IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 4 Original

STATE OF NEW YORK,

Complainant,

vs.

STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO,

Defendants.

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

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Introduction.

On the basis of proceedings jointly instituted by New York and five other complainant states in related cases, and pursuant to the recommendation of the Solicitor General, this historic and protracted litigation over water diversion from the Great Lakes dating back to 1922 was referred to a Special Master by this Court on June 29, 1959 for hearings on the issues properly tendered by the parties.[1] Notwithstanding this recent disposition and the commencement of hearings below, pursuant to the Order of Reference, New York, without comparable action by the five other complainants or the Solicitor General, appar-

1. *Illinois* v. *Michigan*, 360 U. S. 712.

ently would circumvent the Order of Reference, create new procedural complications, and in effect seek reconsideration of this matter by this Court prior to the filing of the Special Master's Report.

Question Presented.

The question presented is whether the State of New York, twenty-nine years after the entry of the 1930 decree in this and related causes, should be allowed to file a supplemental and amended complaint alleging a new cause of action and seeking to expand the relief demanded in its original complaint filed in 1926, when all issues properly raised by the proposed new pleading may be presented and determined in the hearings now being held by Special Master Albert B. Maris on a reopening of the decree pursuant to an application of New York and other Lake States. Specifically, may the State of New York file a Supplemental and Amended Complaint which contains not only allegations of additional damage but also a charge, not included in the original complaint, that the failure of The Metropolitan Sanitary District of Greater Chicago to return to Lake Michigan water used for domestic purposes by the City of Chicago and municipalities within the District is in violation of its rights?

HISTORY AND NATURE OF THE LITIGATION.

The Original Complaint Did Not Seek a Return to Lake Michigan of Water Withdrawn for Domestic Purposes, the Effluent from Which Has Been Discharged Into the Mississippi Watershed Since Prior to 1900.

The State of New York, one of thirteen states involved in this and two related proceedings, seeks to file a so-called Supplemental and Amended Complaint thirty-three years

after the filing of its original complaint; twenty-nine years after this Court's entry of a decree; and six months after this Court referred this cause, together with Nos. 2, 3 and 12, Original, to Albert B. Maris, as Special Master, to take such evidence as may be introduced and as he may call for.

The amended complaints of the other Lake States,[2] alleging damage to navigation and commercial interests, to structures, to agriculture, to summer resorts, to fishing and hunting grounds, to public parks and other enterprises, and to riparian property generally, sought "an injunction against the State of Illinois and the Sanitary District of Chicago from continuing to withdraw 8500 cubic feet of water a second from Lake Michigan at Chicago." Several months after the proceedings initiated by Wisconsin and Michigan had been referred to Special Master Charles Evans Hughes, New York, on October 22, 1926, entered this lengthy litigation by filing its original complaint praying for the same relief. The amended bills of complaint and the complaint filed by New York did not demand that the water taken from Lake Michigan as domestic pumpage be returned to the lake. *Wisconsin* v. *Illinois*, 281 U. S. 179, 200.

At New York's request, this Court permitted it to participate in the taking of evidence before the Special Mas-

2. On July 14, 1922 Wisconsin began the suit which is now No. 2, Original; and on October 5, 1925 an Amended Application was filed in which Minnesota, Ohio and Pennsylvania joined as co-complainants. Missouri, Kentucky, Tennessee and Louisisana were permitted to intervene as defendants. *Wisconsin* v. *Illinois*, 46 S. Ct. 208. Michigan filed its Complaint in No. 3, Original on March 8, 1926. Reference of Wisconsin's case to a Special Master was directed by this Court with permission simultaneously granted to the parties in the Michigan proceeding to participate in the hearings before the Special Master, *Wisconsin* v. *Illinois*, 271 U. S. 650. Subsequently, Arkansas and Mississippi also were granted leave to intervene. *Wisconsin* v. *Illinois*, 273 U. S. 644.

ter appointed in the proceedings previously filed. *Wisconsin* v. *Illinois,* 273 U. S. 642. Shortly thereafter, this Court dismissed the particular portion of New York's complaint which alleged that defendants' diversion might be injurious to the future hydroelectric development of the Niagara and St. Lawrence Rivers. *New York* v. *Illinois,* 274 U. S. 488. Concluding that this paragraph presented only "abstract questions", this Court indicated that New York, "if later on in a position to do so, may be free to litigate the questions which the paragraph is intended to present." *Id.* at 490.

The facts relating to the beginning of the diversion of water from Lake Michigan which began before 1865 are set forth in the Report of the Special Master filed on November 23, 1927 (pp. 11-14), and are summarized by the Court in *Wisconsin* v. *Illinois* in 278 U. S. 367, at pages 401-404.

On pages 22-33 of the Report of the Special Master filed on November 23, 1927, is a table showing amounts of water withdrawn from Lake Michigan for domestic use and the amounts of direct diversion between 1900 and 1926.

