No. 15, Original

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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

ON MOTION FOR LEAVE TO FILE COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

argued

J. LEE RANKIN,
Solicitor General,
OSCAR H. DAVIS,
JOHN F. DAVIS,
Assistants to the Solicitor General,
GEORGE S. SWARTH,
Attorney,
Department of Justice,
Washington 25, D.C.

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INTRODUCTION

The Court, in its order of April 20 in this case, invited the Solicitor General to file a brief and participate in oral argument if he is so advised. In this connection we have taken into consideration the relationship of this case to *Wisconsin* v. *Illinois,* Nos. 2, 3, and 4, Original, this Term, in respect to which the Federal Government filed a brief *amicus* on April 14, 1959. The issues in the cases, although not identical, are closely related, both dealing with diversions of water from the Great Lakes. In *Wisconsin* v. *Illinois,* the Court must be concerned with the merits of the controversy, while in this case the pending question is whether the complainant should be granted

leave to file, and the Court should consider the merits only to the extent that leave should be denied if it appears on the face of the papers that the complaint is without merit. Cf. *Alabama* v. *Texas,* 347 U.S. 272. We believe that the pendency of *Wisconsin* v. *Illinois* lends support to the view that there are important issues here which merit consideration by the Court. Coincidentally, we believe that the existence of this proceeding supports the advisability of the Court's giving further consideration to the problems involved in *Wisconsin* v. *Illinois.*

QUESTIONS PRESENTED

I.

1. Whether the State of Illinois is the real party in interest in a suit to determine the right of an Illinois municipal corporation, as against other States, to remove water from Lake Michigan.

2. Whether this Court has jurisdiction to grant a declaratory judgment in an original suit.

3. Whether an actual controversy is stated by a complaint for a declaration that an Illinois municipal corporation is entitled to draw domestic water from Lake Michigan, where it is alleged that the sale of bonds to finance such a project has been prevented by the defendants' challenge to such claimed right to the extent that the sewage effluent is discharged into a different watershed.

4. Whether Illinois' claimed right to divert water from Lake Michigan for domestic use, as against claims of other Great Lakes States, is to be determined by the principle of equitable apportionment.

II.

Secondary questions include the following:

(a) Whether the controversy described in question 3, *supra,* is the subject of a prior action pending between the same parties which concerns the asserted duty of a different Illinois municipal corporation, also drawing its water from Lake Michigan, to return its sewage effluent thereto.

(b) Whether the complaint fails to state a cause of action in that it fails to show that the Illinois municipal corporation in question has a right under Illinois law to draw water from Lake Michigan.

(c) Whether the complaint fails to state a cause of action in that it fails to show a present actual injury of serious magnitude, where it alleges that the defendants' challenge of the asserted right to take water from Lake Michigan has halted an $18,750,000 project to supply urgently needed water for 87,500 people, by preventing sale of bonds to finance the project.

(d) Whether a complaint seeking a declaration of right to divert water from Lake Michigan is multifarious in joining as defendants several States that have challenged that right or that have conflicting interests in the waters of the lake.

STATEMENT

Under Illinois Revised Statutes, 1957, Chapter 24, Article 81, municipalities may join in creating water commissions to provide them with water from a common source and such commissions may finance the establishment of their systems by the sale of revenue bonds. Pursuant to that Act, the city of Elmhurst

