



Nos. 1, 2, and 3, Original

In the Supreme Court of the United States

**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.

[CAPTION CONTINUED ON INSIDE COVER]

**BRIEF OF THE COMMONWEALTH OF
PENNSYLVANIA IN SUPPORT OF THE
STATE OF MICHIGAN'S MOTION TO
REOPEN**

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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,
COMPLAINT,
V.
STATE OF ILLINOIS AND THE METROPOLITAN
SANITARY DISTRICT OF GREATER
CHICAGO,
DEFENDANTS,
UNITED STATES OF AMERICA,
INTERVENOR.

QUESTION PRESENTED

Whether, because of changed circumstances, the Court should reopen Nos. 1, 2, and 3, Original, to supplement its Decree in these cases to address the threatened invasion of the Great Lakes by injurious fish species, a threat made possible by the subject in controversy – the diversion of water from Lake Michigan through a canal system maintained by Illinois and the US Army Corp of Engineers?

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STATEMENT OF JURISDICTION

The Court retains jurisdiction of this action pursuant to the 1967 Decree in *Wisconsin v. Illinois*, 388 U.S. 426, 430 (1967). The Court has original jurisdiction under Art. III, § 2, cl. 2 of the Constitution of the United States and 28 U.S.C. § 1251 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides in Art. III, § 2, cl. 2:

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction.

28 U.S.C. § 1251(a), Original Jurisdiction, provides:

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

SUMMARY OF THE ARGUMENT

This action is a continuation of the dispute that arose between the States of Wisconsin, Minnesota, Michigan, Ohio, Pennsylvania and New York on the one hand, and the State of Illinois and eventually the US Army Corp of Engineers on the other. The defendants operate a canal system that permits the diversion of water from Lake Michigan and the complainants, when initiating this action,

asserted that this diversion substantially impaired public use of the Great Lakes. The Court agreed and subsequently entered, and has repeatedly modified, a Decree regulating the amount of water that could be diverted from Lake Michigan.

The Court, in its Decree, has retained jurisdiction not to permit retrial of factual and legal issues previously litigated but to address changes in circumstances, or unforeseen issues not previously litigated. That is this case.

The diversion of water from Lake Michigan has now become the mechanism by which injurious fish species threaten to invade the Great Lakes, with, as all parties agree, ecological and economical consequences that will be both devastating and irreparable. That diversion is permitted pursuant to the Court's present Decree and is the subject matter in controversy in this action. The Court has retained jurisdiction of this action to address such changed circumstances as are presented here. Michigan properly seeks the Court's continuing jurisdiction to address those circumstances.¹

¹Pennsylvania adopts by reference Michigan's statement of the case in its brief in support of its motion to reopen. *Sup. Ct. R.* 17.2; *Fed. R. App. P.* 28(i).

ARGUMENT

THE COURT SHOULD EXERCISE ITS CONTINUING JURISDICTION OVER THIS ACTION AND GRANT MICHIGAN'S MOTION TO REOPEN.

The Commonwealth of Pennsylvania, a complainant in original action No. 1, urges the Court to grant the state of Michigan's motion to reopen.

This action is a continuation of the dispute that arose between Wisconsin, Minnesota, Michigan, Ohio, Pennsylvania, and New York (The Great Lake States) and the State of Illinois and its Metropolitan Water Reclamation District of Greater Chicago (District),² upon the construction of the Chicago Sanitary Ship Canal (Canal). The Canal permitted Illinois to reverse the flow of water along the Chicago river. That water, rather than flowing into Lake Michigan, could now flow away from the lake into the Canal and ultimately, into the Des Plaines, Illinois, and Mississippi Rivers. The diversion of water from Lake Michigan was a threat to the entire Great Lakes basin.

The Great Lakes and the rivers, streams and other bodies of water in their drainage basin are

² The District was originally known as the Chicago Sanitary District and later the Metropolitan Sanitary District of Greater Chicago.

an interconnected hydrologic system. Pennsylvania has sixty-three (63) miles of coast line along Lake Erie, and the Commonwealth oversees 748.7 square miles of the Lake. In addition, Pennsylvania's portion of the Great Lakes basin includes the Genesee River, whose head waters begin in Pennsylvania and which flows north to Lake Ontario.

