No. 15 Original

IN THE
Supreme Court of the United States

October Term, 1958

STATE OF ILLINOIS,
Complainant

v.

STATES OF MICHIGAN, OHIO, PENNSYLVANIA, MINNESOTA, NEW YORK AND WISCONSIN,
Defendants

SUPPLEMENTAL BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION AND COMPLAINT

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PRELIMINARY STATEMENT

The Commonwealth of Pennsylvania joins in the brief filed by the States of Michigan, Ohio and Pennsylvania. This supplemental brief is filed to call to the Court's attention additional arguments in opposition to the motions of the State of Illinois.

I. THE STATE OF ILLINOIS IS NOT A PROPER PARTY PLAINTIFF AND HENCE THE ORIGINAL JURISDICTION OF THIS COURT IS NOT PROPERLY INVOKED

The Elmhurst-Villa Park-Lombard Water Commission, organized pursuant to Illinois law, is not an official instrumentality of the State and any injury allegedly suffered by it is not an injury to the State of Illinois. In *Arkansas v. Texas,* 346 U. S. 368, 74 S. Ct. 109, 98 L. Ed. 80 (1953), this Court pointed out that by statute the University of Arkansas was made an official state instrumentality and, therefore, the State of Arkansas on its behalf could bring an original action before this Honorable Court. There is nothing in the Illinois statute which gives to the Water Commission such standing under Illinois law. The Illinois statute permits the formation of a water commission by various municipalities and authorizes such commission to obtain and sell water to the

municipalities, industries and other consumers. Nothing in this statute authorizes or requires a water commission to obtain water from outside its own watershed and to divert waters from one watershed to another. Even if the Illinois courts were to construe this statute to permit such a taking and diversion in contravention of the riparian water law of Illinois, it is clear that no state statute could authorize a taking or diversion of interstate waters to the detriment of the other states. Until there has been a determination by the highest court of Illinois that this statute requires the Commission to act on behalf of and as an agency of the State of Illinois and to divert interstate waters, Illinois cannot assert a sovereign right in this Court with respect to the proposed activities of the Water Commission. There is no reason why the Water Commission itself cannot bring actions in the appropriate district courts to test any claim or right which it asserts with respect to these interstate waters.

II. NO CASE OR CONTROVERSY IS PRESENTED BY THE INSTANT COMPLAINT

This issue is fully discussed in the brief filed on behalf of the States of Michigan, Ohio and Pennsylvania.

III. THE DECLARATORY JUDGMENTS ACT IS INAPPLICABLE TO CASES ARISING UNDER THE ORIGINAL JURISDICTION OF THE UNITED STATES SUPREME COURT

This is the first reported case in which it is sought to invoke the Declaratory Judgments Act in an original action in the United States Supreme Court. Although the statute is phrased broadly to include "any court" of the United States, it is significant that no commentator has ever assumed or even considered that the act extended to the original jurisdiction of the Supreme Court. Act of June 25, 1948, C. 646, 62 Stat. 964, as amended, 28 U.S.C. §2201. Professor Borchard nowhere discusses the jurisdiction of this Court. Borchard, Declaratory Judgments (1941). Nor does Anderson. Anderson, Declaratory Judgments (1951). Artful pleading cannot be used to extend the jurisdiction of the courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667, 70 S. Ct. 918, 94 L. Ed. 1194 (1950). The Declaratory Judgments Act is peculiarly inappropriate for the original jurisdiction of this Court since it would permit a final decision in advance of the operative facts from which no appeal could ever be prosecuted. In the field of public law, premature intervention is especially to be avoided. *Cha-Toine Hotel Apartments Bldg. Corp. v. Shogren,* 204 F. 2d 256 (7th Cir., 1953).

