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.*	No. 1 Original
STATE OF MICHIGAN, *Complainant,* *v.* STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, *Defendants,* UNITED STATES OF AMERICA, *Intervenor.*	No. 2 Original
STATE OF NEW YORK, *Complainant,* *v.* STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, *Defendants,* UNITED STATES OF AMERICA, *Intervenor.*	No. 3 Original

ON MOTION TO REOPEN OR FOR LEAVE TO FILE BILL OF COMPLAINT

REPLY BRIEF

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INTRODUCTION

Michigan's Motion to Reopen and Petition for Supplemental Decree properly invoke this Court's original, exclusive jurisdiction over suits between states. The Petition presents an actual, justiciable controversy between Michigan, supported by six other Great Lakes States,[1] and Illinois. Michigan and its sister states seek to vindicate their sovereign interests in protecting the public trust resources of the Great Lakes from the imminent threat of grave, and likely irreversible harm.

That threat exists because Illinois, in conjunction with its instrumentality, the Metropolitan Water Reclamation District of Greater Chicago (District) and the United States Army Corps of Engineers (Corps), created and now insists upon maintaining an artificial waterway (Waterway) linking the Mississippi Basin to the Great Lakes in a manner that allows highly injurious, alien fish – Asian carp – to invade the Lakes.

The Petition alleges that these conditions are unlawful and constitute a common law public nuisance. Michigan invokes this Court's equitable powers to abate that nuisance and seeks both declaratory and injunctive relief. This includes "a Permanent Injunction requiring the State of Illinois, the District and the Corps to take all appropriate and necessary measures to...*permanently and physically separate*

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[1] The States of Minnesota, New York, Ohio, Pennsylvania and Wisconsin, all complainants in Nos. 1, 2, 3 Original, have filed briefs supporting Michigan's Motion. Indiana and the Province of Ontario have also filed supporting briefs.

carp-infested waters...from Lake Michigan..." (Mich. Pet. 29-30; emphasis added.)

Given Michigan's claims and the nature of the relief it requests, Illinois is a necessary party. Illinois law established the District, mandated the creation of the artificial Waterway linked to Lake Michigan for both waste disposal and navigation, and requires its continued operation for those purposes. Moreover, Illinois exercises state regulatory authority over all navigable waters and placement of structures in them. The permanent physical separation of at least some portions of the Waterway from the Lake sought by Michigan thus cannot occur without Illinois' participation.

The positions of Michigan and Illinois in this regard are clearly adverse. Illinois has vigorously opposed even temporary disruption of some navigation that would have resulted from Michigan's requested preliminary injunction. [Ill. Pre. Inj. Opp. 12-15.] It is apparent that Illinois seeks to maintain the existing navigational functions of the Waterway in its present form, irrespective of the continuing threat of Asian carp migration through it.

For these reasons, and because Illinois has both legal authority over all fish within its waters, and has assumed "lead" responsibility for efforts to track, kill, and control the movement of Asian carp in the Waterway, Illinois is plainly a necessary party with respect to the injunctive relief sought in the Petition. Since only this Court may consider Michigan's claims against Illinois, this Court alone has jurisdiction to

vindicate Michigan's sovereign interests and grant effective relief.

Michigan has moved to reopen Nos. 1, 2, and 3, Original and for a supplemental decree because the conditions which arose from, and are inextricably related to, the diversion project that was the subject of that litigation. There, Michigan and the other complaining states challenged, and this Court enjoined, Illinois' diversion of Great Lakes water through the new artificial Waterway because it harmed public rights in the resources of the Lakes. Because the same artificial Waterway now threatens even graver harm to those rights, Michigan's request for supplemental relief is "proper in relation to the subject matter in controversy" and within this Court's retained jurisdiction under paragraph 7 of the Decree.[2]

Even if the Court determines that Michigan's present claims are not sufficiently related to the subject of the prior litigation to warrant reopening it, those claims fall squarely within the Court's original jurisdiction. Accordingly, the Court should grant Michigan's alternative request for leave to file its Petition as a new Bill of Complaint.

Finally, contrary to the assertions of the United States, Michigan's Petition states ripe, legally cognizable claims against the Corps. First, Congress has broadly waived the United States' sovereign immunity with respect to claims for nonmonetary relief, including Michigan's claim for injunctive relief to abate a common law public nuisance. In addition, this

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[2] *Wisconsin v. Illinois,* 388 U.S. 426, 430 (1967).

Court now has jurisdiction to review, under the Administrative Procedures Act, at least some of the Corps' decisions regarding the Waterway.