On March 3, 1925, the Secretary of War granted to the Sanitary District a permit "to divert from Lake Michigan, through its main drainage canal and auxiliary channels, an amount of water not to exceed 8500 cubic feet per second, * * *.[3] The complainant states contended that

3. Report of Special Master Charles E. Hughes, filed November 23, 1927 in these causes as Nos. 7, 11, and 12 Original, October Term, 1927, p. 77. The diversion was granted upon the recommendation of the District Engineer at Chicago, who explained that by "diversion" he meant "the amount of water which is actually withdrawn from Lake Michigan by the Sanitary District of Chicago, through its main drainage canal and auxiliary channels, and is not inclusive of the amount flowing in the channels which come from the sewers of the locality; * * *" *Id.* at 75. The term "diversion" as used in these causes does not include domestic pumpage, *i.e.,* water pumped from the Lake for domestic purposes. Report of Special Master Charles E. Hughes on Re-Reference, filed December 17, 1929, p. 143.

this permit "should be declared invalid." *Wisconsin* v. *Illinois,* 278 U. S. 367, 411.

"The exact issue," said the Court, was "whether the State of Illinois and the Sanitary District of Chicago, by diverting 8500 cubic feet from the waters of Lake Michigan have so injured the riparian and other rights of the complainant States bordering the Great Lakes and connecting streams by lowering their levels as to justify an injunction to stop this diversion and thus restore the normal levels." *Wisconsin* v. *Illinois,* 278 U. S. 367, 409-10. The decree was directed toward a "reduction of the diversion to a point where it rests on a legal basis * * *." Id. at 420. Thus the "wrong" (see 281 U. S. 179, 197) which was the gravamen of the complaints was not the withdrawal of water from Lake Michigan for domestic purposes and the discharge of sewage effluent into the Sanitary and Ship Canal. The "wrong" consisted of a "failure of the Drainage District to take care of its sewage in some way other than by promoting or continuing the existing diversion." *Wisconsin* v. *Illinois,* 278 U. S. 367, 418.

In his Report on Re-Reference in these related cases (now Nos. 2, 3, and 4, Original) filed December 17, 1929, Special Master Charles E. Hughes explained (pp. 120-121) that the "8500 c. f. s. is the diversion by the Sanitary District allowed by the permit of March 3, 1925, exclusive of pumpage."

However, Special Master Hughes explained further (*ibid.*) that the complainants had asked during the hearings that "all flow at Lockport be enjoined from the date fixed for the completion of the sewage treatment works" which "would mean not only the 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;" that "So far as this pumpage is concerned the question is merely incidental to that relating to the diversion by the Sanitary District." He said (pp. 121-122) that "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."

This Court Has Recognized the Right of the Sanitary District to Discharge Into the Sanitary and Ship Canal and Mississippi Watershed the Effluent Emanating from Domestic Pumpage Withdrawn from Lake Michigan.

In considering the demand made during the hearings in the 1929 Re-Reference that the sewage effluent be returned to the Lake, Special Master Hughes recognized that a community has no legal obligation to return to its source water which has been used for domestic purposes. His opinion on this point was clearly stated as follows (pp. 121-122):

> 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 complainants did not at that time contend that there was any legal obligation on the part of any user of water for domestic purposes to return the water in the form of sewage or sewage effluent to its source.[4] But as so clearly appears from the Report of Special Master Hughes, the question of returning the domestic pumpage in the form of sewage effluent to Lake Michigan came up incidentally or indirectly as a possible expedient or device that could

4. In Exceptions to the Report of the Special Master On Re-Reference, filed February 3, 1930, complainants contended (pp. 19, 21) that "domestic pumpage" was in fact an issue and challenged the findings and conclusions of law under discussion. In New York's Brief in Support of its Motion to File its Supplemental and Amended Complaint O.T. 1959 (p. 3) and in New York's Motion for a Modification of the Decree, O.T. 1957, (p. 3), it is conceded that the permanent withdrawal of water from Lake Michigan for domestic pumpage "had not been complained of in the pleadings * * *."

be adopted as a means of eliminating the necessity for any direct diversion of water from the Lake.

The Court, in confirming the conclusions of the Special Master, rejected the demands of the complainants that the sewage effluent be returned to the Lake. The Court (281 U. S. 179, 200) said, in part:

> The withdrawal of water for domestic purposes is not assailed by the complainants and we are of opinion that the course recommended by the master is more reasonable than the opposite demand. If the amount withdrawn should be excessive, it will be open to complaint. 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.

