No. 4 Original

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

STATE OF NEW YORK,
Complainant,

vs.

STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,
Defendant.

UNITED STATES OF AMERICA,
Intervenor.

ANSWER OF THE STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO TO THE SUPPLEMENTAL AND AMENDED COMPLAINT.

WILLIAM C. WINES,
Assistant Attorney General,
State of Illinois,

LAWRENCE J. FENLON,
Principal Assistant Attorney,
The Metropolitan Sanitary
District of Greater Chicago,

PETER G. KUH,
Senior Assistant Attorney,
The Metropolitan Sanitary
District of Greater Chicago,

GRENVILLE BEARDSLEY,
160 N. La Salle Street,
Chicago 1, Illinois,
Attorney General, State of
Illinois,

GEORGE A. LANE,
100 E. Erie Street,
Chicago 11, Illinois,
Attorney, The Metropolitan
Sanitary District of Greater
Chicago.

JOSEPH B. FLEMING,
JOSEPH H. PLECK and
THOMAS M. THOMAS,
130 E. Randolph Drive,
Chicago 1, Illinois,
Special Assistant Attorneys
General,

Attorneys for Defendants.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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The State of Illinois and The Metropolitan Sanitary District of Greater Chicago (which, with its predecessor, Sanitary District of Chicago, will be referred to as the "Sanitary District"), defendants, answer the Supplemental and Amended Complaint herein as follows:

1. Admit the allegations in paragraph 1.

2. Admit the allegations in paragraph 2, but aver that at the time of the enactment of the Statute entitled "An

Act to Create Sanitary Districts, and to Remove Obstructions in the DesPlaines and Illinois Rivers," approved May 29, 1889, Illinois Laws, 1889, p. 126 (hereinafter called the "Act of 1889"), the legislature of the State of Illinois passed a joint resolution, Illinois Laws, 1889, p. 376, providing as follows:

> "1. That it is the policy of the State of Illinois to procure the construction of a waterway of the greatest practicable depth and usefulness for navigation from Lake Michigan via the Des Plaines and Illinois Rivers to the Mississippi River, and to encourage the construction of feeders thereto of like proportions and usefulness.
>
> "2. That the United States is hereby requested to stop work upon the locks and dams at LaGrange and at Campsville, and to apply all funds available and future appropriations to the improvement of the channel from LaSalle to the mouth, with a view to such a depth as will be of present utility and in such manner as to develop progressively all the depth practicable, by the aid of a large water supply from Lake Michigan at Chicago.
>
> "3. That the United States is requested to aid in the construction of a channel not less than 160 feet wide and 22 feet deep, with such a grade as to give a velocity of three miles per hour from Lake Michigan at Chicago to Lake Joliet, a pool of the Des Plaines River immediately below Joliet, and to project a channel of similar capacity and not less than 14 feet deep from Lake Joliet to LaSalle, all to be designed in such manner as to permit future development to a greater capacity."

3-6. Admit the allegations contained in paragraphs 3 to 6, both inclusive, and aver that the Chicago area was brought into the Mississippi watershed by the construction of a channel pursuant to the Act of 1889 and by Acts of Congress of March 30, 1822, c. 14, 3 Stat. 659, and March 2, 1827, c. 51, 4 Stat. 234. Further aver that

by a series of Acts of Congress culminating in the Rivers and Harbors Act of July 3, 1930, c. 847, 46 Stat. 918, 929, the Illinois Waterway from the Port of Chicago to Grafton, Illinois, became a federal navigation project, and that said Rivers and Harbors Act of July 3, 1930 authorized a diversion of water by the defendants from Lake Michigan through the Chicago Sanitary and Ship Canal (referred to as the Sanitary Canal in the Supplemental and Amended Complaint, and hereinafter referred to as the "Canal") and its auxiliary channels not in excess of an annual average of 1500 cubic feet a second (hereinafter, c.f.s.), in addition to domestic pumpage, for the navigation of said waterway.

7. Admit the allegations in paragraph 7, but aver that the Act of 1889 provided that the channel constructed pursuant thereto should be of sufficient size and capacity to be navigable, and that one of the objects of the Act of 1889 was to authorize the construction of a channel which would serve as a waterway from Lake Michigan into the Illinois River for the purpose of navigation.

8. Admit the allegations in paragraph 8, but aver that the Illinois Act of 1903, Illinois Laws, 1903, p. 113, also provided that the rules of the United States Government then in force regulating the navigation of the Chicago River should govern navigation in the channels of the Sanitary District.