Lake Erie and its connected waterways are perennial producers of Pennsylvania's walleye, small mouth bass, steel head, yellow perch, white bass, white perch, steel head trout, white trout, brown trout, and fresh water drum. *Asian Carp Great Lakes Position Statement January 8, 2010, James Grazio Biologist Pennsylvania Department of Environmental Protection and Charles Murray Biologist Pennsylvania Fish and Boat Commission.* The Great Lakes basin is an integral part of the Commonwealth of Pennsylvania's fisheries, which generates an overall estimated economic benefit of over 1.65 billion dollars annually, supporting nearly 18 thousand jobs. *Testimony of Dr. Douglas Austen, Executive Director of the Fish and the Boat Commission, to the Pennsylvania House of Representatives Game and Fishery's Committee February 5, 2009.* Pennsylvania has a sovereign and proprietary interest in these waters, as well as the diverse ecosystem they make possible.

Because of its sovereign and proprietary interest in the Great Lakes basin, Pennsylvania was a complainant in Original action No. 1 seeking to halt Illinois' diversion of water from Lake Michigan. Pennsylvania and the other Great Lake

States asserted that the diversion substantially impaired public uses of the Great Lakes and connecting waters for navigation, fishing, hunting, recreation, and other riparian rights. *Wisconsin v. Illinois*, 278 U.S. 367, 408 (1929). The Court agreed and held that the diversion was unlawful, except to the limited extent that it was needed to flush sewage from the Chicago river until some other means of disposal could be implemented, and to the extent necessary to keep up navigation in that river. *Id.* at 418-421.

The Court subsequently entered and has repeatedly modified a Decree regulating the amount of water that could be diverted 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). The Court last considered and Amended the Decree in 1980. *Wisconsin v. Illinois*, 449 U.S. 48 (1980).

In its 1967 Decree, the Court stated:

Any of the parties hereto may apply at the foot of this Decree for any other or further action or relief, and this Court retains jurisdiction of the suits in Nos. 1, 2, and 3 Original Docket, 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. App. 6a³ (quoting *Wisconsin v. Illinois*, 381 U.S. 426, 430 (1967)).

The Court used virtually identical language to retain jurisdiction in *Arizona v. California*, 376 U.S. 340, 352 (1964). Subsequently interpreting and applying that language the Court held that it was not to permit retrial of factual and legal issues that were fully and fairly litigated previously, but was, rather, a safety net to ensure that the Court was not precluded from adjusting the Decree "in light of unforeseeable changes in circumstances" or "unforeseen issues not previously litigated" *Arizona v. California*, 460 U.S. 605, 619, 621, (1983). That is this case.

The accidental introduction of big head and silver carp into the lower Mississippi valley certainly represents an unforeseeable change in circumstances since the Court last reviewed its Decree, as is the fact that the carp is now poised to invade the Great Lakes with what all parties acknowledge to be devastating and irreparable consequences. App. 45(a), 51(a). See also Intervenor the United State Memorandum in opposition to Michigan's Motion for preliminary injunction 43, 47.

Some of those consequences are unique to Pennsylvania. For example, Presque Isle Bay, a 3,700 acre embayment of Lake Erie, contains no

³ Pennsylvania's citation to App. __ Refers to the state of Michigan's Appendix in support of its motion to reopen.

fewer than five of Pennsylvania's endangered fish species, whose survival would be severely threatened by the introduction of these carp. Conneaut Creek, another biologically diverse western Pennsylvania tributary, has been specifically identified a potential spawning site for these carp. *Asian Carps of the Genus Hypophthalmichthys (Pisces, Cyprinidae) – A Biological Synopsis and Environmental Risk Assessment Report to U.S. Fish and Wildlife Service per Interagency Agreement 94400-3-0128*. Recognizing these kinds of threats is why Pennsylvania has, for years, made it unlawful, to purchase, possess, or even transport these carp in or through the Commonwealth. 588 Pa. Code § 63.46, 71.6 (d), 73.1(d)

The diversion of water through the canal system is the mechanism now presenting an imminent threat to the Great Lakes. That diversion is permitted pursuant to the Court's present Decree, and that diversion is and remains the subject matter in controversy in this action. The Court has retained jurisdiction of this action since the early decades of the last century, to address such changed circumstances as are presented here. Michigan properly seeks the Court's continuing jurisdiction to address those circumstances.⁴

⁴ If the Court elects to treat Michigan's request as a new Bill of Complaint, the Commonwealth of Pennsylvania intends to file a motion to intervene as a complainant.

CONCLUSION

The Court should grant Michigan's motion to reopen.

Respectfully submitted,

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