

DEC 28 2009

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

States of Wisconsin, Minnesota, Ohio, and Pennsylvania,
Complainants,

v.

States 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.

**STATE OF MINNESOTA'S BRIEF IN SUPPORT OF THE STATE OF MICHIGAN'S
MOTION FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

The State of Minnesota, by and through its Attorney General, Lori Swanson, as one of the parties to No. 1, Original, as captioned above, files this Brief in support of the State of Michigan's motion for a preliminary injunction and the relief requested. Lake Superior is an important environmental and economic asset to the State of Minnesota. Asian carp - which reproduce rapidly and consume huge amounts of food - threaten the Great Lakes ecosystem. Emergency action must be taken to prevent the introduction of Asian carp into the Great Lakes. The requested relief is necessary in order to address the threatened invasion of Lake Michigan and the Great Lakes by Asian carp by way of the Lake Michigan diversion project now maintained by the State of Illinois, the Metropolitan Water Reclamation District of Greater Chicago, and the U.S. Army Corp of Engineers.

The State of Minnesota invokes this Court's retained jurisdiction under paragraph 7 of the 1967 Decree in *Wisconsin v. Illinois*.¹ In the alternative, the State of Minnesota invokes this Court's original jurisdiction under Art. III, § 2, cl. 2 of the United States Constitution and 28 U.S.C. § 1251(a).

ARGUMENT

I. THE PRELIMINARY INJUNCTION FACTORS.

In determining whether a preliminary injunction should be granted, this Court considers whether: 1) the moving party is likely to succeed on the merits of its claim; 2) the movant is likely to suffer irreparable harm without the immediate relief; 3) the balance of the equities tips in the movant's favor; and 4) the relief is in the public interest.² The primary purpose of a

¹ *Wisconsin v. Illinois*, 388 U.S. 426 (1967).

² *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 374 (2008), citing *Munaf v. Geren*, 128 St. Ct. 2207, 2218-19 (2008).

preliminary injunction is to maintain the status quo.³ In the matter before this Court, an immediate injunction is imperative in order to maintain the status quo—that of no Asian carp inhabiting the Great Lakes. Without the preliminary injunction, irreparable harm will occur to the State of Minnesota’s and the public’s interest in maintaining the Great Lakes free of Asian carp. Consequently, weighing the factors accordingly, it is clear that a preliminary injunction should be entered by this Court.

A. An Injunction Is In The Public Interest.

An injunction is clearly in the public interest. Bighead and silver carp, collectively known as Asian carp, are extremely destructive. These large filter-feeding fish can weigh over 100 pounds and can eat huge amounts of plankton and detritus, competing for these foods with Minnesota-native organisms, including some adult fish.⁴ Since Asian carp can eat up to 40 percent of their body weight on a daily basis, they could outcompete native fish species, becoming the dominant species.⁵ Silver carp can jump up to ten feet out of the water when disturbed by the sounds of watercraft, often injuring boaters, personal watercraft operators, and water skiers as well as causing damage to watercraft.⁶

Lake Superior is the largest fresh-water lake in the world, with the State of Minnesota sharing jurisdiction over the lake and its shores with the states of Wisconsin and Michigan and the Canadian Province of Ontario. Together, the Great Lakes comprise over 80 percent of North America’s surface fresh water. The State of Minnesota holds the waters and aquatic resources of

³ *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940).

⁴ Minnesota Department of Natural Resources- Bighead and Silver Carp, <http://www.dnr.state.mn.us/invasives/aquaticanimals/asiancarp/index.html>; State of Michigan’s Appendix (“App.”) at 13a-14a, 57a-59a.

⁵ *Id.*

⁶ *Id.*

that part of Lake Superior lying within its jurisdiction in trust for the benefit of its citizenry.⁷ Minnesota has 140 miles of Lake Superior shoreline. The public enjoys and exercises those rights in Lake Superior and its natural resources through, among other activities, fishing (both recreational and commercial), boating, water-related recreation, and commerce. Maintaining proper stewardship of the Great Lakes by stopping the entry of Asian carp is essential to the continued public use and enjoyment of this important American natural resource.

In addition, maintaining the health of Lake Superior is important to Minnesota's economy. Private and charter fishing on Minnesota's "North Shore" has brought and continues to attract anglers seeking lake trout, salmon and steel head. Lake Superior also serves as a transportation route for ocean-going and other vessels and is the home of the Port of Duluth, Minnesota, one of the largest inland seaports in the world. Consequently, the migration of Asian carp into the Great Lakes is of enormous concern to the State and its citizens, endangering both Lake Superior's commercial and recreational industries.

