limits varying with time of year and natural conditions to the extent permitted by other requirements relating to levels in the St. Lawrence River downstream from the project in Canada, and particularly at Montreal. While such limits attempt to account for, as an existing fact, a diversion from the watershed of 3100 cfs, they do not require such diversion. Further, it may be noted that the present diversion is in excess of 3100 cfs. The supplemental and amended complaint alleges complainant's information and belief that the diversion is presently 3300 cfs, rather than the 3100 cfs used as a reference point in 1958-A, and that such diversion is growing. The only restriction in 1958-A, and the

only physically feasible restriction in any modification thereof, is on the timing of the flows. Whenever such flows are released, however, they must necessarily pass through the power dam, which is capable of converting them into hydroelectric power and energy.

In regard to the project works on the Niagara River, no regulations have as yet been promulgated, although the right to do so is reserved by the license provision incorporating the terms and conditions of Form L-4, entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters of the United States" (16 F.P.C. 1284 (1953)). Article 13 thereof makes the operations of a licensee, insofar as they affect the use, storage, and discharge from storage of waters affected by the license, subject to reasonable regulation for prescribed purposes. Such purposes include navigation, the protection of life, health and property, and the fullest practicable conservation and utilization of such waters for power purposes and other beneficial public uses, including recreation. The physical factors here also preclude any assumption that any regulation would be promulgated under this provision which would prevent utilization for power purposes at Niagara of the present Chicago diversion. None of the criteria of Article 13 could possibly require that the additional flow bypass the power project.

Conclusion

The service of the supplemental and amended complaint would be an appropriate and proper procedure for incorporating in the pleadings important changes in circumstances relating to the substantial rights of New York occurring since the April 21, 1930 decree, and such service

should be allowed as contemplated by this Court's order of May 31, 1927.

Respectfully submitted,

LOUIS J. LEFKOWITZ,
Attorney General of the State of New York,

PAXTON BLAIR,
Solicitor General of the State of New York,

RICHARD H. SHEPP,
Assistant Attorney General of the State of New York,

RANDALL J. LE BOEUF, JR.,
Special Assistant Attorney General of the State of New York.