In sum, Michigan's claims against Illinois, the District and the Corps are now properly and necessarily before this Court.

ARGUMENT

I. Michigan has properly invoked this Court's exclusive original jurisdiction.

A. Vital state interests are at stake here.

This Court's original and exclusive jurisdiction under 28 U.S.C. § 1251(a) is "a means of resolving high disputes between sovereigns."[3] While such disputes often include controversies regarding the equitable allocation of interstate water supplies,[4] they are by no means limited to them. This Court has long exercised its original jurisdiction over disputes between states regarding a variety of other sovereign and quasi-sovereign interests, including fishing rights[5] and the abatement of pollution or other public nuisances.[6]

Here, Michigan and the other supporting Great Lakes States allege that by creating and demanding the maintenance of the artificial Waterway in a

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[3] *South Carolina v. North Carolina*, 130 S. Ct. 854, 869 (2010) (Roberts, C.J.).

[4] *See, e.g., South Carolina*, 130 S. Ct. at 867.

[5] *See, e.g., Idaho v. Oregon*, 444 U.S. 380 (1980).

[6] *Missouri v. Illinois*, 180 U.S. 208 (1901); *Missouri v. Illinois*, 200 U.S. 496 (1906); *New York v. New Jersey*, 256 U.S. 296 (1921).

manner that allows Asian carp to invade the Great Lakes, Illinois is responsible for a public nuisance that threatens severe ecological and economic harm. Michigan and its sister Great Lakes States seek to vindicate the public rights in those waters and their natural resources, including fishing and boating, that the complaining States hold in trust for their respective citizens.[7] Given the indisputable "seriousness and dignity of the claims,"[8] they fall squarely within this Court's original and exclusive jurisdiction.

B. Michigan's Petition presents an actual, justiciable controversy between States, and Illinois is a necessary party to the resolution of the dispute.

The United States (U.S. Br. 23-28) and Illinois (Ill. Br. 22-33) erroneously assert that there is no ripe dispute between Michigan and Illinois and that Illinois is not a necessary party.

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[7] *See, Illinois Central R.R. Co. v Illinois,* 146 U.S. 387, 452 (1892); *Glass v. Goeckel,* 473 Mich. 667 (Mich. 2005).

[8] *Mississippi v. Louisiana,* 506 U.S. 73, 77 (1992).

1. Illinois, through its instrumentality, the District, created the artificial Waterway linked to Lake Michigan and mandates its continued operation in a manner that conflicts with Michigan's request for injunctive relief.

This Court has repeatedly held that despite its separate incorporation, the District is, with respect to the adverse interstate effects of the Waterway, the instrumentality of Illinois and that Illinois is "primary and responsible defendant"[9] for the resulting harm.

Moreover, as both a legal and policy matter, Illinois is committed to the continuing, uninterrupted connection of the Mississippi Basin to Lake Michigan, in its present form. That policy was formally expressed by the Illinois Legislature in 1889.[10] Illinois also adopted statutes, which remain in effect today, regulating the construction of the Waterway and mandating its use for sanitary, drainage, and navigation purposes.[11]

As the record reflects, Illinois has strenuously, albeit unjustifiably, opposed Michigan's requests for preliminary injunctive relief seeking temporary closure of portions of the Waterway to navigation. (Ill. Pre. Inj. Opp. 12-16.) It is thus evident that an actual controversy exists between Illinois and Michigan with

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[9] *Wisconsin v. Illinois,* 289 U.S. 395, 399-400 (1933). *See also, Missouri v. Illinois,* 180 U.S 208, 242 (1901).

[10] *See Wisconsin v. Illinois,* 289 U.S. at 401, quoting Illinois Laws, 1889.

[11] 70 Ill. Comp. Stat. 2605/23, 2605/24.

respect to Michigan's claim for permanent injunctive relief which ultimately seeks to:

> [P]ermanently *and physically separate* carp-infested waters in the Illinois River basin, the Canal, and connected waterways from Lake Michigan... (Mich. Pet. 29-30; emphasis added.)

Although Michigan does not, of course, seek to completely eliminate the Waterway or unnecessarily limit navigation within it, the only reliable and permanent means of halting transfers of harmful aquatic invasive species between the Waterway and Lake Michigan is physical separation (Mich. App. 122a), which will necessarily entail interruption of some existing navigation at strategic points in the Waterway.[12]

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[12] *See* Brammeier, *et al, Preliminary Feasibility of Ecological Separation of the Mississippi River and Great Lakes to Prevent the Transfer of Aquatic Invasive Species* (November 2008), available at http://www.glfc.int/carp/waterwayseparation.pdf. That report preliminarily identified various alternatives, including, for example, construction of a physical barrier in the South Branch of the Chicago River.