and the villages of Villa Park and Lombard, adjoining municipalities located about ten miles west of Chicago, in 1956 formed the Elmhurst - Villa Park - Lombard Water Commission, to furnish water from Lake Michigan to themselves and other communities. Complaint, 8–9. It is proposed to draw about 25 or 30 cubic feet of water a second at the outset, increasing to perhaps 50 c.f.s. by the year 2000. Complaint, 12. The communities concerned lie in the Mississippi River watershed and their sewage will drain into that river and so be lost to Lake Michigan. Brief of Michigan, Ohio and Pennsylvania in Opposition to Motion, 5. Because of this, the Attorneys General of Michigan and Ohio and a Deputy Attorney General of Pennsylvania wrote to the Clerk of the Water Commission and the Elmhurst City Council, in October 1958, threatening to take legal action to prevent the proposed diversion of water from Lake Michigan. Complaint, following page 15. That threat made the Commission's revenue bonds unsalable, leaving it without means to proceed with its project. Complaint 11–12. Alleging need for an early decision because local supplies of ground water are failing rapidly and no other sources are available, Illinois seeks a declaration that it and the Water Commission are entitled to draw water from Lake Michigan as proposed, and an injunction against interference with that right. Complaint, 10, 13–14. In addition to Michigan, Ohio and Pennsylvania, Illinois seeks to join as defendants Minnesota, New York and Wisconsin, on the basis of informal indications that they also would oppose the project. Complaint, 11.

Four briefs have been filed in opposition to the motion for leave to file the complaint: one by Michigan, Ohio and Pennsylvania jointly; a supplemental brief by Pennsylvania alone; one by Wisconsin; and one by Minnesota merely adopting Wisconsin's arguments. In all, about ten arguments are made in opposition to the motion, although differences in approach and analysis leave some room for variations in that number. In our view, the arguments made by the defendants may be enumerated as follows:

1. That the case is not properly within the original jurisdiction of this Court because Illinois is not a real party in interest. Mich., Ohio and Pa. brief, 5–10; Pa. supp. brief, 1–2; Wis. brief, 11–15.[1]

2. That this Court cannot issue declaratory judgments in original suits. Mich., Ohio and Pa. brief, 15–17; Pa. supp. brief, 3; Wis. brief, 15–16.

3. That there is a prior action pending between the same parties and having the same subject matter (i.e., *Wisconsin* v. *Illinois,* Nos. 2, 3 and 4, Orig., this Term). Wis. brief, 9–10.

4. That no cause of action is stated because it is not shown that the Elmhurst - Villa Park - Lombard Water Commission has any riparian or other right to water from Lake Michigan under Illinois law. Pa. supp. brief, 4–8.

5. That no cause of action is stated against Wisconsin or Minnesota in that they are not shown to

[1] Wherever the Wisconsin brief is cited, it is to be understood that the same point is adopted by the Minnesota brief, page 2, by reference.

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have participated in threatening any action against the proposed project. Wis. brief, 17–18.

6. That no actual controversy exists, since the defendants do not object to the withdrawal of water from Lake Michigan, which is the sole function of the Elmhurst - Villa Park - Lombard Water Commission; their only objection is to the discharge of the sewage effluent into a different drainage basin, a function performed by other agencies and unrelated to the project under discussion. Mich., Ohio and Pa. brief, 10–12; Wis. brief, 9.

7. That no cause of action is stated, in that there is no showing of a present injury of sufficient magnitude to justify invoking the original jurisdiction of this Court. Mich., Ohio and Pa. brief, 12–15; Wis. brief, 14, 18.

8. That the complaint is multifarious, in that it joins several defendants. Wis. brief, 19.

9. That the Court should require an attempt in good faith to negotiate, before permitting a suit of this character to be filed. Mich., Ohio and Pa. brief, 24–37.

10. That the doctrine of equitable apportionment of interstate waters is inapplicable and does not entitle Illinois to divert water from Lake Michigan. Mich., Ohio and Pa. brief, 20–23.

Other points raised by the defendants relate to the motion for summary judgment, which was denied on April 20, 1959, or solely to the merits, and will not be considered in this brief.

