IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 15 Original

STATE OF ILLINOIS,

Complainant,

vs.

STATES OF MICHIGAN, OHIO, PENNSYLVANIA, MINNESOTA, NEW YORK and WISCONSIN,

Defendants.

BRIEF OF THE STATES OF MICHIGAN, OHIO and PENNSYLVANIA IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION AND COMPLAINT, AND BRIEF FILED BY COMPLAINANT.

STATE OF MICHIGAN
Paul L. Adams
Attorney General

Samuel J. Torina
Solicitor General

Nicholas V. Olds
Assistant Attorney General

Herbert H. Naujoks
Special Assistant to the Attorneys General

STATE OF OHIO
Mark McElroy
Attorney General

J. Harold Read
Assistant Attorney General

COMMONWEALTH OF PENNSYLVANIA
Anne X Alpern
Attorney General

Lois G. Forer
Deputy Attorney General

SPEAKER-HINES AND THOMAS, INC., LANSING, MICH.—1959

INDEX

INDEX OF CASES CITED

Page

INDEX OF EXHIBITS

INDEX OF STATUTES, CONSTITUTION, AND OTHER DOCUMENTS CITED

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THE JURISDICTION OF THE COURT

The complaint filed by the complainant State of Illinois, asserts that the Court has jurisdiction of the proceedings by virtue of Article III, Section 2 of the Constitution of the United States, and under Title 28 of the United States Code, Section 1251.

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 28, Judiciary and Judicial Procedure, Sections 1251 to 1330, United States Code Annotated.

"Sec. 1251, Original jurisdiction.

(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more states;

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice-consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens."

"Chapter 151 — Declaratory Judgments.

"Sec. 2201, Creation of remedy.

"In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be

sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

As amended Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, Sec. 12 (p.), 72 Stat. 349."

See: United States Code Annotated Title 28, Judiciary and Judicial Procedure, Sections 1961-2280, 1958 cumulative Annual Pocket Part; p. 133.

Chapter 24, Article 81, paragraphs 1 - 8, Part I of the Illinois Revised Statutes, page 734 et seq., (pursuant to which the Elmhurst-Villa Park-Lombard Water Commission was organized) provide, in part as follows:

Art. 81, Paragraph 2.

"* * * the corporate name of the commission shall be '(here insert names of municipalities) Water Commission' and as such the commission may contract and be contracted with, and sue and be sued."

Art. 81, Par. 5.

"Whenever bonds are issued under this article the revenue received from the operation of the properties shall be set aside as collected and deposited in a separate fund to be used only (1) in paying the cost of the operation and maintenance of those properties, (2) in providing an adequate depreciation fund, and (3) in paying the principal of and interest upon the revenue bonds issued by the commission, as provided by this Article."

Art. 81, Par. 8.

"Sales — Contracts. Such commission shall have the right to supply water to any municipality, political subdivision, private person or corporation, in addition to the municipalities which have formed the commission, upon such payment, terms and conditions as may be mutually agreed upon, provided the water is delivered to such party or parties at the corporate limits of the municipalities which have created such commission, or from such water works properties of the commission located outside such municipalities that have been constructed or acquired as necessary and incidental to the furnishing of the water to the municipalities which form the commission."

ARGUMENT

A.

THE MOTION OF THE STATE OF ILLINOIS FOR LEAVE TO FILE A COMPLAINT SHOULD BE DENIED BECAUSE:

1. The State of Illinois is not the real party in interest.

2. The proposed complaint does not present a justiciable controversy between States.

3. No actual "controversy" or "case" exists between complainant State and defendant States.

4. The Bill of Complaint shows neither juridical right nor injury.

5. The Federal Declaratory Judgment Act is not applicable.

1. The Water Commission is the real party in interest, with power to sue and to be sued; the State of Illinois is merely lending its name as complainant for the sole purpose of attempting to bring this suit within the scope of Art. III, Sec. 2, U.S. Constitution.

The Elmhurst-Villa Park-Lombard Water Commission consisting of municipalities located in the Mississippi River watershed, is organized under Ch. 24, Art 81, Vol. 1, pp. 734-736, Ill. Rev. Statutes to sell the water to municipalities, industries and other customers located in the Mississippi River watershed. The water so taken from the Great Lakes watershed, after being used, is to be returned to Salt Creek and the Des Plaines River, located in the Mississippi watershed, and thereafter deposited into the Illinois Waterway, the Mississippi River, and the Gulf of Mexico. The Waterworks, and all needed facilities are to be financed by a revenue bond issue, and the principal and interest of the loan is to amortize solely out of revenue derived from the sale of water taken from Lake Michigan. In these operations the Water Commission operates solely in a private capacity, and thus is no different from any private corporation.

The Illinois law does not require or even permit the three municipalities herein to abstract or divert water from Lake Michigan but merely authorizes such municipalities to form a water commission with authority to obtain and sell water to municipalities, industries and others.

The well settled rule in Illinois, and elsewhere, is that a municipal corporation which owns and operates a water system and which sells water to individuals and others, although engaged in public service, does so in its business or proprietary capacity, and no distinction is to be

drawn between such business whether engaged in by a municipality or a private corporation.

Baltis v. Village of Westchester, 3 Ill. (2d) 388, 397-398,

White v. City of Centralia, Ill., 8 Ill. App. (2d) 483, 487-488, 131 N.E. (2d) 825, (1956)

In the *Baltis* case, supra, the Illinois Supreme Court pointed out:

> "We also have in mind the equally well-established principle that a municipal corporation owning and operating a water system and selling water to individuals, although engaged in a public service, does so in its business or proprietory capacity, not in any governmental capacity, and no distinction is to be drawn between such business whether engaged in by a municipality or by a private corporation. *City of Chicago v. Ames,* 365 Ill. 529; *Rockford Savings and Loan Assn. v. City of Rockford,* 352 Ill. 348; *Sanitary District of Chicago v. Carr,* 304 Ill. 120; *Springfield Gas and Electric Co. v. City of Springfield,* 292 Ill. 236."

The facts in the instant case present a situation which is quite different from the situation involved in *Wisconsin et al. vs. Illinois, et al.,* 278 U.S. 367, (1929). In that case the Illinois law (Act of May 29, 1889, Ill. Session Laws) required the Sanitary District of Chicago to withdraw from Lake Michigan 20,000 cubic feet of water per minute for each 100,000 of population of the Chicago Sanitary District, and that such water be placed in the Sanitary District Canal and passed into the Des Plaines or Illinois rivers and thus permanently diverted from the Great Lakes Basin.

In the present case, the Water Commission is the sole entity that is concerned or affected by the letters written to it by the Attorneys General of the States of Michigan, Ohio and Pennsylvania.

The State of Illinois is merely "fronting" for the Water Commission which is the real party in interest in order that the Water Commission might bring an orginial suit in the United States Supreme Court to determine the right of the Commission to divert permanently water from the Great Lakes watershed.

State of Oklahoma ex rel Johnson vs. Corek, 304 U.S. 387 (1938) was a suit to enforce stockholders statutory liability by a State which had taken legal title to the assets of an insolvent bank which was being liquidated. The fact that the state had claims against nonresident stockholders of the bank by reason of their statutory liability did not entitle such state to maintain an original suit in the Supreme Court, and the fact that a state is the nominal plaintiff is not sufficient to bring the case within the original jurisdiction of the Supreme Court under Article III, Sec. 2, Clause 2.

The original jurisdiction conferred by the U. S. Constitution, Article III, Sec. 2, Clause 2 does not include every case in which the state elects to make itself a party to vindicate the rights of its people or to enforce its own laws or public policy against wrong generally done.

> *State ex rel Oklahoma vs. Atchison, Topeka and Santa Fe Ry.* 220 U.S. 277 (1911)
>
> "The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only."

Louisiana vs. Texas 176 U.S. 1, at 16. (1900)

A state cannot sue on account of the private grievances of its citizens.

> *State of North Dakota ex rel Lemke, Atty. Gen. vs. C.N.W. Ry. Co., et al.,* 257 U.S. 485 at 489 (1922)

In Louisiana vs. Texas, 176 U.S. 1, at 16, (1900), it was pointed out that

> "In order then to maintain jurisdiction of this bill of complaint as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of the grievances of particular individuals."

In the instant suit, the above ruling of the Court is applicable to the situation as disclosed by the complaint and the brief in support thereof.