Chicago's right to discharge sewage into the Canal was first questioned in *Missouri* v. *Illinois and The Sanitary District of Chicago,* 200 U. S. 496. In that case, Missouri filed a bill of complaint to enjoin the Sanitary District from discharging sewage through an artificial channel connecting Lake Michigan with the Des Plaines River, a tributary of the Illinois River, which empties into the Mississippi River. It was claimed that the sewage polluted the Mississippi and rendered the water unfit to drink and productive of typhoid fever and other diseases. Because the facts of pollution were not fully proved, and because it appeared that the pollution might have resulted from the discharge of sewage by other cities, the case was dismissed without prejudice. At the close of the opinion the Court passed on the point made by Missouri, that Chicago, not being in the natural watershed of the Mississippi, should not be allowed to discharge its sewage into the Mississippi water-

shed. In rejecting Missouri's contention, the Court said (526):

> Some stress was laid on the proposition that Chicago is not on the natural watershed of the Mississippi, because of a rise of a few feet between the Desplaines and the Chicago Rivers. We perceive no reason for a distinction on this ground. The natural features relied upon are of the smallest. And if under any circumstances they could affect the case, it is enough to say that Illinois brought Chicago into the Mississippi watershed in pursuance not only of its own statutes, but also of the acts of Congress of March 30, 1822, c. 14, 3 Stat. 659, and March 2, 1827, c. 51, 4 Stat. 234, the validity of which is not disputed. *Wisconsin* v. *Duluth*, 96 U. S. 379. Of course these acts do not grant the right to discharge sewage, but the case stands no differently in point of law from a suit because of the discharge from Peoria into the Illinois, or from any other or all the other cities on the banks of that stream.

The substance of the ruling was that Chicago was brought into the Mississippi watershed by federally sponsored navigation projects and had as much right as Peoria or any other city on the banks of the Illinois River to discharge sewage into that river.

Since the decision in *Missouri* v. *Illinois,* Chicago has expanded geographically, so that a larger part of its population and an even larger portion of the area served by the Sanitary District now lies physically in the Mississippi watershed.

The Illinois and Michigan Canal, constructed pursuant to the Congressional Acts of March 30, 1822 and March 2, 1827, referred to in the *Missouri* case, has been superseded by The Sanitary and Ship Canal and its connections which constituted a link in the Illinois Waterway, completed with federal funds appropriated by the Rivers and Harbors Act of July 3, 1930. Thus, Chicago and the area served by the Sanitary District is located on two watersheds—

Great Lakes and Mississippi—and the construction of the Sanitary and Ship Canal and the Illinois Waterway, a Federal navigation project, permits a natural discharge into the Mississippi watershed of Lake Michigan water used for domestic purposes.

The Decree of April 21, 1930, Granted Injunctive Relief Compelling Reduction of the Diversion to a Point Where It Rests on a Legal Basis.

Upon consideration of the Special Master's Report, this Court sustained in part the contentions of the complainant states concurred in by New York. *Wisconsin* v. *Illinois,* 278 U. S. 367. The Court held that the Secretary of War had authority under the Rivers and Harbors Act of 1899 to permit diversion from the Great Lakes only in aid of navigation. Because of "great losses" suffered by the complainant states, including New York, from the direct diversion of 8,500 c. f. s., this Court ordered "the reduction of the diversion to a point where it rests on a legal basis." *Id.* at 409, 420. In recognition of the potential health hazards which might result if drastic reduction were ordered immediately, the Court again referred the matter to Special Master Hughes to recommend appropriate provisions for the decree. As contemplated by this Court, after the lapse of a "reasonable practicable time" during which defendants would provide alternative means of sewage disposal, there would issue "a final, permanent operative and effective injunction." *Id.* at 419.

In accord with the recommendations of the Special Master's Report on Re-Reference, this Court's final decree in 1930 outlined the program by which the direct diversion of water from Lake Michigan would be founded on a "legal basis" by December 31, 1938. *Wisconsin* v. *Illinois,* 281

U. S. 179. Although requiring defendants to take the measures necessary to permit the gradual reduction of their diversion from Lake Michigan, the Supreme Court, as shown above, expressly rejected the further contention of the Lake States that the defendants be precluded from withdrawing "domestic pumpage" without returning the sewage effluent to Lake Michigan.

The Amended Application for a Reopening of the Decree of 1930, Which Has Been Granted, Makes Substantially the Same Charges as Those Contained in the Proposed Supplemental and Amended Complaint and Seeks Substantially the Same Relief.

On November 3, 1958, the six complainant states, including New York, by an Amended Application, combined in an effort to secure a reopening of the final decree of this Court governing the rights of all parties to these proceedings since 1930.[5] Once again alleging substantial injuries to their navigational, commercial and recreational use of the Great Lakes, the complainants in the Amended Application filed in the October term, 1958 for a reopening of the decree of April 21, 1930 (pp. 9-10), charged that abstraction of water from Lake Michigan for domestic pumpage of the metropolitan area is in violation of their rights. In the prayer of the Amended Application the complainants ask, in part, that the State of Illinois and The Metropolitan Sanitary District of Greater Chicago "be forthwith restrained and enjoined from discharging any of the treated effluents emanating from its sewage and indus-

5. Apart from an early interpretive order, the terms of the 1930 decree have been altered upon petition of the defendants only to permit a few temporary increases in diversion of an emergency nature. The emergency increases were severally limited in both time and amount. *Wisconsin* v. *Illinois,* 311 U. S. 107; 352 U. S. 945; 352 U. S. 983.

trial treatment facilities into the Sanitary and Ship Canal * * *."[6]

Special allegations were presented on behalf of New York to the effect that such Chicago's domestic pumpage and its discharge to the Mississippi River was also impairing the hydroelectric development of the Niagara and St. Lawrence Rivers. Similar allegations are contained in the proposed Supplemental and Amended Complaint which New York seeks to file.