IV. ILLINOIS HAS FAILED TO STATE A CAUSE OF ACTION

Assuming arguendo that this Court has original jurisdiction, the complaint fails to state a cause of action. The complaint alleges that there is an urgent need for drinking water in the City of Elmhurst and the villages of Villa Park and Lombard, and that pursuant to State law the Elmhurst-Villa Park-Lombard Water Commission was organized in 1956. The complaint further alleges that the states of Michigan, Ohio and Pennsylvania notified the clerk of the Water Commission that they intended to institute proceedings to protect the interests of their respective states in the interstate waters of the Great Lakes-St. Lawrence waterway.

There is no allegation that the communities comprising the Water Commission are riparian owners or that they have any legal right to the waters of the Great Lakes. It is a fact that these communities lie outside of the Great Lakes watershed and are in the watershed of the Des Plaines and the Fox Rivers. All of the Great Lakes states adhere to the riparian water law. There is no allegation and there has in fact been no prior diversion by nonriparian communities in Illinois from the Great Lakes and no course of conduct which could be construed to authorize such a diversion. Therefore, the complaint on its face fails to show any color of claim or right on the part of the Water Commission to divert water from the Great Lakes for domestic pumpage or any other purpose.

The bare assertion of an urgent need cannot confer jurisdiction upon this Court or grant to the Water Commission rights which it does not have under existing law. The complaint is further deficient in that it fails to allege that there is such a factual situation which would justify the application of some other law. The Commonwealth does not suggest that necessity would authorize this Court to abandon existing riparian law and by judicial fiat decree a law of prior appropriation or equitable apportionment for riparian states. It is merely pointed out that there is no allegation of facts or circumstances which would indicate the urgency which is baldly asserted in the complaint. The plaintiff does not allege that it has surveyed the existing surface waters and ground waters and found them inadequate or economically unfeasible. It does not allege that it will minimize the diversion out of the watershed by treating and returning the effluent. It does not explain its failure to take steps to provide adequate water resources for these communities during the past three years. It does not allege and in fact it has not sought to obtain interstate waters by compact or negotiation. It is alleged that it will take two years to supply these communities with water from the Great Lakes. There is no allegation that other resources could not be found within the same period of time.

The State of Illinois argues that prior litigation established its right to domestic pumpage from the Great Lakes. *Wisconsin v. Illinois,* 281 U. S. 179, 50 S. Ct. 266, 74 L. Ed. 799 (1930). It need not be pointed out that the Metropolitan Sanitary District which was withdrawing water from the Great Lakes pursuant to a state statute is a riparian body located

on the shores of Lake Michigan for the purpose of supplying water to the City of Chicago, a riparian municipality. There is nothing in that opinion which can be construed to permit communities in Illinois which are not on the shores of Lake Michigan and which in fact are in other watersheds to come to the Great Lakes for domestic pumpage. Illinois is in effect arguing that the entire state and all the municipalities and industries within it, whether located twenty miles or two hundred miles from the Great Lakes, have an unlimited right to divert waters out of the Great Lakes for domestic pumpage. Diligent research has disclosed no case in which such an argument was approved or even made. The plaintiff, it is respectfully submitted, misconstrues this Court's opinion in *New Jersey v. New York,* 283 U. S. 336, 51 S. Ct. 478, 75 L. Ed. 1104 (1931). Plaintiff argues that in the cited case this Court approved for riparian states the doctrine of equitable apportionment and permitted diversion from one watershed to another. In the cited case, New York at its own expense constructed dams on the upper reaches of the Delaware River to capture flood waters which were then diverted out of the watershed and to the City of New York for water supply. The construction of the dam conferred a benefit upon the downstream states with respect to flood control. The diversion of water from the Delaware River was conditioned upon the low flow augmentation of the river by New York. The rights of the downstream users to a guaranteed low flow augmentation was made prior to any right of the City of New York to divert water for its own purposes; and in periods of drought New York has been deprived of the waters stored in its dam which were

required to be released for the benefit of the other states. Experience has shown that New Jersey, Pennsylvania and Delaware have benefited from the construction of this dam. In periods of drought, New York has released waters from its dam for the benefit of the downstream users, even though little if any was available for New York City.