In *Massachusetts vs. Missouri,* 308 U.S. 1 (1939) it was held that the plaintiff State must have a direct interest in the controversy and that to constitute a "justiciable" controversy between States which would give the United States Supreme Court original jurisdiction it must appear that the complaining state has suffered a wrong through the action of the defendant state furnishing grounds for judicial redress, or is asserting a right against the other state enforceable at common law or in equity.

> *United States vs. West Virginia,* 295 U.S. 463, 470, 471 (1935)

A duty rests upon the Supreme Court to see that the

exercise of its powers is confined within the limits prescribed by the Constitution.

> *State of Texas vs. State of Florida,* 306 U.S. 398, 495, 121 ALR 1179 (1939)

It is the duty of the Supreme Court to inquire of its own motion whether the case is one within its jurisdiction under Act III Par. 2, Clause 2, of the Constitution.

> *State of Texas vs. State of Florida,* 306 U.S. 398, 405 (1939)

The injury of citizens of the State of Illinois (if there were any such injury) is not the injury of the State of Illinois and it cannot be made so for the purpose of conferring jurisdiction on this court. The State of Illinois cannot make its citizens' case its own *"and compel the offending state and its authorities to appear as defendants in an action brought in this court."* *Louisiana v. Texas,* 176 U.S. 1 (1900), *New Hampshire v. Louisiana,* 108 US. 76. (1883), *Oklahoma* v. *Atchison, Topeka & Santa Fe Railroad* 220 U.S. 277 (1911), *Oklahoma ex rel West v. Gulf C. & S. F. Ry.,* 220 U.S. 290 (1911).

2. The bill of complaint herein does not present a justiciable controversy between the State of Illinois and the defendant states which can be decided in this Court under the exercise of its original jurisdiction.

The main purpose of the bill of complaint herein is to enforce alleged rights on behalf of a quasi-municipal corporation created under laws of the State of Illinois authorizing such corporation to sell water the same as other water companies, said water supplies to be taken from Lake Michigan. On its face the complaint shows that the alleged

injury, if any, is to a commission acting in a proprietory or business capacity, and not in a governmental capacity and that there is no "case" or "controversy" between States.

The Eleventh Amendment to the United States constitution provides that:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Referring to this Amendment, Mr. Chief Justice Waite in *New Hampshire vs. Louisiana,* and *New York vs. Louisiana,* 108 U.S. 76, 91, said:

> "The evident purpose of the Amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states, or aliens, without the consent of the state sued, and in our opinion, one state cannot create a controversy with another state within the meaning of that term as used in the judicial clauses of the constitution by assuming the prosecution of debts owing by other states to its citizens." (176 U.S. 1, at 16)

3. No actual "controversy" or "case" exists between complainant State and defendant States.

The complaint alleges (Par. 2) that an actual controversy exists as to the right to withdraw Lake water for domestic purposes for the customers of the Commission and that the defendants have attempted to interfere with this program. Paragraph 2 of the complaint is not accurate. In the letters to the Water Commission (See Appendix to the Complaint)

the Attorneys General of the States of Michigan, Ohio and Pennsylvania merely stated their intentions to institute such proceedings as may be necessary *"to protect its interest for the halting of this proposed abstraction of water from the Great Lakes."* The defendant states did not and do not object the taking of water from Lake Michigan by the Water Commission, provided such water, after being used, is returned to the Great Lakes basin. The information available to defendants indicated that the Water Commission proposed to divert and permanently abstract Lake Michigan water. The pleadings as of now present no justiciable issue or controversy, since the Water Commission is not deprived of the use of Lake Michigan water, if it returns it to the basin from which it came. Moreover the complaint shows no actual injury as of the present time.

To sustain the original jurisdiction of the U. S. Supreme Court a "case" or "controversy" to which the State is a party and which is within the judicial power of the Judiciary Clause of the Constitution must be presented.

Louisiana vs. Texas, 176 U.S. 1 (1900)

In any event, the pending motion and bill seeking a declaratory judgment by the State of Illinois against the defendant States does not lie on the basis of the pleadings herein, since no "controversy" between complainant State and defendant States exists under the facts alleged in the complaint.

In *Massachusetts vs. Missouri,* 308 U.S. 1 (1939) a bill was brought by one State against another State and citizens of the other, which alleged that plaintiff State had assessed a tax on the transfer by death of the estate of one of its own citizens, the satisfaction of which depended upon resort to the intangible assets of the decedent consisting of securities

held by the individual defendants, as trustees, in the defendant State, and which alleged that the defendant State claimed and would exercise a right to levy a like tax upon the transfer of this intangible property, and which prayed to have the respective rights of the two States adjudicated, and for general relief, but which showed that the property was sufficient to answer the claims of both of the States and that the claims were independent so that each State could constitutionally press its own claim without conflict in law, did not present a justiciable controversy between the two States.

4. The bill of complaint shows neither juridicial right nor injury.

As we pointed out in the preceding sections, no actual injury or wrong and no juridicial right is shown herein. An actual right must exist and an invasion of such right with resultant injury must be shown by complainant State before this Court will assume jurisdiction under Article III, Sec. 2 of the United States constitution.

In *United States vs. West Virginia,* 295 U.S. 463 (1935) a suit was brought by the United States against the State of West Virginia and private corporations, to enjoin the construction by the latter of a dam forming part of a hydro-electric project, the bill alleged the stream in question to be a navigable water of the United States, and that the dam would be an unlawful obstruction since it had not been authorized under the Act of March 3, 1899, nor had a license been granted by the Federal Power Commission under the Federal Water Power Act. As grounds for joining the State, it was alleged that the State had licensed the project and, through its officials, was denying the navigability of the stream and claiming that the power to permit and

control its use for the projected purposes resided in the State and not in the United States, and claiming that insofar as the Federal Water Power Act purports to confer upon the Federal Power Commission authority in the premises the Act is an invasion of the sovereign rights of the State and a violation of the United States Constitution.

This Court in the case *United States v. West Virginia,* 259 U.S. 463 (1935) said, in part, at pages 473-474:

> "But there is threatened here, as respects the State, no case of actual or threatened interference with the authority of the United States. At most, the bill states a difference of opinion between the officials of the two governments, whether the rivers are navigable and, consequently, whether there is a power and authority in the Federal Government to control their navigation, and particularly to prevent or control the construction of the Hawks Nest dam, and hence whether a license of the Federal Power Commission is prerequisite to its construction. Only when they become the subject of controversy in the constitutional sense are they susceptible of judicial determination. See *Nashville, C. & St. L. Ry. Co. vs. Wallace,* 288 U.S. 248, 249.
>
> "Until the right is threatened with invasion by acts of the State, which serve both to define the controversy and to establish its existence in the judicial sense, there is no question presented which is justiciable by a Federal Court. See *Fairchild vs. Hughes* 258 U.S. 126, 129, 130; *Texas vs. Interstate Commerce Commission,* 258 U.S. 158, 162; *Massachusetts vs. Mellon,* supra, 483-485; *New Jersey vs. Sargent,* supra, 339, 340.
>
> "General allegations that the State challenges the claim of the United States that the rivers are navigable, and asserts a right superior to that of the United States

> to license their use for power production, raises an issue too vague and ill-defined to admit of judicial determination. They afford no basis for an injunction for perpetually restraining the State from asserting an interest superior or adverse to that of the United States in any dam on the rivers, or in hydro-electric plants in connection with them, or in the production and sale of hydro-electric power the bill fails to disclose any existing controversy within the range of judicial power. See *New Jersey vs. Sargent,* supra, 339, 340."

The Court then went on to say:

> "No effort is made by the Government to sustain the bill under the Declaratory Judgment Act of June 14, 1934, c. 512, 48 Stat. 955. It is enough that that Act is applicable only 'in cases of actual controversy'. It does not purport to alter the character of the controversies which are subject to the judicial power of the Constitution. See *Nashville, C. & St. L. Ry. Co. vs. Wallace,* supra."

It is clear that the case as presented herein is not of such serious magnitude nor is any injury alleged which is clearly and fully proved, so as to warrant this Court to exercise its exclusive and original jurisdiction under established practice. *Missouri v. Illinois,* 200 U.S. 383, 393-394.

Any potential threat of damage or injury, representing only a possibility for the indefinite future is no basis for a decree herein because the Court cannot issue declaratory decrees. *Nebraska v. Wyoming,* 325 U.S. 589, 608 (1945); *Arizona v. California,* 283 U.S. 423, 393-394 (1931).

There is no showing that the health or comfort of the

people of the State of Illinois presently is in any way involved herein.