In response to such allegations, Illinois and the Sanitary District maintained that their right to withdraw "domestic pumpage" from the Great Lakes was settled by the 1930 decree, in the absence of any substantial change in circumstances, and that a final decree should not be nullified in the guise of modification.[7] Furthermore, defendants urged that any subsequent developments such as New York's power projects must be held subject to the legal rights established by the 1930 decree. In any event,

6. On April 30, 1959 the complainants filed a motion to amend and enlarge the prayer of the Amended Application by adding subparagraphs thereto, as follows:

> "(3) (a) That if it should be determined by the Court through a Special Master, upon the investigation recommended by the Solicitor General, and upon full hearings, that measures other than the return to Lake Michigan of the Chicago domestic pumpage effluent can be put into effect so that such measures will reduce either the direct diversion or limit or restrict the Chicago domestic pumpage, to the end that the total amount of diversion of water from the Great Lakes at Chicago will be reduced or restricted, the Court should enter a supplemental decree, or a modified decree, to that effect.
>
> "(b) That the Court grant such other relief agreeable to and in accordance with equity and good conscience which will insure to the greatest possible degree the future integrity and development of the Great Lakes reservoir so that the maximum use and benefit of its waters be assured to the complainant States."

7. Brief in Opposition to the Amended Application of the Complainants for a Reopening and Amendment of the Decree of April 21, 1930, and For Further Relief. *Wisconsin* v. *Illinois,* Nos. 2, 3 and 4 Original, O. T. 1958.

it was contended that the equitable considerations which persuaded the Court to reject the complainants' contention in 1930 were even more compelling after the lapse of 28 years.

At the request of this Court, the Solicitor General submitted the view of the United States on the matter.[8] Stressing that the scope of the proceeding was "more limited than if it were an original application", the Solicitor General concluded that the complainant states had not demonstrated "any such substantial changes in circumstances as to require or justify the modification of the decree which they request."[9] Nevertheless, the Solicitor General recommended that a Special Master be appointed, "not to change the present decree as applied to the present facts", but to determine whether future developments may require the entry of a supplemental decree.[10]

The Supreme Court on June 29, 1959, directed that the Honorable Albert B. Maris be appointed Special Master to hold hearings and to submit such reports as he considered necessary. *Illinois* v. *Michigan,* 360 U. S. 712. Hearings pursuant to the Order of this Court commenced in Chicago on October 19, 1959.

Four months after such Order of Reference, complainant New York has complicated the case by its motion for leave to file in this Court the Supplemental and Amended Complaint now at issue.

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8. Memorandum for the United States as *Amicus Curiae, Wisconsin* v. *Illinois,* Nos. 2-4, Original, O.T. 1958.

9. *Id.* at 13-14. The Solicitor General supported this general statement by analysis of the various allegations of the complainant states referring to such matters as the current rate of domestic pumpage, changes in water levels, injuries to navigation, adequacy of sewage treatment, and the anticipated increase in defendants' "domestic pumpage."

10. *Wisconsin* v. *Illinois,* Nos. 2-4, Original, O.T. 1958, at 31.

ARGUMENT.

I.

New York Should Not Be Allowed, After More Than Half a Century Without Complaint, to File a Supplemental and Amended Complaint Charging for the First Time That the Withdrawal of Water from Lake Michigan at Chicago for Domestic Purposes Without Returning the Effluent to the Lake Is in Violation of Its Sovereign and Proprietary Rights.

Until the filing of the Applications in the 1957 and 1958 Terms, in Causes Nos. 2, 3, and 4 Original, the complainants, including the State of New York, did not charge in their pleadings that the discharge of sewage effluent into the Sanitary and Ship Canal, instead of into Lake Michigan, was in violation of their rights. Only the direct diversion of water from Lake Michigan through the channels of the Sanitary District for the purpose of taking care of the sewage was challenged.

Alleging, as New York does now in its proposed Supplemental and Amended Complaint, that the direct diversion caused damage "to navigation and commercial interests, to structures, to the convenience of summer resorts, to fishing and hunting grounds, to public parks and other enterprises, and to riparian property generally" (278 U. S. 367, 408), the complainants were successful in obtaining injunctive relief compelling a reduction of the direct diversion. The purpose of the diversion was partially "to oxidize and carry off this sewage." (281 U. S. 179, 199.)