DISCUSSION

I. The proceeding is within the original jurisdiction of this Court

A. The State of Illinois is the proper party plaintiff

Article III, Section 2 of the Constitution gives this Court original jurisdiction of suits to which a State is a party, and it is on that ground that Illinois invokes the original jurisdiction of the Court here. Complaint, 7. The defendants assert that Illinois is not the real party in interest, but is merely suing on behalf of the Elmhurst - Villa Park - Lombard Water Commission, a municipal corporation, and that the case therefore is not properly one to which the State is a party in such sense as to give this Court original jurisdiction.[2] Mich., Ohio and Pa. brief, 5–10; Pa. supp. brief, 1–2; Wis. brief, 11–15. We think that this is not a valid objection to the Court's original jurisdiction over this case.

A State may not invoke the original jurisdiction of this Court in a case where it is not a real party in interest but acts only for the benefit of others. *Oklahoma* v. *Cook,* 304 U.S. 387, and cases there cited. However, a State has a real interest, quasi-sovereign in character, in all the earth, water, and air within its domain, and it may maintain an original suit in this Court to vindicate that interest. *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, 237. Specifically, a State may bring an original suit to establish the rights

[2] The fact that the defendants are States cannot alone sustain the jurisdiction of this Court, since the federal judicial power does not extend to suits against States unless brought by other States or by the United States. United States Constitution, Eleventh Amendment; *Hans* v. *Louisiana,* 134 U.S. 1.

of its water users in interstate waters, as against water users of other States. *Wyoming* v. *Colorado,* 286 U.S. 494, 508–509; *Kansas* v. *Colorado,* 206 U.S. 46, 95–96; see *Oklahoma* v. *Cook,* 304 U.S. 387, 393–394. The water users themselves are not necessary parties, as the State stands in judgment for them, *Nebraska* v. *Wyoming,* 295 U.S. 40, 43, and the judgment binds them although they are not parties to the suit. *Wyoming* v. *Colorado,* 286 U.S. 494, 508–509. Thus, in *New Jersey* v. *New York,* 345 U.S. 369, where Pennsylvania was allowed to intervene as a plaintiff in a suit to establish rights in an interstate river, the city of Philadelphia was denied leave to intervene, on the ground that its interests were already represented by Pennsylvania as *parens patriae.* In *Colorado* v. *Kansas,* 320 U.S. 383, the Court enjoined prosecution of a suit between water users in the two States, brought to determine the relative rights of the two States in the Arkansas River. Clearly, the Court regards litigation between States, rather than litigation between particular water users, as the appropriate means for determining relative rights in interstate waters.[3]

The present suit is brought to determine relative rights in the waters of Lake Michigan, as between Illinois and its water users on the one hand and the defendant States and their water users on the other. Under the foregoing decisions, we believe that Illinois

[3] Pennsylvania suggests that the Elmhurst - Villa Park - Lombard Water Commission should bring actions in the appropriate district courts to test the rights which it claims. Pa. supp. brief, 2. However, it does not appear that the defendant States have consented to be made defendants in any such suit. Cf. *Petty* v. *Tennessee-Missouri Bridge Commission,* No. 233, this Term, decided April 20, 1959.

is a real party in interest as *parens patriae,* and is entitled as such to invoke the original jurisdiction of this Court. In this view it is unnecessary to consider Pennsylvania's argument that the Elmhurst - Villa Park - Lombard Water Commission lacks the characteristics of an "official instrumentality of the State" such as made it permissible for Arkansas to sue as the real party in interest on behalf of the University of Arkansas in *Arkansas* v. *Texas,* 346 U.S. 368. Pa. supp. brief, 1.

B. The original jurisdiction of this Court extends to suits for declaratory judgments

Three of the defendants assert that this Court has no jurisdiction to enter declaratory judgments in original suits. Mich., Ohio and Pa. brief, 15–17; Pa. supp. brief, 3. Wisconsin and Minnesota say only that if the Court has such power it is inherent and not derived from the Declaratory Judgment Act. Wis. brief, 15–16. We believe that the Court does have power to enter declaratory judgments in original suits, and that this power derives from its constitutional grant of original jurisdiction.