5. The Federal Declaratory Judgment act is not applicable herein.

The prayer of the Complaint asks that a declaratory judgment of the Court be rendered declaring that the Water Commission is entitled to proceed with its program to withdraw water from Lake Michigan for the domestic uses of the City of Elmhurst, the Villages of Villa Park, and Lombard and other customers and restraining and enjoining defendants from interfering in any manner with the construction of said water supply system in withdrawing water from Lake Michigan.

An examination of the Federal Declaratory Judgment Act shows that it was not intended to apply to the jurisdiction of this Court under Article III, Sec. 2, Clause 2 United States Constitution.

A request for a Declaratory Judgment does not present a "case" or "controversy" under article III, Sec. 2, U. S. Constitution.

United States vs. West Virginia, 295 U.S. 463 (1935)

Texas vs. Interstate Commerce Commission, 258 U.S. 158.

New Jersey vs. Sargent, 269 U.S. 447.

Massachusetts vs. Mellon, 262 U.S. 447.

The gist of the complaint of the State of Illinois is for a declaration or opinion as to the legal rights of the Water Commission relating to the withdrawal of water from Lake

Michigan for the purpose of selling such water to municipalities, industries and individuals.

It is clear that "this Court may not be called on to give advisory opinions or to pronounce declaratory judgments." *Alabama v. Arizona,* 291 U.S. 286 at 291 (1934); *Nebraska v. Wyoming,* 325 U.S. 589, 608 (1945). See also:

Ashwander vs. Tennessee Valley Association, 297 U.S. 288, 324 (1936);

Arizona vs. California, 283 U.S. 423, 462-464 (1931);

Pennsylvania vs. West Virginia, 262 U.S. 553 (1923);

Massachusetts vs. Missouri, 308 U.S. 1, (1939);

United States vs. West Virginia, 295 U.S. 463, 475 (1935)

See also:

Willing vs. Auditorium Ass'n., 277 U.S. 274, 288 (1928);

Liberty Warehouse vs. Grannis, 273 U.S. 70, 73 (1927) *45 Harv. L. Rev. 1089* (April, 1932)

An analysis of the Federal Declaratory Judgment Act shows clearly that that Federal Act was never intended to apply to the original and exclusive jurisdiction provision of Article III, Sec. 2, Clause 2 of the United States Constitution. The last sentence of the Federal Declaratory Judgment Act provides that *"any such declaration shall have the force and effect of a final judgment or a decree and shall be reviewable as such."* What tribunal would review a declaration of rights under the above Act if the Supreme Court entertained such a suit and a review were desired?

The State of Illinois, being unable to present on their own behalf a controversy between States, and thereby invoke the original jurisdiction of this Court, has substituted the claim of the Water Commission for a declaratory judgment under the Federal Declaratory Judgment Act, as the basis for invoking the original jurisdiction of this Court. This is an effort by the State of Illinois to sustain its position by a "boot straps argument".

B.

DISCUSSION OF CASES CITED BY COMPLAINANT AND THE DE MINIMIS DOCTRINE IN GENERAL.

1. *Connecticut v. Massachusetts,* 282 U.S. 660, 673, relating to priority of uses of diverted water is not in point on the facts. *Wyoming v. Colorado,* 298 U.S. 573, 579-581; *Nebraska v. Wyoming,* 325 U.S. 589, 627; all involved states having the rule of priority of appropriation or where the rule was dominant in the areas affected. In *Colorado v. Kansas,* 320 U.S. 383, the special facts governed the decision. *Connecticut v. Massachusetts,* 282 U.S. 660, 669, and *Washington v. Oregon,* 297 U.S. 517, 522, on the point that damage must be shown by the use complained of, also distinguishable on the facts.

If a diversion of 30 to 60[1] cfs from the Great Lakes Basin by nonriparian communities is permitted then a Pandora's box of trouble is opened. With such a precedent, every other community on the Great Lakes could divert unlimited quantities of water from the Great Lakes Basin

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[1] We are informed by our experts that the pipeline contemplated is capable of pumping from Lake Michigan a maximum of 60 cfs by re-pumping methods.

and thus eventually destroy for the Great Lakes a priceless asset. In the past, many Great Lakes communities located in Ohio, Wisconsin, and other states have publicly stated their desire to divert water from the Great Lakes to other watersheds. It would be unreasonable to require the Great Lakes States to wait until such diversions are accomplished and the damage done before the State's rights in such waters may be enforced. The so-called *trickle of today could easily become the torrent of tomorrow* and thereby cause irreparable damage to the Great Lakes States and their residents.

The decision in the case of *Wisconsin v. Illinois,* 278 U.S. 367; 281 U.S. 179, 281 U.S. 696, was based upon conditions as they existed in the year 1930, when most of the raw sewage of the Chicago area was placed in the Chicago Drainage Canal and the Court, as a humanitarian measure, refused to require the domestic pumpage to be returned to Lake Michigan. This decision is no precedent authorizing the Water Commission to divert and permanently remove from the Great Lakes basin water for municipalities, industries and individuals and drain it into another water basin.

For the convenience of the Court there is attached as appendix A to this brief a map of the Great Lakes Basin. This map shows that diversion of water from the Great Lakes to other watersheds could be made from within six states: To the Mississippi River watershed from the states of Minnesota, Wisconsin, Illinois and Indiana, and to the Ohio River watershed from the States of Ohio and Pennsylvania.

Symptomatic of what can and is happening in the Chicago suburban area, there is attached to this brief, appendix B "Engineers' Summary and Conclusions", from the so-called

Meissner Report, published in PURE WATER, Vol. VIII No. 10, October, 1956.

This study was made for the City of Chicago Water Department, and shows, among other things, that in 1953, the population of the City of Chicago was 3,700,000 and the Chicago suburban population served with water by Chicago was 586,000, or a total of 4,286,000 people served with Lake Michigan water by the City of Chicago. The study shows that it is estimated in 1980 the population of Chicago will be 4,260,000 and the suburban population as far west as the Fox River will be 2,720,000, or a total population in 1980 of 6,980,000 that would receive Lake Michigan water from the Chicago water department.

The study notes further that the 1953 pumpage and sales to Chicago and suburbs now served shows that pumpage used by Chicago alone was 918.4 million gallons daily, and the pumpage to the suburbs was 88.2 million gallons daily, of a total of 1,006.6 million gallons daily.

It was estimated, in this study, that the water required in 1980 on an average day will be:

Chicago alone	1,116.1 MGD
Suburbs now served	189.4 MGD
Larger suburban area (to Fox River)	183.6 MGD
A total of	1,489.1 MGD

This would amount to a total domestic pumpage of Lake Michigan water at Chicago of 2300 cfs in contrast to present domestic pumpage of 1,800 cfs.

The purpose of quoting the foregoing figures with respect to the estimated future growth in population and the esti-

mated increase in demand for domestic pumpage from Lake Michigan is to refute the suggestion that the diversion of Lake Michigan water by the Elmhurst-Villa Park-Lombard Water Commission is but a very minor and insignificant act. In addition, if this diversion is allowed, no one knows how many more communities in other states bordering on the Great Lakes will divert water from the Great Lakes to other watersheds.

Moreover, the communities which form the Water Commission should be made to reveal whether they propose to abandon the wells from which they now draw their water for domestic use, and thus rely entirely on Lake Michigan water, or do they propose to take only such needed additional water from Lake Michigan as a supplement to the water from present wells, and whether they plan to obtain additional customers from other communities and industries. The complaint and brief shows that this commission already has additional customers such as the villages of Bensenville, Elk Grove and Addison, Illinois, and there is no limit to the number of new customers the commission may add.

In *Reeves et al v. Jackson,* 207 Ark 1089, 184 SW 2nd 256, 258, it was held that the "de minimis" doctrine does not apply to the invasion of the property of another, citing 26 RCL 762 and annotation of "de minimis" in 44 ALR 168.

2. In the Delaware River case, the court did not apply the doctrine of equitable apportionment.

The brief filed by the Attorney General of Illinois leans heavily on the Delaware River case, New Jersey v. New York, 283 U.S. 336 (1931) in which Pennsylvania intervened, see 280 U.S. 528 (1930). In this case the State of New York was permitted to build huge reservoirs at the

head-waters of the Delaware River within its own borders, and to divert a certain portion of the dammed-up waters to the City of New York for domestic purposes. But a close study not only of the opinion but of the Master's report indicates the following:

(a) New York had to construct at its own expense not only dams but also sewage disposal works to protect this portion of the river against contamination.