In its motion for leave to file a supplemental and amended complaint, New York asserts (pp. 6-7) that

changed facts and circumstances, consisting principally of hydroelectric power development on the Niagara and St. Lawrence Rivers and the St. Lawrence Seaway Project, have enhanced the damage suffered in 1926. In paragraph 13 of the proposed Supplemental and Amended Complaint it is alleged that "present diversion [*i. e.,* direct diversion] has been determined to be in violation of the sovereign and proprietary rights of the State of New York."[11] In paragraphs 21 and 35 it is alleged that any withdrawal or diversion of waters from the Great Lakes injures New York in its sovereign and proprietary capacities.

It is clear, defendants submit, that hydroelectric power development and the St. Lawrence Seaway project has not created a new cause of action for the State of New York. An increase in damages might be thrown into the scale of "relative suffering" (see 281 U. S. 179, 200) on a reopening of the decree in determining the relief to which the complainants might now be entitled under their original complaints as amended, filed in 1925 and 1926, but it does not justify the filing of a supplemental and amended complaint which sets up a new cause of action. *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co.,* 260 U. S. 261, 281; *Schuckman* v. *Rubenstein,* 164 F. 2d 952, 958 (6th Cir., 1947), *cert. denied,* 333 U. S. 875.

In *Wisconsin* v. *Illinois,* 281 U. S. 179, the Court (p. 200) in considering whether the defendants should be required to return the sewage effluent to the Lake to obviate the

11. This allegation is incorrect. The present direct diversion of 1500 c.f.s., in addition to domestic pumpage, is fixed by the decree of April 21, 1930 and "rests on a legal basis." *Wisconsin* v. *Illinois,* 278 U. S. 367, 420. New York apparently means that direct diversion, not in the interest of navigation, is a "wrong" (281 U. S. 179, 197). But the withdrawal of water for domestic use without returning it to the Lake has not been declared a wrong. It is precisely on this issue that the proposed Supplemental and Amended Complaint departs from the original complaint filed in 1926.

necessity of any direct diversion (which was held to be a "wrong") stated that

> "* * * 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."

Between 1910 and 1923, intercepting sewers were constructed, at a cost of $109,021,613, to discharge all the sewage from the area into the main drainage canal instead of partially into Lake Michigan. Special Master's Report of November 23, 1927; *Wisconsin* v. *Illinois,* 278 U. S. 367, 404.

To carry out the provisions of the 1930 decree, the Sanitary District, prior to 1954, 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.[12] This construction was ordered by the Court for the purpose "of avoiding the [direct] diversion in the future" and "to restore the navigable capacity of Lake Michigan to its proper level." *Wisconsin* v. *Illinois,* 278 U. S. 367, 420.

No criticism was made by the complainants of the sites selected for the sewage treatment plants. "The construction of outfall sewers or tunnels to take the effluents from the sewage treatment plants directly into Lake Michigan would mean the construction of sewers or tunnels from the West Side plant and the Southwest Side plant several miles across the City of Chicago to points on the Lake." Special Master's Report of December 17, 1929, pp. 133-134. Undoubtedly, sites nearer the Lake would have been selected had such criticism been made.

12. Hearings, Subcommittee of Senate Committee on Public Works on H. R. 3210, S. 1772, 84th Cong. Second Sess., pp. 18-19.

In 1932 the complainant Lake States applied to the Supreme Court for the appointment of a commissioner or special officer to execute the decree of April 21, 1930, because of the delay in the construction of the works and facilities embraced in the program envisaged by the 1930 decree. The Court in its opinion (289 U. S. 395, 401) referred to the program as the "restoration of the just rights of the complainants" (which did not include a return of pumpage to the Lake) and ordered (p. 411) Illinois to take all necessary steps to effectuate the reduction in diversion as provided in the 1930 decree. Thus the complainants, contrary to the position now taken, renewed their demand that vast sewage treatment works and facilities designed to meet the situation *caused by discharging the sewage effluent into the Canal be completed.* If the effluent were to be discharged into the Lake, the District would have been under no compulsion, by court decree or otherwise, except in the interests of its own people in the Chicago area, to undertake such a sewage treatment program as was required by the 1930 decree. To discharge the effluent into the Lake would have called for a different location of treatment plants and a different arrangement and type of outfall sewers.

The action of the Lake States in 1932 directed toward a speedy completion of the sewage treatment program, designed to discharge the effluent into the Canal, and the compliance of the District with the Court's order of 1933, augmented the equities previously found to lie in defendants' favor in the 1930 decision.