Because of their enormous size, rapid reproduction, and vast consumption of food, Asian carp crowd out native fish species and carefully calibrated ecosystems. If they invade the Great Lakes, they will have access to the rivers and tributaries that feed into the Great Lakes, thereby threatening inland waters. This would be extremely destructive to Minnesota's economy and way of life, where inland fishing is an important recreational and economic pursuit. Indeed, Minnesota is known as the Land of 10,000 Lakes and the recreational fishing in Minnesota alone

⁷ The State holds title on behalf of the public in the waters of the State (Minn. Stat. § 103G.255 (2008), the fish and wildlife located within the State (Minn. Stat. § 97A.025 (2008), and the aquatic vegetation located in the State's waters (Minn. Stat. § 84.091, subd. 1 (2008)).

is a \$2.725 billion per year industry⁸. Thus, issuance of a preliminary injunction is clearly in the public interest.

B. The State Of Minnesota And The Public Will Be Irreparably Harmed Without A Preliminary Injunction.

With evidence of Asian carp discovered between the protective electric barrier (“Dispersal Barrier System”), located within the Chicago Sanitary and Ship Canal, and Lake Michigan, it is apparent the Asian carp are about to enter into the Great Lakes. While the United States Army Corp of Engineers, the Metropolitan Water Reclamation District of Greater Chicago, and the State of Illinois have taken some steps to address this migration over the years, such steps have been insufficient. There is no evidence that these parties intend to take any significant step to address the issue on an exigent basis. Consequently, without the issuance of a preliminary injunction, the State of Minnesota will incur irreparable harm, harm that the State itself has taken extensive measures to avoid through management efforts.

Invasive species such as the Asian carp have been and continue to be the focus of intensive State management efforts. In order to address the danger posed by invasive species, the State of Minnesota has implemented a comprehensive invasive species management program for aquatic plants and wild animals.⁹ Through its Minnesota Department of Natural Resources (“MN DNR”), the State has established this program “to prevent and curb the spread of invasive species of aquatic plants and wild animals.”¹⁰ As a part of this program, the State of Minnesota has designated the big head and silver carp as prohibited invasive species.¹¹ By state law, “[n]o person may possess, import, purchase, propagate, or transport a prohibited invasive species

⁸ U.S. Fish & Wildlife Service, 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation at 111, Table 64, <http://www.census.gov/prod/2008pubs/fhw06-nat.pdf>.

⁹ Minn. Stat. ch. 84D (2008); Minn. R. ch. 6216 (2007). *See also* State of Minnesota Invasive Species Program, <http://dnr.state.mn.us/eco/invasives/index.html>.

¹⁰ Minn. Stat. § 84D.02, subd. 1 (2008).

¹¹ Minn. R. 6216.0250, subp. 3.A and H (2007).

without a permit from the commissioner [of MN DNR]”¹² Due to the concern over the impact that the Asian carp may have on the State of Minnesota’s natural resources, the State joined with the United States Fish and Wildlife Service and the Wisconsin Department of Natural Resources in 2004 to fund a study to provide direction on the feasibility of limiting the invasion of Asian carp by way of the Upper Mississippi River.¹³ As one outcome of the study, the Minnesota Legislature in 2007 passed legislation requiring that any person who takes an Asian carp must report the type of carp to MN DNR within seven days of the taking.¹⁴

In addition, as directed by the Minnesota Legislature in 2007, the State developed a plan meant to prevent the introduction of Asian carp into the state.¹⁵ In the plan, the State expressed concern regarding the possible migration of Asian carp into Minnesota by way of the Mississippi River.¹⁶ The State also noted that Asian carp were “poised to enter into Lake Michigan through the Chicago Sanitary and Ship canal.”¹⁷ The State stated that “[t]he Chicago Sanitary and Ship Canal is the key to stopping large numbers of Asian carp from dispersing into Lake Michigan and the other Great Lakes.”¹⁸ While recognizing that efforts were being made by the State of Illinois and the Corps to address such migration, the State noted that the manufacturer of the currently-utilized Dispersal Barrier System had estimated its efficiency “in the mid-80% range, and has stated a need for two or three more such barriers downstream to gain 100% efficiency.”¹⁹

¹² Minn. R. 6216.0265, subp. 4 (2007).