This Court has sustained its power to review declaratory judgments of State courts when presented in actual controversies and not merely abstractly. *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U.S. 249. The Court there said (288 U.S. at 264):

> But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which

> that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.

The Court similarly sustained the Federal Declaratory Judgment Act of June 14, 1934, 48 Stat. 955, now 28 U.S.C. 2201, in *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 239–240:

> The Constitution limits the exercise of the judicial power to "cases" and "controversies." * * * The Declaratory Judgment Act of 1934, in its limitation to "cases of actual controversy," manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word "actual" is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. * * * The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.

In the light of these decisions, it cannot be questioned that it is within the federal judicial power, under Article III of the Constitution, to enter a declaratory judgment in a case of actual controversy.

The judicial power exercised by the Supreme Court in original suits is no different in character from that which it exercises in its appellate capacity, or which is exercised by federal courts created by Congress under Article III of the Constitution. It is "the judicial Power of the United States," distributed among various courts as provided in that Article. It must, then, be within the constitutional power of this Court to enter declaratory judgments in appropriate cases.

The question remains whether that power must be implemented by congressional action before it can be exercised. We think it clear that it need not be. In *Kentucky* v. *Dennison,* 24 How. 66, 96–98, the Court, in a careful opinion by Chief Justice Taney, considered the similar question of the nature of the process it might issue in original suits, and concluded (24 How. at 98):

> The cases referred to * * * show that it has been the established doctrine upon this subject ever since the act of 1789, that in all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice.

Since the device of a declaratory judgment in an actual controversy is merely a matter of procedure within the scope of the federal judicial power, and since this Court has constitutional power to establish the procedure in original suits, it follows that the

Court has power to enter declaratory judgments in original cases properly before it. And this in effect has been the practice, as the Court pointed out in *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U.S. 249, 263:

> This Court has often exerted its judicial power to adjudicate boundaries between states, although it gave no injunction or other relief beyond the determination of the legal rights which were the subject of controversy between the parties, *Louisiana* v. *Mississippi,* 202 U.S. 1; *Arkansas* v. *Tennessee,* 246 U.S. 158; *Georgia* v. *South Carolina,* 257 U.S. 516; *Oklahoma* v. *Texas,* 272 U.S. 21; *Michigan* v. *Wisconsin,* 272 U.S. 398 * * *.

Those were among the cases there cited by the Court for the very purpose of showing that declaratory judgments were within the scope of the federal judicial power.

It is true that in *Nebraska* v. *Wyoming,* 325 U.S. 589, 608, the Court said, "* * * we cannot issue declaratory decrees. *Arizona* v. *California,* 283 U.S. 423, 462–464, and cases cited." It is evident, however, that the Court was there using "declaratory" as synonymous with "advisory" or "abstract," for the Court went on to say,

> We fully recognize those principles. But they do not stand in the way of an entry of a decree in this case.
>
> The evidence supports the finding of the Special Master that the dependable natural flow of the river during the irrigation season has long been over-appropriated. *A genuine controversy exists.* [Emphasis added.]

Arizona v. *California,* 283 U.S. 423, was an original suit in which Arizona sought a declaration that the Colorado River Compact and the Boulder Canyon Project Act, 45 Stat. 1057, were unconstitutional, and to enjoin the defendants from carrying out their terms. The Court dismissed the bill without prejudice, holding that it was "based not on any actual or threatened impairment of Arizona's rights but upon assumed potential invasions" (283 U.S. at 462). The Court then said (283 U.S. at 464):

> This Court cannot issue declaratory decrees. Compare *Texas* v. *Interstate Commerce Commission,* 258 U.S. 158, 162; *Liberty Warehouse Co.* v. *Grannis,* 273 U.S. 70, 74; *Willing* v. *Chicago Auditorium Assn.,* 277 U.S. 274, 289–90.