If the domestic pumpage were to be put back into Lake Michigan in the form of sewage effluent, the defendants' sewage disposal facilities would have to be rearranged, and new pumping stations, works and tunnels, extending miles out into Lake Michigan, would have to be constructed

at tremendous cost, estimated by competent engineers to exceed 300 million dollars.[13]

Water levels, as reduced by the withdrawal of water for domestic pumpage and by direct diversion, were taken as normal for the Niagara and St. Lawrence hydroelectric power projects. The licenses issued to the Power Authority by the Federal Power Commission applied only to the water remaining in the Great Lakes after the authorized withdrawal and diversion of water at Chicago.[14]

Losses to American shipping resulting from a withdrawal of 1800 c.f.s., the present amount of domestic pumpage, has been estimated by the Corps of Engineers, United States Army, to be something under 600,000 tons annually, with about $660,000 value.[15]

By its Supplemental and Amended Complaint, New York would nullify in large part enormous expenditures incurred by the defendants in compliance with the 1930 decree, and would force the defendants, at staggering cost, to undo what they have done in their compliance with the decree. Such gross inequity should not be countenanced.

The ordinary rule of laches may be applied to a state when functioning in a proprietary capacity. *United States* v. *Midway Northern Oil Co.*, 232 Fed. 619, 631 (S. D. Cal., 1916); accord, *French Republic* v. *Saratoga Vichy Co.*, 191 U. S. 427, 438. As between sister states, the doctrine of quasi-estoppel may be invoked. *Missouri* v. *Illinois*, 200 U. S. 496, 520; accord, *Michigan* v. *Wisconsin*, 270 U. S. 295, 307-308; *New Mexico* v. *Texas*, 275 U. S. 279, 302. In asserting its sovereign and proprietary rights in its original Complaint filed in 1926, New York did not demand that Chicago's domestic pumpage, after being purified,

13. Memorandum for the United States as *Amicus Curiae*, filed April 14, 1959 in *Wisconsin* v. *Illinois*, p. 34.

14. *Id.* at 19-23.

15. *Id.* at 16.

be returned to the Lake, but demanded and obtained injunctive relief based on the assumption that Chicago's domestic pumpage could and would be discharged into the Sanitary Canal rather than Lake Michigan.

The injunctive relief now sought by the proposed Supplemental and Amended Complaint is inconsistent with the relief sought and obtained by the decree of 1930. Under the doctrine of quasi-estoppel New York is estopped to assume a position, to defendants' prejudice, which is inconsistent with the position taken in its complaint filed in 1926. *Davis* v. *Wakelee,* 156 U. S. 680, 689.

Where one in whose favor a judgment is rendered accepts the benefits, he is estopped from questioning the validity of the judgment in any subsequent litigation. *Burgess* v. *Nail,* 103 F. 2d 37 (10th Cir., 1939); *Wilson* v. *Union Electric Light & Power Co.,* 59 F. 2d 580 (8th Cir., 1932).

II.

All Issues Properly Raised by the Proposed Supplemental and Amended Complaint May Be Heard in the Pending Reference, and New York Should Not Be Permitted to Litigate, De Novo, Issues Which Have Been Adjudicated.

Apart from its patent impropriety, New York's Supplemental and Amended Complaint raises no new legal or factual issues warranting an initial determination by the Special Master. Admitting that the allegations of its revised Complaint "are in fact already in issue" by virtue of the pleadings previously filed in this modification proceeding (Brief, p. 7), New York has failed to establish the "extraordinary" circumstances warranting interference by this Court with the pending proceedings before the Special Master. 5 Moore, Federal Practice, 2952 (2d ed. 1948).

The Amended Application for a reopening of the 1930 decree filed in Nos. 2, 3 and 4, Original, October Term, 1958, contains allegations similar to those set forth in the proposed Supplemental and Amended Complaint, and the prayer, as amended by the Motion for Leave to Amend, filed on April 30, 1958, seeks substantially the same relief. Whether the quantity of direct diversion of water from Lake Michigan through the channels of the Sanitary District is necessary, or whether the domestic pumpage is excessive, are proper subjects of inquiry in the reference to Special Master Maris pursuant to the opening ordered on June 29, 1959.[16]

Since all legitimate factual and legal issues may be fully reviewed by this Court upon consideration of the Special Master's Report, New York cannot be prejudiced by this Court's refusal to refer such an unwarranted pleading to the Special Master.[17] The lack of legitimate justification for New York's Supplemental and Amended Complaint thus documents the conclusion that the only apparent reason for this pleading is to bolster New York's solo effort to relitigate *de novo* settled legal issues.

But New York cannot escape the provisions of the 1930 decree affirming Chicago's basic legal right to withdraw water for domestic pumpage from Lake Michigan without returning the sewage effluent to the Lake, as settled by this Court in *Missouri* v. *Illinois*, 200 U. S. 496, 526,

16. Nor does this Court's 1927 opinion require any broader investigation. New York has sufficient opportunity within the meaning and intent of the 1927 opinion to "litigate" the issues raised by alleged injury to the hydroelectric development of the St. Lawrence and Niagara Rivers by presenting such facts as changed circumstances justifying modification of the 1930 decree.