(b) It was permitted to divert only the excess flood-waters which were of no use either to Pennsylvania or New Jersey, but to the contrary were harmful during flood periods.

(c) New York was required to release from the various reservoirs sufficient water at all times of the year in order to provide in the Delaware River a minimum volume of flow, even though during the summer months it could receive no water for itself. This provided the river with a flow during the summer greater than that normally prevalent when the water was naturally low.

(d) This arrangement was of great benefit to New Jersey and Pennsylvania and caused no damage whatsoever to the interests of these two states. The doctrine of equitable apportionment was mentioned in the opinions but it should be borne in mind that the diversion was allowed under the severe restrictions mentioned above.

In the instant proceedings, the State of Illinois is conferring no benefits whatsoever on the other States and is inflicting irreparable injury to their interests. The whole State of Illinois, in a state of nature, contributed only 503 cfs of water to the Great Lakes basin, and the State of Illinois is now diverting about 3300 cfs of water from that

basin at Chicago. The real party in interest herein, the Elmhurst-Villa Park-Lombard Water Commission (the member municipalities which are located in the Mississippi Valley watershed) contributes no water to the Great Lakes basin but threatens to divert 30 cfs or more now and probably double that amount in the future. One of the important elements in the doctrine of equitable apportionment is the amount of contribution which the State makes to the quantity of water in the river or lake from which a diversion is desired. The Water Commission communities make no contribution to the Great Lakes watershed.

It should be pointed out that the *Delaware River case, supra,* was not decided on the basis of equitable apportionment but on the basis of equitable principles, namely, the lack of injury to the lower riparian states and the conferring of a benefit upon them.

In *Colorado v. Kansas,* 320 U.S. 383 (1943) at 393-394, the Court in discussing equitable apportionment of water, said:

> "* * * in determining whether one State is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted."

In *Nebraska v. Wyoming,* 325 U.S. 589 (1945), at page 618, the Court referred to the above quoted remarks (in *Colorado v. Kansas,* 320 U.S. 383, 393-4) and said:

> "That case did not involve a controversy between two appropriation states. But if an allocation between appropriation states is to be just and equitable, strict

adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made."

A reading of the foregoing cases shows that the doctrine of equitable apportionment is applied to states having the rule of prior appropriation and not to states (such as Illinois and the other Great Lakes States) adhering to the common law rule of reasonable use based upon riparian ownership. The *Delaware River* case, we submit, is clearly distinguishable from the instant case.

C.

IN ANY EVENT, THE COURT SHOULD NOT ENTERTAIN THE MOTION FILED BY THE STATE OF ILLINOIS UNTIL A GOOD FAITH EFFORT BY THE STATE OF ILLINOIS TO NEGOTIATE WITH DEFENDANT STATES HAS FAILED.

The State of Illinois should not be heard by this Court because it has failed to exert a good faith effort to negotiate with the defendant states, particularly the States of Michigan and Ohio and the Commonwealth of Pennsylvania, with respect to the proposed program to divert water from Lake Michigan by the Elmhurst-Villa Park-Lombard Water Commission and the municipalities composing the same.

This Court is all too familiar with the cases of *Wisconsin et al v. Illinois et al* arising out of the diversion of water at Chicago as well as the pending amended application filed by the States of Wisconsin, Michigan, Ohio, Pennsylvania, New York and Pennsylvania, in which it is sought to compel the State of Illinois and the Sanitary District of Greater Chicago to return to Lake Michigan the domestic pumpage presently abstracted by the City of Chicago but discharged into the Sanitary Canal by the Sanitary District, thence to the Mississippi River basin.

Alarmed at the growing demands for the diversion of more water from Lake Michigan, the Governor of Michigan, G. Mennen Williams, on December 19, 1957 addressed a communication to the Honorable William G. Stratton, Governor of Illinois, copy of which communication is appended hereto as Appendix C. In this letter

the Governor of Michigan enclosed a copy of a memorandum he received from the Attorney General which is also attached and marked Appendix D, and asked the Governor of Illinois for verification of the information that had come to the officials of the State of Michigan concerning the projected extraction of water from Lake Michigan by communities in DuPage County and further asked the Governor of Illinois what he intended to do "to halt this projected additional diversion of water from the Great Lakes — St. Lawrence System".

Receiving no answer to this communication, the Governor of Michigan again on March 11, 1958 sent a communication to the Governor of Illinois, copy of which is attached and marked Appendix E. After calling the attention of the Governor of Illinois to the seriousness of this additional proposed diversion, the Governor of Michigan concluded "It would seem to me that by this time you should have been able to consult with the state and local officials who are concerned with this development and to have ascertained whether this threat is a real one. I sincerely hope that you will realize the gravity of this situation and that you will favor us with a reply to my inquiry". This letter also remained unanswered; in fact to this day the Governor of Michigan has never received any reply to these letters.

Having received no response to these two letters, and discovering from certain publications that the Elmhurst-Villa Park-Lombard Water Commission was proceeding with its program of constructing a pipeline from Lake Michigan at Glencoe, the Attorney General of the State of Michigan, Paul L. Adams, on October 9, 1958 sent by registered mail the letter attached to the motion filed in this cause by the State of Illinois. Copies of this letter were dispatched to the individual communities as well as

to the Governor of Illinois and the Attorney General of Illinois. Letters of similar import were sent to this Water Commission by the State of Ohio and the Commonwealth of Pennsylvania.

Although these letters precipitated a crisis in the plans of the Water Commission, it is significant to note that until that date no official of the State of Illinois from the governor on down and no representatives of the Water Commission made any effort to notify the State of Michigan or the other Great Lakes States of this attempt to further increase the diversion of water from Lake Michigan to the one made by Chicago over which there had been so much controversy.

To keep the record straight, we should like to advise the Court that shortly after receipt of the letter of October 9, 1958 as well as those from Ohio and Pennsylvania, attorneys and officials of the Water Commission made contact with the Attorney General of Michigan and in several conferences urged that these letters be withdrawn and that these three states forego their protest against this new and additional diversion. Their attitude could be expressed thusly: *"Either you withdraw your letters or we will sue you."* In fact, at a conference held in the office of the Attorney General in Lansing, Michigan on December 15, 1958 it was stated by special counsel whose name appears on the motion and brief that he had not come to the meeting to negotiate any differences between us but merely to demand withdrawal of the letter of protest.

Under the Compact Clause of the Constitution, states have the power and authority to settle their differences and controversies by consultation and negotiation. This Court on numerous occasions has adverted to this power

and has counselled the states in controversies of this kind to make reasonable and good faith efforts to resolve their differences by such means.

In *Colorado v. Kansas* 320 U.S. 383, this Court admonished the states in the following language:

> "The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power."

This Court pointed out that the original jurisdiction reposed in it by the Constitution should be exercised only after great caution in controversies between States, by saying:

> "In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a State, for the burden on the complaining State is much greater than that generally required to be borne by private parties. Be-

> fore the court will intervene the case must be of serious magnitude and fully and clearly proved."

That the Court will not ultimately shirk its responsibilities after it is made apparent that genuine and good faith efforts at settlement have proved abortive was again given expression in *Nebraska v. Wyoming* 325 U. S. 589 in which, after referring to its admonitary language in *Colorado v. Kansas,* this Court stated:

> "But the efforts at settlement have failed. Genuine controversy exists. The gravity and importance of the case are apparent."

May we point out that it is the express legislative policy of the State of Illinois to attempt to find solutions to its interstate problems arising out of the use of the waters of the Great Lakes by the approving, adopting and adhering to the Great Lakes Basin Compact which was ratified by the State of Illinois, Act of July 13, 1955 (Laws of 1955, p. 1678; Smith-Hurd Ill. Ann. Stat. Ch. 127, Sec. 192.1). This Compact was adopted by the State of Illinois on March 10, 1955; by the State of Michigan on April 14, 1955; by the State of Minnesota on April 22, 1955; by the State of Wisconsin on June 21, 1955; and by the Commonwealth of Pennsylvania on March 22, 1956.

The Compact creates a Great Lakes Commission which has been a functioning body since 1955 with headquarters at Ann Arbor, Michigan. In Article VII the Compact provides "Each party state agrees to consider the action the Commission recommends in respect to:

* * *

H. Diversion of waters from and into the basin."

The purposes of the Compact are expressed in Article I and we quote the first sentence therefrom:

> "I. To promote the orderly, integrated, and comprehensive development and conservation of the water resources of the Great Lakes Basin (hereafter called the Basin)".