Texas v. *Interstate Com. Comm.,* 258 U.S. 158, the only original suit cited, likewise dealt with an abstract, advisory judgment, and not with a declaratory judgment in an actual controversy. The Court said (258 U.S. at 162):

> Much of [the bill] is devoted to the presentation of an abstract question of legislative power—whether the matters dealt with in several of the provisions of Titles III and IV fall within the field wherein Congress may speak with constitutional authority, or within the field reserved to the several States. * * * Obviously, this part of the bill does not present a case or controversy within the range of the judicial power as defined by the Constitution. It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially

> by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power.

Liberty Warehouse Co. v. *Grannis,* 273 U.S. 70, and *Willing* v. *Chicago Auditorium Assn.,* 277 U.S. 274, the other cases cited in *Arizona* v. *California, supra,* have likewise been explained by the Court as having been thought to involve only uncertain or hypothetical states of facts. *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U.S. 249, 262. Both involved the power of lower federal courts; thus the only importance of their citation in *Arizona* v. *California* is its indication that the Court considered the constitutional limitations on the power of those courts to be the same as the limitations on its own power in original suits. As we have shown (*supra,* pp. 10–11), it is now clearly established that the judicial power of the lower federal courts extends to the entry of declaratory judgments in cases of actual controversy.

The distinction between a hypothetical or advisory judgment and a declaratory judgment in an actual controversy was clearly brought out by this Court in *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240–241:

> A "controversy" in this sense must be one that is appropriate for judicial determination. * * * A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. * * * The controversy must be definite and concrete, touching the legal relations of parties having adverse legal in-

> terests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.

Since the Court has now clearly held that the judicial power under Article III of the Constitution extends to the rendition of declaratory judgments in actual controversies, there is no reason why this Court may not render such judgments in original suits. We think that its past statements should not be understood as being to the contrary.

As we have shown, congressional action is not needed to implement the Court's original jurisdiction to enter declaratory judgments; and it is clear that no congressional action can limit the original jurisdiction of the Court. Consequently we find no necessity for the Court to determine the meaning of the Federal Declaratory Judgment Act, 28 U.S.C. 2201, as applied to original suits—although we do suggest that the terms of that Act (applying to "a case of actual controversy" within the "jurisdiction" of "any court of the United States") squarely cover original actions in this Court.

II. The complaint states a cause of action

A. The complaint asserts a controversy which is not the subject of any prior pending action

Michigan, Ohio and Pennsylvania argue that no actual controversy is stated, since Illinois seeks only a declaration of a right to remove water from Lake Michigan, whereas the defendants do not contest that right but only insist on subsequent return of the sewage effluent to the lake. Mich., Ohio and Penn. brief, 10–12. Wisconsin makes the same point or, alternatively, argues that if there is a controversy it is as to the obligation to return sewage effluent to the lake, as to which there is a prior action pending between the same parties. Wis. brief, 9–10. In our view, the complaint does state a controversy between the parties, which is not the subject of the pending action between them.

It is true that the defendants do not object to the use of Lake Michigan water by Illinois communities, and that the Elmhurst - Villa Park - Lombard Water Commission is concerned only with withdrawal and distribution of water, and not with the disposal of sewage effluent. If this were the whole story, there would appear to be no present controversy. But it is not the whole story. Michigan, Ohio and Pennsylvania have asserted that there must be no *diversion* of water from the lake; that is, no water must be withdrawn for use unless the resulting sewage effluent will be returned to the lake.[4] The Water Commission, on