17. New York itself recognizes the impropriety of its pleading by declaring that the issue pertaining to its rights in the flow of the St. Lawrence and Niagara Rivers is one of law "which could more properly be reviewed by this Court following a full development of the facts on the hearings before the Special Master" (Brief, p. 8).

and *Wisconsin* v. *Illinois,* 281 U. S. 179, 200. This issue is not subject to *de novo* consideration at the current stage of this protracted litigation. Whether a decree is final or interlocutory, it is conclusive as to all rights, questions or facts put in issue and actually adjudicated. *Wyoming* v. *Colorado,* 286 U. S. 494, 506-07; *Southern Pacific R. R. Co.* v. *United States,* 168 U. S. 1. As shown above, the question of returning Chicago's pumpage to Lake Michigan arose incidentally in the 1929 hearings, although not by the pleadings, and an adjudication was made that the demand was unreasonable. *Wisconsin* v. *Illinois,* 281 U. S. 179, 199-200. As emphasized by the Solicitor General but a few months ago in assessing complainants' application, the only issue in a modification proceeding is whether the complainant states can document such a substantial change in circumstances as to require or justify the modification of the decree under traditional equitable principles.[18]

New York certainly cannot circumvent the inherent limitations of this Court's Order of Reference by the filing of a so-called Supplemental and Amended Complaint challenging afresh the settled issue of "domestic pumpage" and generally modernizing its case. For the Order of Reference has vested in the Special Master the initial responsibility for deciding whether the provisions of the 1930 decree should be modified in light of the evidentiary showing to be mustered by the complainants. Perhaps in recognition of its inability to meet the standards of proof required in the conventional modification proceeding contemplated by the Order of Reference, New York resorts to procedural legerdemain to improve its case before the

18. To protect the finality of prior determinations, the decisions of this Court indicate that the inherent powers of a court of equity to modify its injunctions are exercised sparingly. *United States* v. *Swift & Co.,* 286 U. S. 106, 114, 119.

Special Master.[19] For by attempting to file its Supplemental and Amended Complaint, New York solicits from this Court the very determination as to legal sufficiency which the Master was designated to make in the first instance after full consideration of complicated legal and factual issues. *Cf. Alabama* v. *Texas,* 347 U. S. 272; *Alabama* v. *Arizona,* 291 U. S. 286, 291-92.

Accordingly, New York's premature effort to influence the proceedings before the Special Master contrary to this Court's Order of Reference should be rejected.

III.

A Supplemental and Amended Complaint Cannot Serve as a Procedural Device to Reopen Legal Issues Resolved by the Entry of a Decree.

The filing of New York's Supplemental and Amended Complaint twenty-nine years after the entry of judgment is a procedural device neither authorized nor contemplated by established equity precepts or Rule 15(d) of the Federal Rules of Civil Procedure.

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19. Such a change in strategy was perhaps stimulated by the conclusion of the United States that, apart from "the question of water power at the Niagara and St. Lawrence Rivers [the complainant states] do not show that circumstances have changed in any way at all." Memorandum for the United States as *Amicus Curiae,* p. 14, *Wisconsin* v. *Illinois,* Nos. 2-4 Original, O.T. 1958.

New York's new tactics are of a piece with its novel assertion before the Special Master that established equitable doctrines are inapplicable to the pending modification proceeding. Memorandum, Lake States' Reply to Defendants' "Statement of Fact Issues" (undated). According to New York and the other complainant states, the limitations of the *Swift* rule apply only when modification of a judicial decree is sought by "the wrongdoer or defendant party." *Id.* at 2. In light of the several unsuccessful efforts of the United States as plaintiff to secure modification of judicial decrees, this contention is clearly untenable. *Hughes* v. *United States,* 342 U. S. 353; *Ford Motor Co.* v. *United States,* 335 U. S. 303.

Supplemental complaints are traditionally utilized to facilitate consideration of all relevant matters *prior to* judicial decision rather than to impeach a decree. Thus supplemental complaints may be permitted within the discretion of the Court to introduce developments occurring subsequent to the filing of the original complaint which may justify other or further relief with respect to the subject matter pending before the Court. *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co.*, 260 U. S. 261, 280-82; *Missouri* v. *Illinois*, 200 U. S. 496, 517. This fundamental purpose is reflected in Rule 15(d) of the Federal Rules of Civil Procedure, applicable generally to original actions in this Court.[20] 3 Moore, Federal Practice 857 (2d ed. 1948). In accord with this underlying rationale, the filing of a supplemental pleading was recently permitted by this Court in the early stages of an original action when such procedure was considered conducive to "the just, orderly, and effective determination" of the issues to be litigated. *United States* v. *Louisiana*, 354 U. S. 515, 516.

After a case culminates in a decree, the judgment rather than the original pleadings governs the rights of the parties. *Cf. Wisconsin* v. *Pelican Ins. Co. of New Orleans*, 127

20. Federal Rule of Civil Procedure 15(d):

"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."