We deem it proper to advise the Court that although the State of Illinois through its legislature has adhered to the principles of this Compact, the administrative officials of that State have never made any effort to utilize the facilities of the Great Lakes Commission for a study, discussion or negotiation with respect to this newly proposed diversion, nor of the general diversion problem at Chicago which has a long and notorious history in the State of Illinois.

In *Kansas v. Colorado,* 186 U.S. 125, p. 146-147, this Court took cognizance of the fact that in cases between the sovereign states of the Union it must resort to principles of international law when the nature of the case requires it. It said:

> "Setting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and *international law,* as the exigencies of the particular case may demand, . . ." (italics ours)

In the instant case, as in the cases involving the diversion at Chicago, this Court is dealing with the reciprocal rights and responsibilities of seven states. Our relations with a foreign power, Canada, are also involved, although that is a matter about which the Solicitor General of the United States should advise the Court. It would seem that a grave responsibility rests upon this Court to use its

constitutional power of original jurisdiction so that the relationships between these states be as peaceful and harmonious as possible and that the area of friction between them be kept at a minimum.

Recently the State Department has evolved certain basic principles that should guide nations having a common boundary with respect to the uses of international waters or a system of international waters. The Great Lakes basin certainly constitutes a system of international and interstate waters. Thus, it seems to us, that the Court should utilize recognized principles of international law which are applicable to systems of international water.

At the request of the chairman of the Senate Committee on Interior and Insular Affairs, the Secretary of State prepared a memorandum on "Legal Aspects of the Use of Systems of International Waters With Reference to Columbia-Kootenay River System under Customary International Law and The Treaty of 1909". This has been printed as Senate Document No. 118 of the 85th Congress, 2nd Session. In the "Foreword" to this document the chairman, Senator James E. Murray, stated:

> "The memorandum submitted in response to my request was a masterful piece of legal research and workmanship in a very difficult and developing field of the law; it has been greeted with intense interest throughout the world by lawyers concerned with the very involved questions of international water law, and the committee on uses of international waters, of the American Bar Association, in a formal memorandum submitted to the section of international and comparative law on May 17, 1958, described it as "a milestone in the field of international water law."

"All over the world problems of rivers flowing across international boundaries are arising to add tension and discord to the relationships between neighboring nations. On a shrinking globe whose international relations are already so tense and discordant as to threaten the survival of the race, any work which strengthens and supports the growing body of the law of nations is most assuredly a contribution to human welfare and world stability and progress."

Now, what are the legal principles that should be applied in the field of international law with respect to rights and responsibilities of neighboring countries on the use of a system of waters which is common to or affects them all? The conclusions are contained on pages 89-91 of this document and are summarized as follows:

1. "A riparian has the sovereign right to make maximum use of the part of a system of international waters within its jurisdiction, consistent with the corresponding right of each coriparian."

2. (a) "Riparians are entitled to share in the use and benefits of a system of international waters on a just and reasonable basis.

(b) "In determining what is just and reasonable account is to be taken of rights arising out of —

(1) Agreements,

(2) Judgments and awards, and

(3) Established lawful and beneficial uses; and of other considerations such as —

(4) The development of the system that has al-

ready taken place and the possible future development, in the light of what is a reasonable use of the water by each riparian;

(5) The extent of the dependence of each riparian upon the waters in question; and

(6) Comparison of the economic and social gains accruing, from the various possible uses of the waters in question, to each riparian and to the entire area dependent upon the waters in question.

3. (a) A riparian which proposes to make, or allow, a change in the existing regime of a system of international waters which could interfere with the realization by a coriparian of its right to share on a just and reasonable basis in the use and benefits of the system, is under a duty to give the coriparian an opportunity to object.

(b) If the coriparian, in good faith, objects and demonstrates its willingness to reach a prompt and just solution by the pacific means envisaged in article 33 (1) of the Charter of the United Nations, a riparian is under a duty to refrain from making, or allowing, such change, pending agreement or other solution."

We wish to call the Court's particular attention to the comment which follows each of these principles. From the comment under No. 3 we should like to emphasize the following language:

"The crux of this aspect of the matter is that friendly states desirous of conducting their mutual relations in good faith under the rule of the law do in fact —

seek solution by negotiation, enquiry, mediation, con-

ciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice —

as envisaged in article 33 (1) of the United Nations Charter.

"Riparians are also doubtless motivated to seek agreement because of recognition that under the international law of responsibility of states, a riparian which alters the character of the bed or flow of a system of international waters is responsible if injury is thereby caused to a coriparian. The concept of injury in international law is very complex; and it is difficult to set an absolute limit beyond which the injury is sufficient to provide legitimate grounds for opposing action taken by a riparian. Moreover, responsibility means a duty to make reparation for an injury; and reparation may consist of pecuniary or specific restitution, specific performance, monetary damages, or some combination of these. It might be a vast responsibility to make pecuniary reparation or restore a status quo. Consequently, it is very important that riparians come to an agreement in advance, so that such responsibility would not arise. Their agreement upon the distribution of benefits is in effect an indemnification in advance."

The compact clause in our constitution was placed therein not as so many idle words but for a highly benificient purpose — that of providing a vehicle by which disputes and controversies between our quasi-sovereign states could be settled by "*negotiation, enquiry, mediation, conciliation, arbitration,* judicial settlement, *resort to regional arrangements, or other peaceful means of their own choice*" — in

the same manner as is provided in the United Nation's charter.

On March 2 and 3 this year the Solicitor General of the United States, J. Lee Rankin, called a conference of all the states involved in this case. Although the main purpose of the conference was to explore and discuss with us the issues in the pending amended application filed by the defendants herein in the consolidated cases of Wisconsin et al vs. Illinois et al at the conclusion he suggested to the representatives of all these states that they make an attempt at exploring the possibilities of arriving at an amicable and satisfactory solution and thus avoid the appointment of a master with its attendant expenses.

On March 6, 1959, Mr. Paul L. Adams, Attorney General of Michigan on behalf of all the states defendants herein (complainants in the consolidated case, Wisconsin, et al vs. Illinois, et al) addressed a letter to Latham Castle, Attorney General of Illinois, a copy of which was sent to George A. Lane, Attorney for the Sanitary District; Ernest Buehler, Assistant Corporation Counsel for the City of Chicago; William C. Wines, Assistant Attorney General for the State of Illinois; Russell Root, Attorney for the Sanitary District; Robert L. Stern, Special Counsel for the Sanitary District of Greater Chicago; Thomas M. Thomas, Special Counsel for the Sanitary District; Joseph H. Pleck, Special Counsel for the Sanitary District; Peter J. Kuh, Senior Assistant Attorney for the Sanitary District; and Laurence J. Fenton, Principal Assistant Attorney for the Sanitary District, in which it was stated:

> "At the conclusion of the conference held in the office of Mr. J. Lee Rankin, Solicitor General of the United States on Tuesday, March 3, Mr. Rankin suggested to all of us that we consider the possibility

of holding a conference attended by duly designated representatives of all of the Great Lakes states for the purpose of discussing all the problems relating to the diversion of water from Lake Michigan by the State of Illinois and its municipalities. It was Mr. Rankin's hope that there might be a possibility that the differences among us could be explored, and some satisfactory solution found that would obviate the necessity of the appointment of a master by the Supreme Court. I have discussed this suggestion with the other Great Lakes states and may I inform you that all of us view this suggestion with favor.

"Will you please let me know as soon as possible what your views are with respect to Mr. Rankin's suggestion?"

On March 16, 1959 he received the following reply from Mr. Castle:

"Honorable Paul L. Adams
Attorney General of Michigan
Lansing, Michigan

Re: Wisconsin et al v. Illinois
and Chicago Sanitary District

"Dear General:

"This is in reply to your letter of March 6, 1959, the receipt of which I have previously acknowledged.

"I am always glad to discuss any pending matter with a view to its disposition and should be happy to confer with Attorneys General and other representatives of the complainant States in the pending matters. However, in any such conferences, the ex-

igencies of Illinois with respect to Lake Michigan's waters are such that Illinois *would remain steadfast in her support of House Bill No. 1 and in her position that she is entitled to take domestic pumpage from the Lakes without returning any part thereof to Lake Michigan.* These requirements are minimal for Illinois' need for water.

"My staff and that of the Sanitary District would be happy to discuss with you the matter of inspections and sampling of the waters involved.

"Please accept my kindest personal regards.