[4] Wisconsin and Minnesota have raised the point that no controversy is shown as to them, since they did not join in the protests made by Michigan, Ohio and Pennsylvania. Wis. brief, 17–18. That issue in no way concerns the United States

the other hand, proposes to withdraw water under circumstances where the resulting effluent will be discharged into another watershed. Regardless of what agency will handle the sewage disposal, it seems that this withdrawal will be under circumstances which these defendants regard as in violation of their rights. The defendants might have chosen to let the withdrawal of water go unchallenged, and directed their objections simply to the sewage disposal operations; but they did not do so. Each of the three letters of protest is directed to the operations of the Water Commission (Complaint, following p. 15), and the defendants rejected Illinois' suggestion that those protests be withdrawn, reserving objections to discharge of sewage effluent out of the Great Lakes basin. Complainant's reply brief, 18. It is alleged that the defendants' protests have interfered with the operations of the Water Commission. Complaint, 11–12. In these circumstances it is clear that there is a controversy over the operations of the Water Commission, and it is no answer to say that there would be no controversy if the same operations were conducted under other circumstances of sewage disposal. As things are, there is an actual controversy.

This controversy is similar to but not the same as that now pending before the Court in *Wisconsin* v. *Illinois,* Nos. 2, 3 and 4, Original. The question there is whether the Metropolitan Sanitary District of Greater Chicago shall be required to return to Lake Michigan the sewage effluent resulting from water pumped from the lake by the city of Chicago. The

and does not affect the case as a whole; we deem it more appropriate to leave discussion of it to the parties concerned.

question here is whether the Elmhurst - Villa Park - Lombard Water Commission may remove water from the lake without provision being made for return thereto of the sewage effluent. One case involves effluent from water pumped by Chicago; the other involves effluent from water to be pumped by the Water Commission. This distinction is not merely formal. The question of whether a State will be permitted to divert water from an interstate body of water depends upon a weighing of equities. *Connecticut* v. *Massachusetts,* 282 U.S. 660, 670–671.[5] The equities as to the communities of Elmhurst, Villa Park and Lombard will not necessarily be the same as the equities as to the city of Chicago. For example, these communities are farther from Lake Michigan than Chicago is, so that returning their sewage effluent to the lake would involve a longer conduit; they are much smaller, so that the resulting benefit to lake levels would be much less. On the other hand, the smaller quantity of their sewage effluent would result in a lesser danger of water pollution. We suggest these factors merely as illustrative of the differences which might lead to different results in the two cases. Undoubtedly the cases raise many common questions of law and fact, and if the Court entertains them both it may want to consider them together; but we believe that the pendency of Nos. 2, 3 and 4, Original, is not a ground for abatement of the case at bar.[6]

[5] See *infra*, pp. 22–25.

[6] Wisconsin and Minnesota assert that the complaint is multifarious in its joinder of several defendants. Wis. Brief, 19. This Court said in *Alabama* v. *Arizona*, 291 U.S. 286, 290:

B. The complaint alleges substantial actual or threatened invasion of the rights which it asserts

The complaint alleges that Illinois is entitled to draw water from Lake Michigan for domestic purposes (par. 11, p. 12) and has conferred such right on the Elmhurst - Villa Park - Lombard Water Commission (par. 9, p. 11).[7] It alleges that Michigan,

"There is no test or rule of general application by which to determine whether a complaint in equity is multifarious. That question is to be decided by the court in the exercise of sound discretion having regard to the facts alleged, circumstances disclosed and the character of the relief sought."

Here, the issue is the right to withdraw water from Lake Michigan, which necessarily involves a balancing of the rights of all the States adjacent to that lake or other lakes whose levels will be affected. (Lake Superior is not so affected, and as noted above we express no opinion as to whether a cause of action is stated against Minnesota.) It seems that an effective decree cannot be entered unless all the interested States are before the Court. This has been the practice in other cases involving rights in interstate bodies of water. Thus, in *Nebraska* v. *Wyoming*, 325 U.S. 589, involving the North Platte River, the Court ordered Colorado joined as a defendant, 296 U.S. 553; in *New Jersey* v. *New York*, 345 U.S. 369, involving the waters of the Delaware River, Pennsylvania was allowed to intervene, 280 U.S. 528. See also *Arizona* v. *California*, 350 U.S. 114. In our opinion joinder of all interested States is the only satisfactory and effective way to decide rights in a body of water in which several States have conflicting interests. Cf. *Wisconsin* v. *Illinois*, No. 2, Orig., in which Wisconsin, Minnesota, Ohio and Pennsylvania joined as plaintiffs to assert the same rights that they are asserting here as defendants.