9. Admit that pursuant to said Act of 1903, the defendant Sanitary District constructed and placed in operation a hydroelectric power plant at Lockport, Illinois, near the western terminus of the Canal, but aver that this Court in *Wisconsin* v. *Illinois,* 278 U. S. 367 (October Term 1928), held that the use of the diverted water for power was "merely incidental." Further aver that since the reduction in diversion from Lake Michigan to an amount not to exceed an annual average of 1500 c.f.s., in addition to

domestic pumpage, the amount of power generated has been drastically reduced and the flow of water through the power plant has not been sufficient to produce enough power for the needs of the Sanitary District.

10. Deny the allegations in paragraph 10 and aver that the water diverted from Lake Michigan by the Sanitary District through its channels and water pumped from the lake in the Chicago area for domestic purposes is needed and used, and is authorized by the Rivers and Harbors Act of 1930, for the navigation of the Illinois Waterway. Further aver that the Sanitary District does not sell any electrical energy generated at its hydro-electric plant located near the western terminus of the Canal.

11. Admit the allegations in paragraph 11, but aver that the complaints of the State of New York and the other states bordering upon the Great Lakes, referred to in paragraph 11, did not assail the withdrawal of water from Lake Michigan in the Chicago area for domestic use, and did not demand that the water taken from Lake Michigan in the Chicago area for domestic use be returned to the lake. Aver that the issue presented by said original complaints, as amended, was whether a permit issued by the Secretary of War authorizing a diversion from Lake Michigan of 8500 c.f.s. by the defendants for purposes of sanitation was valid, and the Court in its decision on said complaints (*Wisconsin* v. *Illinois,* 278 U. S. 367), held the permit to be invalid and that the diversion from Lake Michigan for the purpose of diluting sewage was without legal basis, except in so far as such diversion was necessary for the purpose of maintaining navigation in the Chicago River as a part of the Port of Chicago; that this Court re-referred the causes to Special Master Hughes for the purpose of determining the extent of diversion required to maintain navigation in the Chicago River; that such re-reference contemplated a continuation of the discharge of sewage (and

sewage effluent after the completion by the Sanitary District of sewage treatment plants) into the Canal and the Chicago River; that upon recommendation of the Special Master on re-reference, this Court in *Wisconsin* v. *Illinois*, 281 U. S. 179 (October Term, 1929), held that for the purpose of maintaining conditions suitable for navigation in the Chicago River as a part of the Port of Chicago the diversion should be limited to an annual average of 1500 c.f.s., in addition to domestic pumpage, after the construction of sewage treatment plants and appurtenances outlined in a program proposed by the Sanitary District. Further aver that as found by Special Master Hughes on re-reference (Report of December 17, 1929, page 121), the right of the City of Chicago to take water from Lake Michigan for the ordinary use of its inhabitants is not "open to serious question", and that there is no "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."

12. Deny the allegations in the first sentence of paragraph 12 with respect to the reasons for the decision of this Court in *Wisconsin* v. *Illinois*, 281 U. S. 179, requiring the defendants to limit their diversion after December 31, 1938 to an annual average of 1500 c.f.s., in addition to domestic pumpage. Aver that this Court held the demand for a return of domestic pumpage to Lake Michigan (as a means of obviating the necessity for any direct diversion from the lake through the channels of its Sanitary District) to be excessive and unreasonable and should not be pressed "without regard to relative suffering and the time during which the complainants have let the defendants go on without complaint;" 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 1000 c.f.s. to 1500 c.f.s. in addition to domestic pumpage after the sewage treatment program has been carried out."

Admit the remaining allegations in paragraph 12, and aver that in compliance with the Decree of April 21, 1930 the Sanitary District completed construction of vast sewage treatment projects, consisting of sewage treatment plants, intercepting sewers, and sewage pumping stations, at a cost in excess of 316 million dollars; that 109 million dollars had previously been spent for the construction of sewers which discharged the effluent from domestic pumpage into the Canal.