2. Illinois has not undertaken all interim measures within its control to minimize the risk of Asian carp migration into Lake Michigan, and would necessarily be involved in implementing the relief sought by Michigan.

Although Illinois has publicly assumed a "lead" role in recent efforts to monitor the Chicago Area Waterway for Asian carp[13] and emphasized its coordination of multi-agency applications of the fish poison rotenone in one segment of the Waterway in December 2009 (Ill. Br. 8-9), it has not taken all measures within its control to prevent Asian carp migration into the Lake. For example, it has not, since that two-day period several months ago, applied rotenone to kill fish at any other location in the Waterway, including areas where eDNA testing has indicated the recent presence of silver or bighead carp.

And, Illinois must be involved in any such efforts. By law, it owns and controls all fish within its

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[13]*See, e.g.,* Press release issued by Asian Carp Regional Coordinating Committee, available at http://www.asiancarp.org/RegionalCoordination/documents/MonitoringResultsNewsRelease(3.29.10).pdf. While important, such conventional monitoring with nets and electrofishing cannot detect all fish present in the area sampled. (U.S. App. 115a, 129a.)

waters[14], and must be within the jurisdiction of a court ordering further fish kills. [15]

Moreover, Illinois, like the Corps, has not undertaken any effort to place an interim barrier to block the passage of Asian carp in the segment of the Little Calumet River within Illinois, despite the nearby positive eDNA detection and the ultimate connection of that water body to Lake Michigan.[16] Illinois' apparent suggestion that it is incapable of placing such a barrier as a legal matter (Ill. Br. 24) is unfounded. The part of the Little Calumet River closest to positive eDNA results is located within Illinois. As a matter of Illinois law, Illinois has authority over placement of such structures,[17] and jurisdiction over all public waters in

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[14] 515 Ill. Comp. Stat. 5/5-5.

[15] Contrary to the bald assertions by the United States (U.S. Br. 24, n. 14) and Illinois (Ill. Opp. Renewed P.I. 19-20), it is by no means clear that Section 126 (Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, § 126, 123 Stat. 2853 [2009]) provides the Army Corps of Engineers "broad clear authority" to kill any and all fish it chooses in Illinois waters and necessarily preempts Illinois law. Indeed, in the context of our federal system, those assertions would suggest a remarkable usurpation of state authority by the federal government and an apparent abdication of state responsibility.

[16] See Renewed Mot. P.I. at 38 and Michigan's comments on the *Draft Asian Carp Control Strategy Framework*, at p 5, available at http://www.stopasiancarp.com/FrameworkComments21810.pdf., touted by the United States. (U.S. Br. 5-12.) To date, neither Illinois nor the Corps has responded to, let alone implemented, that request.

[17] 615 Ill. Comp. Stat. 5/18.

the state.[18] Nothing would prevent Illinois from obtaining a federal permit, if needed, under 33 U.S.C. § 403, for that purpose.

Further, implementation of either such interim barriers or permanent measures to physically separate portions of the Waterway from Lake Michigan would require both federal and state involvement. Pursuant to appropriations, the Corps operates and maintains certain facilities in the Waterway for navigation.[19] But Illinois retains its statutory authority, noted above, to regulate the placement of structures in all waters within its jurisdiction. It has long been recognized that placement of structures in the navigable waters of Illinois depends upon the concurrent or joint assent of both the federal and state government.[20] For all of these reasons, Illinois is a necessary party in any proceeding for the relief sought in Michigan's Petition.

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[18] Under 615 Ill. Comp. Stat. 5/26, the Illinois Department of Natural Resources has "full and complete jurisdiction of every public body of water in the State of Illinois, subject only to the paramount authority of the Government of the United States with reference to the navigation of such stream or streams...") There is no suggestion that that portion of the Little Calumet River supports navigation.

[19] But contrary to the United States' suggestion (U.S. Br. 3), the appropriation statutes it cites do not, by their terms, mandate the indefinite operation of the entire waterway system as it is currently configured. *See* Energy and Water Development Appropriation Act, 1982, Pub. L. No. 97-88, § 107, 95 Stat. 1137 (1981); Supplemental Appropriations Act, 1983, Pub. L. No. 98-63, Tit. I, Ch. IV, 97 Stat. 311.

[20] *See Cummings v. Chicago,* 188 U.S. 410, 431 (1903) (applying Rivers and Harbors Act).