Yours very truly,
/s/ LATHAM CASTLE
Attorney General"

If this Court expects to make effective its admonishment expressed in *Colorado vs. Kansas* — that states should first exert themselves in finding amicable solutions of these controversies by negotiation and conciliation, — then one means by which this could be done would be to refuse to entertain original jurisdiction until efforts conducted in good faith for settlement have proved abortive.

It is self-evident that the tenor of the letter dated March 16 from Latham Castle, Attorney General of Illinois, hardly allows any room for "good faith" negotiations since it precludes any discussion of the very issues which are the subject of controversy in the instant case.

In the instant case a statutory corporate entity of the State of Illinois has proposed to divert water from the Great Lakes Basin into another watershed. The Governor of Michigan sent two letters of inquiry to the Gov-

ernor of Illinois which were utterly ignored by the executive head of that State. No public official from the State of Illinois made any effort to advise the other sister states on the Great Lakes of these proposals and it was discovered only by sheer accident that the plans were maturing to the point where this water commission was about to let contracts and sell the bonds for the financing of the project. Whereupon the Attorneys General of Michigan, Ohio and Pennsylvania sent letters of protest to the water commission and the municipalities composing it. Thereafter, these people's sole and only purpose of communicating with the attorneys general of these States was to induce them to withdraw their letters or, otherwise, *they would be sued.* This is not a good faith effort to negotiate but is merely the sending of an ultimatum — *either you do our bidding or we will declare war.*

Needless to say, this hardly comports with the proper attitude with which friendly nations conduct their foreign affairs, let alone that which should prevail between sister states belonging to our federal union.

D.

DISCUSSION OF MOTION TO ADVANCE AND FOR SUMMARY DECREE.

The State of Illinois recently filed a motion to advance and for summary decree, claiming that there are no issues of fact and law involved in this purported litigation and that the water requirements of these municipalities are such that admit of no delay.

Aside from the serious constitutional and legal issues which are certainly critical as disclosed in this brief, we

submit that there are important factual issues about which this Court should make inquiry:

1. Is the need here for water from Lake Michigan so serious as is made out in Plaintiff's Motion? Although it is so alleged, is this Court going to accept this mere allegation as proved? What explorations have these municipalities made for new and additional ground water supplies. We are informed that other municipalities in this area secure sufficient water from the ground and need not go to Lake Michigan. Full information is not disclosed and the defendants are entitled to make a critical study by their experts of the explorations conducted by these municipalities.

2. Do these municipalities intend to abandon their present wells and rely entirely on Lake Michigan water? This is apparently what their plans are, but the defendants are entitled to a full and complete disclosure in this respect.

3. Should not these municipalities be compelled to make a study of the possibility of making the fullest utilization of their present ground and surface water resources such as might be provided by the flow of the Des Plaines river, which runs through them, and the Fox river which is only a few miles to the west of these municipalities, — and then, under proper safeguards and restrictions, secure Lake Michigan water only as a supplemental supply.

4. Have these municipalities made a study of whether it is feasible and what it would cost to return the water they expect to abstract from Lake Michigan to that Lake.

5. Have these municipalities made a study of what arrangements could be effected with the Sanitary District

of Chicago to turn their effluent over to that District — thus making it subject to the orders of this Court in the pending amended application in the cases of *Wisconsin, et al v. Illinois et al?*

These are only some of the questions which this Court should inquire into before coming to a final decision, in the event, of course, that it decides to accept jurisdiction in this case.

The State of Illinois cannot escape responsibility, since it has assumed the duty, rightly or wrongly, to front for this water commission and its municipalities. It is the same state which on one hand says that the amount of water to be diverted here is so minimal as to be inconsequential and thus should not be returned to Lake Michigan, and on the other hand says that the problem of supplying Chicago with "domestic pumpage" is so enormous that nothing can be done to return that water to Lake Michigan except at great costs. This reminds us of the Mother Goose rhyme:

Jack Sprat could eat no fat
His wife could eat no lean,
But between the both of them
They swept the platter clean.

Unfortunately this court in 1930 in the consolidated cases of *Wisconsin et al v. Illinois et al,* 278 U.S. 367 and 281 U.S. — 179 was faced with a *fait accompli.* For years the City of Chicago had been withdrawing water from Lake Michigan for "domestic pumpage" and then after use, turning it over to the Sanitary District of Chicago for discharge into the Sanitary Canal.

This is not true in the instant case. Not a shovel full

of earth has yet been turned. This Court can view this case without being hampered by accomplished facts. These non-riparian municipalities claim they can't grow in population unless they secure additional water, ostensibly from Lake Michigan. Are they, as non-riparians, entitled to such water? Do they have the right to grow at the expense of water resources which belong to others and in which the other Great Lake States, the Federal Government and Canada have a vital interest?

These are not "minimal" questions, but questions the answers to which by this Court will affect the welfare and prosperity of millions of people residing in the Great Lakes Basin.

The procedure to be followed in cases of original jurisdiction are not governed by rule but by case by case orders issued by this court. On this subject, following is the text found in Supreme Court Practice by Sterm & Gressman 2nd Ed., 1954 Rules: pp 274-5.

> "(1) The Court may deny leave to file, without more, which ends the case.
>
> "(2) The Court may order argument on the motion for leave to file. This course is often followed when only a point of law is involved. The argument on the motion for leave to file may relate either to jurisdictional issues or to the merits of the case. *Alabama v. Texas,* 347 U. S. 272. When an argument is ordered, any party who has not done so should file a brief.
>
> "(3) The Court may grant the motion for leave to file and order argument on the merits of the case,

or on specified points of law. This procedure is likely to be followed when the questions presented are legal rather than factual.

"(4) The Court may grant the motion for leave to file, and direct that process be served on the defendant. The case then follows the course of an ordinary lawsuit in a trial court. Defendant may move to dismiss the complaint, or file an answer. Other motions, such as motions for judgment on the pleadings or for summary judgment, are permissible. If no questions of fact are presented, the Court will set the case for argument. But 'The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts.' *United States v. Texas,* 339 U. S. 707, 715. Thus if factual issues appear, the Court will generally appoint a Master to take the evidence and submit his findings and recommendations. See, for example, *Texas v. New Mexico,* 344 U. S. 906. The parties will have an opportunity to take depositions, to introduce other evidence and to argue before the Master, file exceptions to his findings and report, and present arguments and briefs to the Court before the Court's final decision. When the case comes before the Court for argument, the Rules governing cases on the appellate docket are applicable to the brief and the oral argument. See Chapters X and XI, pp. 293, *et seq., infra.*

"(5) The Court may continue the motion for leave to file until other pending litigation is concluded, which might resolve the whole controversy and leave no federal issues for the Supreme Court. *Arkansas v.*

Texas, 346 U. S. 368. See also *Kentucky v. Indiana,* 281 U. S. 163, 177."

We submit that this procedure calls for a denial of complainants motion to advance and summary judgment.

Conclusion

It is respectfully urged that this Court deny the motion for leave to file the complaint because:

(1) The complainant State of Illinois is not the real party in interest;

(2) The proposed complaint does not present a justiciable controversy between States.

(3) No actual 'case' or 'controversy' exists;

(4) The complaint shows neither juridical right nor any injury; and

(5) The Federal Declaratory Judgment Act is not applicable to the exercise of the exclusive and original jurisdiction of this Court under Article III, Clause 2, paragraph 2 of the United States Constitution.

It is further respectfully urged, in any event, that before this Court assumes jurisdiction of the proceedings herein, it should require the parties complainant and defendant to attempt in good faith to settle their differences by "negotiation, inquiry, mediation, conciliation, arbitration * * * or other peaceful means of their own choice;"[2] and in that case it should require the State of Illinois, the water commission and the municipalities to disclose fully with respect to the questions and matters set forth in Section D of this brief.

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[2]

For discussion of the compact clause, see Marquette Law Review. Vol. 36, 1952-53, No. 3, p. 219. "Compacts and Agreements Between States and Between States and a Foreign Power."

The Great Lakes water system constitutes the largest inland commercial highway in the world, with freight rates on water-borne cargo that are astonishingly low. An efficient and magnificent industrial empire has been built in the Great Lakes region. Nearly forty million people live in the Great Lakes area. Involved in this case are the correlative and common rights of the other seven states, of the Federal Government, and of a friendly neighboring nation, all of whom have great and enormous stakes in the waters comprising this great basin. In view of recent developments in this basin of great magnitude which are of public knowledge, the Great Lakes Basin needs "every drop of water" which naturally belongs to it.