13. Deny the allegations contained in paragraph 13 except the allegation in the first sentence thereof with respect to the amount of diversion from Lake Michigan (an annual average of 1500 c.f.s.) and the present amount of domestic pumpage withdrawn from Lake Michigan in the Chicago area (approximately 1800 c.f.s.). Aver that the amount of domestic pumpage withdrawn in the Chicago area in 1930 was 1700 c.f.s.; that the average annual increase in domestic pumpage for the years 1925 through 1928, as shown by the Report of the Special Master on Re-Reference, was 75 c.f.s.; that at the rate of increase then prevailing, it would have been estimated in 1930 that the domestic pumpage in the Chicago area would have doubled by 1958, but because of measures taken by the defendants, including the City of Chicago, the per capita consumption of water in Chicago and municipalities served by the Sanitary District and the rate of increase in domestic pumpage have been greatly reduced; and that the domestic pumpage of the area of Chicago served by the Sanitary District is not excessive, and is far less than would have been estimated in 1930 on the basis of experience and facts presented before the Special Master on Re-Reference.

14. Deny the allegations in paragraph 14.

15. Admit the allegation contained in the first sentence of paragraph 15; deny the allegation that a diversion of water from Lake Michigan has an effect on the level of Lake Superior; deny the remaining allegations contained in the second sentence of paragraph 15, and aver that the effect on lake levels of a diversion of water from Lake Michigan, without return, depends not only upon the amount of the diversion but also upon the absence or presence of compensating factors.

16. Admit the allegations in paragraph 16.

17. Deny the allegation in paragraph 17 that the State of New York, its agencies or citizens, are entitled to receive all of the waters from rivers and streams in the Great Lakes watershed without diminution by any other State, its agencies or citizens.

18. Deny the allegations in paragraph 18 that the improvements in aid of navigation therein referred to were made in reliance upon a right to the undiminished waters of the Great Lakes watershed, and deny that the State of New York, its agencies, its municipalities, or its citizens have such a right. Aver that certain improvements described in paragraph 18 have resulted in diversions from Lake Erie.

19. Admit the allegations in paragraph 19.

20. Admit the allegation in the first sentence of paragraph 20, but aver that no responsive pleading is required to be made to the conclusion (a *non sequitur*) contained in the second sentence of paragraph 20 or to the argumentative allegation contained in the last sentence in this paragraph.

21. Deny the allegations in paragraph 21. Aver that the State of New York, acting in its proprietary capacity, is estopped to question the withdrawal of water from Lake

Michigan by defendants for domestic purposes, on grounds of long acquiescence in such withdrawal and the discharge of the effluent into the Canal and the acceptance of benefits under the decisions of this Court in *Wisconsin* v. *Illinois,* 278 U. S. 367 (October Term, 1928) and 281 U. S. 179 (October Term, 1929).

22. Deny that the right of the State of New York, its agencies, municipalities, or citizens to use the natural flow of the Great Lakes water system for the production of hydroelectric power is subject only to reasonable regulation by Congress and the concurrent right of Canada under international law and treaty as alleged in paragraph 22, but aver that its right to such flow is also subject to (1) the United States-Canadian Boundary Waters Treaty of 1909 between the United States and Great Britain which exempted from legal action the existing diversion from Lake Michigan at Chicago, (2) the Niagara River Water Diversion Treaty of 1950 which imposes limitations on New York's right to such flow, (3) the licenses issued to the Power Authority of the State of New York by the Federal Power Commission, and (4) the diversion from Lake Michigan at Chicago as authorized by the Court's decree of April 21, 1930 (*Wisconsin* v. *Illinois,* 281 U. S. 179, 696), and said Rivers and Harbors Act of July 3, 1930.

23. Admit the enactment of the New York Public Authorities Law as alleged in paragraph 23, but aver that the rights of the State of New York are inferior to the power of Congress over navigable waters and are subject to the doctrine of equitable apportionment of waters. Further aver that the rights of the State of New York are subject to diversion of water from Lake Michigan as specified in the decree of this Court entered herein on April 21, 1930 and the said Rivers and Harbors Act of July 3, 1930.

24. Admit the allegations in paragraph 24.

25-31. Admit the factual allegations contained in paragraphs 25 to 31, both inclusive, except the allegations with

respect to losses sustained by the Power Authority of the State of New York as a result of diversion of water from Lake Michigan or the withdrawal of water from Lake Michigan for domestic use, which are denied. Aver that the power projects referred to were developed and financed on the basis of existing water levels, as affected by the decree of this Court entered on April 21, 1930 (281 U. S. 696) and the Rivers and Harbors Act of July 3, 1930, 46 Stat. 918, 929; that the water levels, as reduced by the diversion at Chicago, were taken as normal for purposes of the projects; that the licenses issued to the Power Authority of the State of New York for the construction and operation of the projects applied only to the water remaining after the authorized withdrawal and diversion of water from Lake Michigan at Chicago; that the State of New York has no right to seek a reduction in diversion of water at Chicago in the interests of the Power Authority of the State of New York; that the right to use water for drinking, sanitary, and domestic purposes has been declared judicially and by treaty to be the highest use of water, taking precedence over all other uses.