Rule 9(2) of the Revised Rules of the Supreme Court of the United States:

"The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court."

U. S. 265, 293. Relief departing from the provisions of a final decree must be sought by "some form of original proceeding" setting forth a new and valid cause of action or acceptable grounds for modification of the decree as entered. *Mackall* v. *Richards,* 116 U. S. 45, 48.[21] A litigant cannot ignore prior judicial dispositions by filing a supplemental pleading stating a more attactive case. *Cf. First Nat. Bank* v. *American Surety Co.,* 148 F. 2d 654 (4th Cir. 1945). Indeed, even in the absence of a final decree, this Court more than one hundred years ago rejected as "made at too late a period" a supplemental complaint tendered after the case had been argued and taken under advisement by the court. *Snead* v. *McCoull,* 53 U. S. 407, 422.[22]

These elemental tenets of judicial administration, controverted only by New York out of fourteen litigants, bar New York from filing a supplemental complaint twenty-nine

21. Seizing on the common use of the word "supplemental", New York seeks to support its extraordinary use of a supplemental complaint by reliance on authorities sustaining the unchallenged power of a court to *enforce* the provisions of a prior decree by means of a "supplemental bill" (Brief, p. 6). The irrelevance of such cases is demonstrated by the fact that New York does not and cannot allege any violation of the 1930 decree by defendants necessitating an enforcement proceeding in this Court. Yet such allegation was the *sine qua non* in the precedents cited by New York. *E. g., Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640, 650; *Connett* v. *City of Jerseyville,* 96 F. 2d 392, 396-97 (7th Cir., 1938)

22. More recently, this Court reversed a judgment of a lower court, with leave to file a supplemental pleading, indicating that such a pleading might have been appropriate below "[i]f the original decree in the trial court had not been entered." *Texarkana* v. *Arkansas Gas Co.,* 306 U. S. 188, 203. In *Virginia* v. *West Virginia,* 234 U. S. 117, this Court permitted a supplemental answer bearing on the single issue of the amount of money due Virginia from West Virginia, stressing that on two previous occasions the Court had refused motions by Virginia to proceed to a final decree. *Id.* at 119-120. Similarly, under Rule 15(d), as interpreted by the lower courts, supplemental pleadings are inappropriately presented where the court has "terminated the litigation." *Brill* v. *General Industrial Enterprises,* 234 F. 2d 465, 470 (3d Cir., 1956); *Ebel* v. *Drum,* 55 F. Supp. 186, 188-89 (D. Mass., 1944).

years *after* the entry of a decree in order to revive a legal issue which this Court's decree for decades has put to rest.

IV.

Reference of New York's Particularistic and Defective Pleading to the Special Master Serves No Legitimate Purpose and Can Only Impede the Expeditious Conduct of the Proceeding Below.

Actually, referral of New York's Supplemental and Amended Complaint to the Special Master can only disrupt the efficient progress of the hearings below affecting the vital interests of thirteen sovereign litigants. Pursuant to the authority entrusted to him by this Court, the Special Master has already entered an order formulating the factual and legal issues raised by the pleadings previously filed by the complainant states and defendants.[23] Any superimposition on such formulation by referral of this Supplemental and Amended Complaint can only divert the hearings below from the course charted by the Master under this Court's referral order of June 29, 1959.

Moreover, if New York's petition has merit, the other thirteen litigants in these proceedings who to date have abided by more conventional legal procedures could well follow New York's example and file similar documents to modernize their original pleadings. In turn, updated responsive pleadings would appear in order.[24] Such re-

23. Pre-Hearing Order (Oct. 20, 1959). This further demonstrates the specious nature of complainant's argument that the Supplemental and Amended Complaint is necessary to present "the issues in conformity with the rules of the Court." (Motion, p. 2.)

24. Certainly, defendants desire to file a Supplemental and Amended Answer in response to New York's revised Complaint if this Court grants New York's motion for leave to file its Supplemental and Amended Complaint.

peated applications to this Court during the hearings now under way before the Special Master would only "tend to defeat the very purpose of reference" and thus stultify this Court's considered disposition of these proceedings last June. 5 Moore, Federal Practice 2951 (2d ed. 1948).

In short, absent any present necessity for interference by this Court with the proceedings before the Special Master prior to the filing of his Report, reference of New York's unauthorized pleading can only obstruct such proceedings and subvert this Court's recent Order of Reference.

CONCLUSION.

By filing a Supplemental and Amended Complaint twenty-nine years after the issues were merged into a decree, New York seeks to inject a new issue and overturn an adjudication made in 1930. This unorthodox procedural device, employed by one out of fourteen parties not only impeaches this Court's Order of Reference, but would complicate and confound the expeditious conduct of the pending hearings before the Special Master.

Accordingly, the State of Illinois and The Metropolitan Sanitary District of Greater Chicago respectfully submit that New York's Motion for Leave to File a Supplemental and Amended Complaint be denied.

Respectfully submitted,

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