We do not believe that this Court should sanction an additional diversion of water from the Great Lakes by the unilateral action of non-riparian municipalities of the State of Illinois to the injury of the rights of other Great Lakes States, the Federal Government and Canada.

We therefore respectfully submit that the motion for leave to file a complaint should be denied.

Respectfully submitted,

STATE OF MICHIGAN
Paul L. Adams
Attorney General

Samuel J. Torina
Solicitor General

Nicholas V. Olds
Assistant Attorney General

Herbert H. Naujoks
Special Assistant to the Attorneys General

STATE OF OHIO
Mark McElroy
Attorney General
H. Harold Read
Assistant Attorney General

COMMONWEALTH OF PENNSYLVANIA
Anne X Alpern
Attorney General
Lois G. Forer
Deputy Attorney General

APPENDICES

GREAT LAKES—ST. LAWRENCE RIVER DRAINAGE SYSTEM

SCALE OF MILES

25 0 25 50 75 100 125 150 175

Ogoki River To Hudson Bay
Dam
Dam
Diversions into Lake Superior.
Kenogami River To Hudson Bay
LAKE NIPIGON
Dam
Power Houses
Nipigon River
Long Lake
Dam
Aguasabon River
International Boundary
PORT ARTHUR
MINNESOTA
St. Louis River
DULUTH
SUPERIOR
LAKE SUPERIOR
Deepest sounding
HOUGHTON
MARQUETTE
ONTARIO
DIVIDE BETWEEN GREAT LAKES DRAINAGE BASIN AND OTHER DRAINAGE BASINS
Navigation Locks. Regulating works and power diversions.
Point Iroquois
SAULT STE MARIE
St. Marys River
WISCONSIN
ESCANABA
GREEN BAY
STRAITS OF MACKINAC
LAKE MICHIGAN
LAKE HURON
International Boundary
Deepest sounding
Sturgeon Point
Deepest sounding
GEORGIAN BAY
FRENCH RIVER
MONTREAL
Gut Dam
OGDENSBURG
St. Regis River
MILWAUKEE
MUSKEGON
BAY CITY
PORT HURON
St. Clair River
TORONTO
LAKE ONTARIO
Deepest sounding
OSWEGO
Burlington Bay
Port Dalhousie
NIAGARA FALLS
ROCHESTER
New York Canal
Power diversions.
Navigation and power diversion
Niagara River
Navigation and power diversion into New York Canals.
WELLAND CANAL
BUFFALO
Diversion from Lake Michigan into Mississippi River Basin
CHICAGO
Sanitary canal
To Mississippi River
DETROIT
Lake St. Clair
Detroit River
Deepest sounding
LAKE ERIE
TOLEDO
CLEVELAND
ILLINOIS
INDIANA
OHIO
PENNSYLVANIA
NEW YORK
DIVIDE BETWEEN GREAT LAKES DRAINAGE BASIN AND OTHER DRAINAGE BASINS

Army-U.S. Lake Survey Detroit-Litho.1957

Appendix "A"

Appendix "B"

PART 1

ENGINEERS' SUMMARY AND CONCLUSIONS

In accordance with the authorization of James W. Jardine, Commissioner of Department of Water and Sewers, City of Chicago, we have studied the matter of the feasibility and cost of extended water supply service by Chicago to the suburban area. Having completed our study, we take pleasure in reporting as follows:

This suburban area surrounds the City of Chicago and extends outward twenty to thiry miles, including the Fox River cities. For practicable reasons, later stated, the Indiana cities and the Lake Shore cities north of Chicago, have been excluded from the study. The area studied lies principally in Cook County but also lies partly in Will, DuPage and Kane Counties.

Although a few of the suburban communities are quite old, substantial growth began about 1890. Since then growth has been rapid. Each city and village has its own system of public water works. Originally each water works obtained its supply from wells. This water while clear and pure is very hard and has become increasingly costly and difficult to secure in the larger concentrations of population.

Beginning in 1908 the larger towns close to the city limits began the purchase of Chicago city water; piped from Chicago city limits through mains financed by each town, and repumped by the town through its pipes for the supply of its citizens. *At the time of this study, 51*

such towns, all lying within the Sanitary District of Chicago, obtain this service, buying the water at wholesale, at the same rate per thousand gallons, as charged to all metered water users in Chicago, in conformiy with the State laws under which the Sanitary District of Chicago was formed. (Emphasis added)

This means of supply to the suburbs as a whole is inadequate to meet the requirements because many of the towns in need of additional water supply are outside the Sanitary District; it also becomes uneconomical and sometimes impracticable for each town to build a separate pipe line to the Chicago city limits. Although where towns are close together one town can, and does, sell purchased water to another, this system breaks down ultimately as the towns grow. Most individual communities have not practiced advance planning and in periods of rapid growth where the present and future appear to converge, suburban water service has frequently been inadequate.

During th dry summer of 1953 water conditions in many suburbs were particularly acute, primarily because of the inability to transport the water from the Chicago limits to areas of use.

All adequate water works systems must be designed to give adequate service on maximum consumption days in exceptional years. As a practical matter the investment must be made well in advance of need, on a predetermined program. All cities are growing, and particularly suburban areas around Metropolitan centers.

Thus it appears that an adequate and economical future supply for the greater Chicago suburbs would require a central authority with power to serve and authority and

responsibility to plan and to finance construction well in advance of need.

It has been the purpose of this report to consider the feasibility of Chicago as this central authority. It has an unlimited supply of water in Lake Michigan. It is already supplying 42 per cent of the population in the greater Chicago Suburban Area, and about 73 per cent of the suburban population most likely to desire Chicago water in the near future. It has the credit to finance necessary construction if backed by remunerative revenues and suitable legislation. It is better able to finance such capital improvements as are necessary to furnsh such supplies to the Metropolitan area than can another agency. In addition, Chicago is the only unit in the region which has a large working organization competent to cope with the problems of operation, maintenance and construction of water supply facilities; and also the experienced engineering staff and know-how capable of coping with the various problems involved in extending adequate water service to the Metropolitan area.

It has been our purpose to show the magnitude of the problem, its cost, and whether or not remunerative rates from water sales may be such that it would be of interest to the towns to buy such water at wholesale, to be distributed by the towns to their people. There is no thought to take over the local distribution of the water. This is a service well established, in the several towns, which they would be loath to abandon.

1. Population

(a) The suburban population now (1953) served with water by Chicago is estimated at ..... 586,000.

This is 16% of the population of the present City of Chicago (3,700,000) and 14% of the total population served with Chicago water.

(b) The present population of the suburban area from the Chicago limits to and including the *Fox River* towns is estimated at about ..... 1,394,400.

This is 38 per cent of Chicago's population.

(c) It is estimated that in 1980 the population of Chicago will be ..... 4,260,000.

and that the population of the larger suburban area as far west as the Fox River will be ..... 2,720,000.

The suburban population will then be 65% as large as that of Chicago.

2. *Average Day's Water Requirements*

(a) The 1953 record of pumpage and sales to suburbs now served shows that pumpage used by Chicago alone was ..... 918.4 MGD.*

*MGD means million gallons per day.

and pumpage to suburbs was ..... 88.2 MGD

A total of ..... 1,006.6 MGD

This *average day* serves as a guide to revenues.

(b) If all the suburban area as far west as Fox River should be served at this time (1953) the average pumpage would be:

Chicago alone	918.4 MGD
Suburbs now served	88.2 MGD
Larger Suburban Area (to Fox River).	76.4 MGD
A total of	1,083.0 MGD

(c) We estimated that the water required in 1980 on an *average day* will be:

Chicago alone	1,116.1 MGD 1730 cfs
Suburbs now served	189.4 MGD
Larger suburban area (to Fox River).	183.6 MGD
A total of	1,489.1 MGD 2300 cfs

All the above figures assume that *all* communities will buy the Chicago water.

(d) Just as at the present time many suburbs have independent sources of supply, many, particularly those more distant from Chicago to the west, will continue independent for many years. It is believed that by 1980 the suburban population taking water from Lake Michigan will reach about 1,700,000 or 29% of the total population then supplied by Chicago. It is believed that these suburbs using Lake Michigan water by 1980 will require about 263 MGD or 19% of the total requirement of 1379 MGD for the average day.

(e) Approximately 60% of the increased number of people using Lake Michigan water in the next 25 years will live outside of Chicago.

Of the increase in average day's water use in the next 25 years the suburban areas will account for 46.7%

3. Maximum Day's Water Requirements

The year 1953 experienced the maximum day's pumpage recorded on the Chicago water system and the most wide spread deficiencies in suburban water service.