32. Deny the allegations in paragraph 32.

33. Deny the allegations in paragraph 33, and aver that the right of the State of New York, its agencies, municipalities, and citizens to use the flow of the Great Lakes system for recreational purposes, and to receive the waters from rivers and streams in the Great Lakes watershed for the purpose of keeping up and maintaining the levels of the Great Lakes-St. Lawrence Waterway for recreational purposes, are subject not only to regulation by Congress and concurrent rights of Canada under international law and treaty, but are subject also to rights of other Great Lakes

States, and their citizens. Further aver that the governments of the United States and Canada have agreed upon criteria for the regulation of the level of Lake Ontario, which are set forth in an order of the International Joint Commission under date of July 2, 1956, which is supplemental to the order of said Commission referred to in paragraph 25 of the Supplemental and Amended Complaint and attached thereto as Exhibit A; that such criteria are designed to maintain the level of Lake Ontario within certain ranges for the benefit of riparian, navigation, and power interests, after taking into account existing diversions in and out of the Great Lakes system, including the diversion from Lake Michigan at Chicago.

34. Deny the allegation in paragraph 34 that the recreational improvements therein referred to were made in reliance upon a right to the undiminished waters of the Great Lakes watershed, and deny the existence of such a right.

35. Deny the allegations in paragraph 35 and aver that the effect of the diversion of waters from the Great Lakes are dependent not only on the diversions and the amount thereof, but on other factors; and further aver that in times of high water diversions are beneficial to shore front property and recreational improvements thereon.

36. Admit the allegation in paragraph 36 that the State of New York and its citizens have a right in and to the waters of Lake Erie and Ontario and the Niagara and St. Lawrence Rivers for domestic, municipal, and industrial purposes, subject to the powers of Congress and the rights of Canada under international law and treaty, but deny that the State of New York or its citizens are entitled to receive all of the waters which would flow into said lakes and rivers from the other rivers and streams in the Great Lakes

Waterway without diminution by any other State, its agencies, or its citizens.

37. Deny the allegations in paragraph 37 that the State of New York, its agencies, municipalities or citizens have expended sums of money for domestic, municipal or industrial purposes in reliance upon a right to undiminished waters of the Great Lakes Waterway, and deny the existence of such a right. Aver that the State of New York diverts water from the Delaware River and its tributaries for domestic purposes without returning the water to the Delaware River watershed, and has successfully resisted an action in this court by the State of New Jersey seeking to enjoin such diversion. Aver that this Court, adopting contentions advanced by the State of New York in *New Jersey* v. *New York,* 283 U. S. 336 (October Term, 1931), upheld such diversion on principles of equity and right and the doctrine of equitable apportionment.

Further aver that the State of New York diverts water for domestic use from Lake Erie through the Erie Division of the New York State Barge Canal without returning such water to Lake Erie.

38-39. Deny the allegations in paragraphs 38 and 39.

Further answering the defendants aver that no facts are alleged in the Supplemental and Amended Complaint which warrant a change in the decree entered in this cause on April 21, 1930 (*Wisconsin* v. *Illinois,* 281 U. S. 696).

WHEREFORE, the defendants ask that the prayer of the State of New York for relief be denied; that the Amended and Supplemental Complaint, which purports to allege all relevant facts and changed circumstances since the entry of the decree herein in 1930, be taken to supersede the amended application for a modification of said decree

heretofore filed herein; that the Supplemental and Amended Complaint be dismissed; and that the Court assess the costs of this proceeding against the complainant.

Respectfully submitted,

GRENVILLE BEARDSLEY,
Attorney General, State of Illinois,

WILLIAM C. WINES,
Assistant Attorney General, State of Illinois,

GEORGE A. LANE,
Attorney, The Metropolitan Sanitary District of Greater Chicago,

LAWRENCE J. FENLON,
Principal Assistant Attorney, The Metropolitan Sanitary District of Greater Chicago,

PETER G. KUH,
Senior Assistant Attorney, The Metropolitan Sanitary District of Greater Chicago,

JOSEPH B. FLEMING,
JOSEPH H. PLECK AND
THOMAS M. THOMAS,
Special Assistant Attorneys General, State of Illinois,
Attorneys for Defendants.