It is apparent that the diversion of waters out of the Great Lakes for the benefit of the Elmhurst-Villa Park-Lombard Water Commission will confer no benefit upon the other Great Lakes states. To permit such a diversion would indeed apportion interstate waters, not among the riparian users, but grant to those users having no legal rights in the water a diversion for which no compensation is paid. In *Kansas v. Colorado,* 206 U. S. 46, 27 S. Ct. 655, 51 L. Ed. 956 (1907), this Court was concerned with the rights of two states, one riparian and one nonriparian. The practice which was being complained of was old and in existence long before the litigation. There was no diversion out of the watershed. In a subsequent adjudication involving the same waters, *Colorado v. Kansas,* 320 U. S. 383, 64 S. Ct. 176, 88 L. Ed. 116 (1943), this Court referred to the doctrine of equitable apportionment and pointed out that there was no proof that Kansas permitted diversion of the interstate waters by nonriparians. In *Wyoming v. Colorado,* 259 U. S. 419, 42 S. Ct. 552, 66 L. Ed. 999 (1922), this Court was dealing with the respective rights of two states which do not recognize riparian law. The diversion of water out of the watershed which was permissible under the laws of both states was sanctioned by this Court. There is, therefore, no precedent to justify the diversion of water out of the

watershed in a riparian state, particularly when such a diversion would be to the detriment of other sovereign states.

V. THE QUESTION IS NOT DE MINIMIS

Plaintiff argues that because the amount of water to be diverted is small in comparison with the total waters of the Great Lakes-St. Lawrence Seaway system, that the question is de minimis. The doctrine of de minimis applies to taxpayers' suits. *Commonwealth of Massachusetts v. Mellon, Secretary of the Treasury,* 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923). Where the injury complained of is purely a monetary one in which the taxpayer asserts that the practices complained of add to his tax burden, the courts have required that he show some measurable loss. But where the injury complained of is not measurable in dollars and cents and where the rights asserted are not those of a taxpayer, the doctrine does not apply. See majority and minority opinions in *Doremus v. Board of Education of the Borough of Hawthorne,* 342 U. S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952). It is respectfully submitted that this case is not a pocketbook action. It involves the rights of the sovereign Great Lakes states to these interstate waters. Assuming jurisdiction, the issue is whether a nonriparian may divert interstate waters out of the watershed to the detriment of the sovereign riparian states.

VI. THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED

Plaintiff moves for summary judgment urging that there are no issues of law or of fact to be considered. Litigation involving water rights and the claims of sovereign states is not lightly resolved. This Court has required the most careful and accurate supporting documentation. See *Wyoming v. Colorado,* 298 U. S. 573, 56 S. Ct. 912, 80 L. Ed. 1339 (1936); *New Jersey v. New York,* supra. No such information is now available with respect to this proposed diversion.

Assuming arguendo that this Court has jurisdiction and that a good cause of action has been stated, it is respectfully submitted that the motion for summary judgment be denied. In addition, it is urged that the matter is not yet ripe for litigation. No attempt has been made to negotiate or to arrive at an amicable settlement.[1] The necessary engineering and other data upon which an adjudication must be based is not yet available. In the light of these important factual questions and serious legal issues, the motion for summary judgment should be denied.

[1] The decree of this Court in *New Jersey v. New York,* supra, was in effect a consent decree, all of the affected states having agreed to the report of the master.

CONCLUSION

The Commonwealth submits that this Court lacks jurisdiction because the State of Illinois is merely a nominal party and the Elmhurst-Villa Park-Lombard Water Commission is not an agency of the State. No case or controversy is presented. The Declaratory Judgments Act is inapplicable to the original jurisdiction of the Supreme Court. Illinois has failed to state a cause of action in that it has not alleged any rights on the part of the Water Commission to the interstate waters and it has not substantiated the allegation of urgency. Any action under the existing circumstances is premature.

Wherefore, the Commonwealth respectfully requests that the motion for leave to file complaint for declaratory judgment be denied and that the motion for summary judgment likewise be denied.

Respectfully submitted,

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