(a) In 1953 the maximum day's pumpage on the Chicago Water System was.... 1,470.2 MG

(b) Of this total the City of Chicago used.. 1,329.1 MG
and
The suburban areas used ..... 141.1 MG
or 9.6%

(c) By 1980 it is estimated that the maximum day's requirements will be ..... 2,217 MG
3400+ cfs

(d) Of this total the City of Chicago will use ..... 1,760 MG
2720 cfs
and
The suburban areas will use ..... 457 MG
or 20.6% 706 cfs

(e) Of the increase in maximum day's use in the next 25 years the suburban areas will account for 42½%.

It is the *maximum day's* use that pri-

marily determines plant additions and investment in property.

4. *Present Water Supplies of the Suburban Area*

Fifty-one suburbs are now served with Chicago water.

The others have well supplies. Shallow wells are practicable in a belt about ten miles in width located *principally in DuPage County and extending northwesterly to Elgin.* This area along with the area further west will probably be the last to seek Lake Michigan water. Those communities east of this area where only deep sandstone water is available and the water level is receding rapidly will probably all want Lake Michigan water at an early date.

5. *Present Cost of Chicago Water to the Suburbs*

Under conditions prevailing in 1955, prior to the large expenditures for capital improvements, including the Central District Filtration Plant, water could be sold by Chicago to the suburbs at the following rates which would be fair to both City and suburbs:

(a) Communities adjoining Chicago and having adequate connections — 12¢ per 1000 gals.

(b) Communities now served, but inadequately, requiring additional mains—14¢ to 15¢ per 1000 gals.

(c) *Communities not now served but that can be served Chicago water without repumping including those as far from Chicago as Des Plaines, Bellwood, Lyons and East Hazelcrest* at 17¢ per 1000 gals.

(d) Communities not now served but more distant from Chicago than those in (c) above and which require

repumping for adequate pressure — 20¢ per 1000 gals. This group includes such suburbs as *Arlington Heights, Elmhurst, LaGrange, Chicago Heights* and *Park Forest.*

6. *Additional Plant and Investment Required*

Each part of the Chicago Water Works has been studied to determine the construction and the investment required to serve the forecasted needs of the year 1980 for the City and the suburbs likely to be taking Lake Michigan water at that time, with the following results:—

(a) *Intakes* — With the shore intake being provided at the Central District Filtration Plant no other intake construction will be required.

(b) *Tunnel System* — With the completion of the 16 foot tunnel from Chicago Avenue to Lakeview, the 16 foot tunnel recently authorized in 79th Street and the 12 foot tunnel extension to serve the new southwest station, there will be no other tunnels needed until 1975 or 1980.

The three tunnels above named will cost approximately $35,000,000.

(c) *Filtration Plants*

The Central District Plant now under construction is estimated to cost about $70,000,000 exclusive of tunnels. The South District Plant should be enlarged by 80 MGD at an early date followed with a second 80 MGD addition about 1970, at a total estimated cost of $11,250,000.

(d) *Pumping Stations*

The City is now engaged in a program of pumping station betterments estimated to cost $15,000,000 to 1960.

Present stations will need 360 MGD of additional pumping equipment prior to 1970. The southwest station with 230 MGD of equipment must be constructed soon. The estimated cost of the above additions to the 1960 program is $4,981,000.

Appendix "C"

December 19, 1957

Honorable William G. Stratton
Governor of Illinois
The Capitol
Springfield, Illinois

My Dear Governor Stratton:

I am enclosing a copy of a letter which I have received from Attorney General, Thomas M. Kavanagh, with reference to an additional diversion of water from the Great Lakes watershed to the Mississippi watershed.

Would you kindly advise me whether we are correct in assuming that the water which would be extracted from Lake Michigan by the Du Page county water commission will ultimately find its way into the Mississippi watershed rather than be returned to Lake Michigan and if so, what you as Governor of Illinois intend to do to halt this projected additional diversion of water from the Great Lakes-St. Lawrence system.

An early reply would be appreciated.

Very sincerely yours,
/s/ G. Mennen Williams
Governor

jw
enclosure

Appendix "D"

December 19, 1957

Honorable G. Mennen Williams
Governor of Michigan
The Capitol
Lansing, Michigan

My Dear Governor Williams:

This letter is prompted by an item that appeared in the Chicago Sunday Tribune, issue of December 1, 1957, entitled "Water Group Buys Strip of Land on Lake," a varifax copy of which is enclosed.

As we understand it, the Du Page county water commission was organized for the purpose of abstracting water from Lake Michigan, processing it through its filtration plant and supplying it to a group of communities of which Elmhurst, Villa Park, and Lombard are a part. These communities, as you know, are situated on the Mississippi River watershed and consequently it is reasonably expected that once this water is used it will be discharged into sewers and conduits to a sewage disposal plant which in turn will discharge the treated effluent either into the Du Page River or the Des Plaines River. Both streams, of course are within the Mississippi River Valley watershed.

Consequently this is another instance of diversion of water from the Great Lakes watershed to the Mississippi watershed, augmenting again the present diversion caused by the Metropolitan Sanitary District of Greater Chicago originating in the form of domestic pumpage.

I would like to invite your attention to paragraphs 1,

2, and 3 of the decree of the Supreme Court of the United States dated April 21, 1930, which read as follows:

> "1. On and after July 1, 1930, the defendants, the State of Illinois and the Sanitary District of Chicago, are enjoined from diverting any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels or otherwise in excess of an annual average of 6,500 cfs in addition to domestic pumpage.
>
> "2. That on and after December 31, 1935, unless good cause be shown to the contrary the said defendants are enjoined from diverting as above in excess of an annual average of 5,000 cfs in addition to domestic pumpage.
>
> "3. That on and after December 31, 1938, the said defendants are enjoined from diverting as above in excess of an annual average of 1,500 cfs in addition to domestic pumpage."

Inasmuch as this decree was directed against the State of Illinois as well as the Sanitary District of Chicago, it is my view that it enjoins the State of Illinois from diverting water out of the Great Lakes-St. Lawrence system "to the Chicago Drainage canal and its auxiliary channels or **otherwise.**" Nevertheless we are greatly concerned about the proposed diversions undertaken by other municipalities of the State of Illinois besides the present diversion for which the Sanitary District of Chicago is responsible.

Therefore, I would like to have you find out from Governor Stratton whether we are correct in assuming that the water which would be extracted from Lake Michigan by the Du Page county water commission will ultimately find

its way into the Mississippi River watershed rather than be returned to Lake Michigan; and if no, what he, as Governor of the State of Illinois, intends to do to halt this projected additional diversion of water from the Great Lakes-St. Lawrence system.

I am sending a copy of this letter to the Attorneys General of Minnesota, Wisconsin, Ohio, Pennsylvania, and New York so that they may be informed of this matter.

Very sincerely yours,
/s/ Thomas M. Kavanagh
Attorney General

jw
cc: Hon. Louis J. Lefkowitz
Hon. Stewart O. Honek
Hon. Thomas D. McBride
Hon. William Saxbe

Appendix "E"

March 11, 1958

Honorable William G. Stratton
Governor of Illinois
The Capitol
Springfield, Illinois

My dear Governor Stratton:

On February 19, 1957* I addressed a communication to you calling your attention to a memorandum which I had received from the Attorney General of the State of Michigan with reference to an additional diversion of water from the Great Lakes basin to the Mississippi watershed that could result from a proposal by the DuPage County Water Commission to abstract water from Lake Michigan and supply it to a group of communities located on the Mississippi side of the divide.

Up to this date I have not had a reply from you. The purpose of my writing to you at that time was to ascertain whether the information that had come to me was accurate, and if so, what action you as Governor of Illinois would propose.

In view of the fact that the Greater Chicago Metropolitan District has expanded considerably over the past two decades, and expects to keep on expanding in the future, the present diversion of water through the Sanitary and Ship canal will undoubtedly increase. The construction of the St. Lawrence Seaway with its attendant increase in ship traffic requiring greater depths of water will make it imperative that my State as well as the other Great Lakes States be on the alert for and oppose vigorously any new

and additional effort of water diversion from the Great Lakes basin.

It would seem to me that by this time you should have been able to consult with the state and local officials who are concerned with this development and to have ascertained whether this threat is a real one. I sincerely hope that you will realize the gravity of this situation and that you will favor me with a reply to my inquiry.

Sincerely yours,
/s/ G. Mennen Williams
Governor

* Statement was erroneous — should have read "December 19, 1957".