¹³ Preventing the Introduction of Asian Carp into Minnesota, a Plan Prepared by the Minnesota Department of Natural Resources, dated November 1, 2007, (“Minnesota Plan”) at 2, http://files.dnr.state.mn.us/natural_resources/invasives/aquaticanimals/asiancarp/110107_plan.pdf.

¹⁴ Minn. Stat. § 97C.417 (2008).

¹⁵ 2007 Minn. Laws ch. 57, § 4, subd. 8.

¹⁶ Minnesota Plan at 8-9.

¹⁷ *Id.* at ii.

¹⁸ *Id.* at 9-10.

¹⁹ *Id.* at 10.

The State stated that “[o]ther more effective technologies such as the creation of a 3-5 mile anaerobic zone in the canal should be investigated, as should the construction of a physical dam or levy to separate the two ecosystems.”²⁰ Thus, the State recognized in 2007 that the actions so far taken to address the danger posed by the Illinois canal system were insufficient to protect the Great Lakes from the migration of Asian carp. The recent discovery made by the Corps has proven that the State’s fears were warranted. Irreparable harm is demonstrated here.

C. The Balance Of The Equities Favors Issuance Of A Preliminary Injunction.

The balance of the equities also clearly tips in the State’s favor. The State’s concern regarding the ecological disaster associated with the invasion of the Great Lakes by Asian carp is shared by the federal government, through the U.S. Army Corp of Engineers, the U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service, and by the State of Illinois. As noted in the State of Michigan’s motion for a preliminary injunction at pages 10-12, the Corps has expressed concern that “[t]he prevention of an interbasin transfer of big head and silver carp from the Illinois River to Lake Michigan is paramount in avoiding ecological and economic disaster.”²¹ The U.S. Environmental Protection Agency has noted that, “[d]ue to their size, ravenous appetites, and rapid rate of reproduction, these fish could pose a significant risk to the Great Lakes ecosystem.”²² The U.S. Fish and Wildlife Service states that, “Asian carp pose the greatest immediate threat to the Great Lakes ecosystem”²³ And the Illinois Department of Natural Resources has stated that, “[o]nce in the lake, it would be very difficult to control [Asian carp].”²⁴

²⁰ *Id.*

²¹ Dispersal Barrier Efficacy Study, dated 12/4/09, prepared by the U.S. Army Corp of Engineers (See App. 51a).

²² App. 48a-49a.

²³ App. 15a.

²⁴ App. 45a.

There is no dispute among all the parties to these proceedings that Asian carp constitute a grave danger to the Great Lakes. The efforts that have been and continue to be made by the Corps, the District, and the State of Illinois have been inadequate to address the immediate danger of migration of Asian carp into the Great Lakes, and the equities clearly support this Court's intervention. The Great Lakes are an important natural resource for the entire country, not just any one state. Proper stewardship of the Great Lakes means preventing an environmental train wreck caused by the introduction of Asian carp into the Great Lakes ecosystem.

D. The State Of Michigan Is Likely To Succeed On The Merits.

Last, it is highly likely that the movant State of Michigan will succeed on the merits of its action. The State of Michigan, exercising its *parens patriae* authority, has brought this action on behalf of its citizens to protect the "well-being of its populace."²⁵ States have long exercised such authority to bring public nuisance actions to abate pollution created by and emanating from other states.²⁶ There is no dispute that the migration of Asian carp into the Great Lakes will have a devastating impact on the Great Lakes, an extremely important natural public resource. In short, there is a likelihood that the State of Michigan will be successful in persuading this Court to exercise its original jurisdiction to pursue the appropriate relief requested.

²⁵ *Alfred L. Snapp & Sons, Inc. v. Puerto Rico, ex rel, Barez*, 458 U.S. 592, 602 (1982).

²⁶ See e.g., *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1907); *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 519-20 (2007).

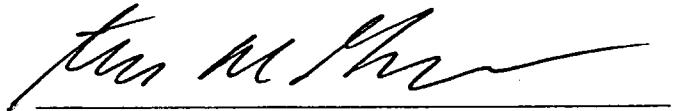
CONCLUSION

The State of Minnesota requests that, pursuant to its jurisdiction under Nos. 1, 2, and 3, Original, or, alternatively, under this Court's original jurisdiction under Art. III, § 2, cl. 2 of the United States Constitution and 28 U.S.C. § 1251(a), this Court grant the State of Michigan's motion for a preliminary injunction.

Dated: December 28, 2009

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