C. This Court is the appropriate forum for resolution of Michigan's claims, either through reopening Nos. 1, 2, and 3 Original, or through a new original action.

Michigan's reasons for seeking to reopen Nos. 1, 2, and 3 were explained at length in its initial Motion to Reopen and Supporting Brief. Contrary to the suggestions by Illinois and the United States, Michigan does not contend that the prior litigation should be reopened "over every allegation of harm arising...from the waterway's mere existence." (U.S. Br. 19.) Rather, Michigan's recent claims are "proper in relation to the subject matter in controversy" in the prior proceedings because now, as then, the operation of the artificial Waterway that is the core of the diversion project established and maintained by Illinois threatens serious harm to the same public trust rights in the Great Lakes that Michigan and the other complaining states have a sovereign duty to protect – the same rights they raised in that case – including fishing and boating.

Alternatively, the allegations in Michigan's Petition present an actual, justiciable controversy between states that warrants leave to file a new original action. Both the gravity of the interests involved, and the unavailability of an adequate legal forum for their resolution justify their consideration by this Court. Where, as here, only this Court can provide effective relief, it can and should exercise its constitutionally and statutorily prescribed jurisdiction,

notwithstanding the potential complexity of factual and legal issues that may be presented.[21]

II. Michigan has asserted ripe claims for declaratory and injunctive relief against the Corps.

The United States' argument that Michigan's claim as pleaded against the Corps "is premature in any court" (U.S. Br. 28-30) fails for at least three reasons. First, the waiver of sovereign immunity found in 5 U.S.C. § 702 is not limited to statutory appeals from final agency actions under 5 U.S.C. § 704, but also extends to nonstatutory claims seeking relief other than money damages.[22] Thus, the United States has waived sovereign immunity with respect to Michigan's claim for declaratory and injunctive relief against the Corps based on common law nuisance. (Mich. Pet. 22-25.)

Second, federal law provides a remedy for common law nuisance.[23] While this Court determined that the federal common law of nuisance with respect to interstate pollution resulting from sewer discharges was supplanted by the comprehensive discharge control scheme established by the Clean Water Act, that decision is not controlling here. [24]

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[21] *See, e.g., Idaho v. Oregon,* 444 U.S. at 390, n. 1, *citing Nebraska v. Wyoming,* 325 U.S. 589 (1945).

[22] *Trudeau v. FTC,* 456 F.2d 178 (D.C. Cir. 2006); *see also* 16-105 Moore's Federal Practice – Civil § 105.45.

[23] *Missouri v. Illinois,* 200 U.S. 496 (1906); *Illinois v. Milwaukee,* 406 U.S. 91, 104 (1971); *Connecticut v. American Electric Power Co.,* 482 F.3d 309, 350-359 (2009).

[24] *Milwaukee v. Illinois,* 451 U.S. 304 (1981) (*"Milwaukee II"*).

So, the United States' assertion here that the Corps' temporary authority under section 126 operates to supplant the federal common law of nuisance in this case is misplaced. In contrast to the Federal Water Pollution Control Act Amendments at issue in *Milwaukee II,* section 126 is a single paragraph in an appropriations bill that expires one year from the date of its enactment. It sets no standards for the Corps to follow, other than directing it to take interim measures to prevent the introduction of Asian carp into the Great Lakes.

Third, Michigan has alleged one or more final agency actions by the Corps that are now reviewable under the APA. For example, after closing the O'Brien Lock for several days in December 2009, the Corps decided to reopen it, re-establishing a direct water connection through which Asian carp could pass, notwithstanding eDNA evidence that Asian carp were present in the immediate vicinity. (Mich. Pet. 21, 22.) The United States contends that because the Corps intends to study various potential changes in lock operations (although not permanent lock closure) over a period of months and perhaps years,[25] it has not yet made any decision subject to judicial review. (U.S. Br. 30.) Under this theory, the Corps could continue to indefinitely conduct studies, and take "interim" actions – thereby insulating itself from judicial scrutiny – while Asian carp become established in Lake Michigan.

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[25] *Draft Asian Carp Control Strategy Framework*, at 24 - Separation Study to Conclude in 2012, available at http://www.asiancarp.org/RegionalCoordination/documents/AsianCarpControlStrategyFramework.pdf.

Such an approach is legally unjustified and underscores the need for prompt consideration of Michigan's motion.

CONCLUSION

For the foregoing reasons, Michigan respectfully requests that this Court:

A. Grant its Motion to Reopen Nos. 1, 2, and 3, or, in the alternative;

B. Grant it leave to file a new original action; and

C. Appoint a Special Master to expeditiously conduct proceedings in this matter.

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