

DEC 23 2009

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Nos. 1, 2, and 3, Original
In the Supreme Court of the United States
October Term 1966

STATES OF WISCONSIN, MINNESOTA, OHIO,
AND PENNSYLVANIA,
Complainants,

v.

STATE OF ILLINOIS AND THE METROPOLITAN
SANITARY DISTRICT OF GREATER CHICAGO,
Defendants,
UNITED STATES OF AMERICA,
Intervenor.

STATE OF MICHIGAN,
Complainant,

v.

STATE OF ILLINOIS AND THE METROPOLITAN
SANITARY DISTRICT OF GREATER CHICAGO,
Defendants,
UNITED STATES OF AMERICA,
Intervenor.

STATE OF NEW YORK,
Complainant,

v.

STATE OF ILLINOIS AND THE METROPOLITAN
SANITARY DISTRICT OF GREATER CHICAGO,
Defendants,
UNITED STATES OF AMERICA,
Intervenor.

MEMORANDUM OF THE STATE OF OHIO

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MEMORANDUM OF THE STATE OF OHIO

The State of Ohio, a complainant in original action No. 1, urges the Court to grant the State of Michigan's motion to reopen. This Court has jurisdiction to consider Michigan's request, which relates directly to the subject matter of the Court's 1967 consent decree—the defendants' creation and operation of a series of artificial waterways connecting Lake Michigan and the Des Plaines and Illinois Rivers, and their diversion of water from the Great Lakes into these waterways. Thanks to the current operation of this project, which was blessed by the consent decree, two invasive species of Asian carp are now on the doorstep of the Great Lakes.

As detailed in Michigan's motion, a group of States bordering the Great Lakes brought these original actions in the 1920s to address the State of Illinois's construction of the Chicago Sanitary and Ship Canal. The Canal permitted Illinois to reverse the flow of water along the Chicago River. Instead of flowing into Lake Michigan, water and the accompanying sewage now flow away from the lake—into the Canal first, and then into the Des Plaines and Illinois Rivers. This project caused a significant diversion of water from Lake Michigan. It lowered water levels in all the Great Lakes and damaged the fragile ecosystem and economic sustainability of the region.

The State of Ohio, together with Michigan, Minnesota, New York, Pennsylvania, and Wisconsin, brought an original action in this Court challenging the project. The Court declared that, although "some flow from . . . Lake [Michigan] is necessary to keep up navigation in the Chicago River," the defendants' diversion project was unlawful and should be

ameliorated within “a reasonably practicable time.” *Wisconsin v. Illinois*, 278 U.S. 367, 418-19 (1929).

Consistent with that finding, the Court entered, and has occasionally modified, a decree regulating the amount of water the defendants may divert from Lake Michigan into the Canal. See *Wisconsin v. Illinois*, 281 U.S. 696 (1930); *Wisconsin v. Illinois*, 289 U.S. 395 (1933); *Wisconsin v. Illinois*, 388 U.S. 426 (1967). In its 1967 decree, the Court indicated that it would retain jurisdiction “for the purpose of making 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.” 388 U.S. at 430.

Michigan’s new motion relates directly to the subject matter of the Court’s 1967 decree. That decree authorized the State of Illinois, its municipalities, and its instrumentalities to divert 3,200 cubic feet of water per second into the Canal. *Id.* at 427-28. This Court should revisit that authorization in light of “changed circumstances” and “unforeseen issues not previously litigated,” *Arizona v. California*, 460 U.S. 605, 619 (1983)—specifically, the presence of Asian carp in the Illinois River, the Des Plains River, and the Canal system.

As detailed in Michigan’s motion (and the defendants’ own statements), these carp present a substantial threat to the Great Lakes. Their rapid population growth will crowd out native fish species, impair area fisheries, and disrupt the Great Lakes’ fragile ecosystem. The State of Ohio is at particular risk. The State oversees 2.25 million acres of Lake Erie—the most biologically productive lake of all the

Great Lakes. An estimated 450,000 people fish in Ohio's waters each year, contributing some \$680 million to Ohio's economy. See Lake Erie Strategic Plan, Ohio Department of Natural Resources, at <http://www.dnr.state.oh.us/Home/FishingSubhomePage/fisheriesmanagementplaceholder/fishingfairportstratplan/tabid/6167/Default.aspx> (last visited Dec. 22, 2009). The introduction of Asian carp to this body of water would be ecologically and economically devastating.

But for the defendants' actions in the early twentieth century—the construction and operation of the Chicago Sanitary and Ship Canal—the Great Lakes would not now be threatened by the steady march of the Asian carp up the Mississippi River and its tributaries. By sanctioning the ongoing diversion of water from Lake Michigan, this Court's 1967 consent decree permits the continued operation of that Canal. Therefore, the State of Michigan has appropriately sought a modification of that decree: Until the State of Illinois, the Metropolitan Sanitary District of Greater Chicago, and the United States agree to take all necessary and appropriate measures to prevent the introduction of the carp into Lake Michigan, this Court must modify its decree to prohibit all further diversion of water from Lake Michigan into the Canal—thereby closing the door to the carp's entryway into the Great Lakes, and to the irreparable damage that would ensue.¹

¹ If the Court elects to treat the State of Michigan's request as a new Bill of Complaint, the State of Ohio intends to file a motion to intervene as a complainant.

CONCLUSION

For these reasons, the Court should grant the State of Michigan's Motion to Reopen.

Respectfully submitted,

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