[7] Pennsylvania argues that there is no sufficient allegation that the Elmhurst - Villa Park - Lombard Water Commission has any right under Illinois law to withdraw water from Lake Michigan. Pa. supp. brief, 4–8. The contention is unsound. The complaint alleges (Par. 9, p. 11) that the Commission has arranged for an intake site in the village of Glencoe, and has

"procured permits for the construction of the project from the United States Corps of Engineers, the Department of Pub-

Ohio and Pennsylvania have challenged this right and have threatened legal action against its exercise unless the sewage effluent is returned to the lake, and that this threat has prevented the financing of the Water Commission's project. Complaint, par. 10, pp. 11–12. The defendants argue that this fails to state a cause of action in that it fails to show any injury resulting from actual invasion of a right claimed by the complainant, or at least any injury so substantial as to justify invoking the jurisdiction of this Court. Mich., Ohio and Pa. brief, 12–15; Wis. brief, 14, 18. We believe that the objections are not sound.

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lic Works of the State of Illinois, the State Sanitary Water Board and the Village of Glencoe, which are all the permits required by law * * *".

Ill. Rev. Stats, 1957, Ch. 19, Art. 65, as amended by the Act of July 6, 1957, Ill. Laws 1957, p. 1315, §1, forbids erection of structures in public bodies of water without permission of the Department of Public Works and Buildings of the State, imposes certain restrictions not here material, and continues:

"The Department of Public Works and Buildings may grant, subject to the foregoing provisions of this section, a permit to any person, firm or corporation, not a riparian owner, to use the water from any of the public bodies of water within the State of Illinois for industrial manufacturing or public utility purposes * * *. If the water so to be used is to be taken from a lake or stream located in or adjoining any municipality, such permit shall not become effective until approved by the Commissioner of Public Works of such municipality, or if it has no Commissioner of Public Works, by the Public (or City) Engineer, or if it has no such Engineer, by the mayor or president of the municipality."

It appears therefore that the complaint alleges issuance of permits entitling the Water Commission to withdraw water from Lake Michigan, so far as Illinois law is concerned.

Wisconsin argues that there is no showing that the project could not be financed by some other method, and suggests that Illinois itself is responsible for the Water Commission's difficulties, in failing to provide such financing or to overcome the defendants' objections by requiring the sewage effluent to be returned to Lake Michigan. Wis. brief, 14. But if Illinois has a right to proceed in its chosen way, the defendants cannot justify their interference by pointing out that they might let Illinois proceed in a different way. To state a cause of action, a plaintiff need only show that one of his rights has been interfered with; he need not show that all his rights have been interfered with.

The defendants argue that the case is not of sufficient importance to justify invoking the original jurisdiction of this Court, since the only injury shown is interference with the financial arrangements for supplying water to three small communities. Mich., Ohio and Pa. brief, 12–15; Wis. brief, 14, 18. However, the defendants' objections are addressed not to the bond issue but to the project itself. Complaint, following p. 15. That project is alleged to involve the water supply for about 87,500 people. Complaint, 9. We do not regard this as a matter so unimportant that the Court should refuse to entertain it, particularly where no other proper forum seems available. 28 U.S.C. 1251(a)(1); cf. *Massachusetts* v. *Missouri,* 308 U.S. 1, 19. Moreover, the relationship to Nos. 2, 3, and 4 Original (*supra,* pp. 17–18) furnishes another ground for assuming jurisdiction here.

The defendants' argument that consideration can be given only to injuries actually experienced, not to injuries threatened or in prospect (Mich., Ohio and Pa. brief, 12–14), rests on their view that this Court cannot give a declaratory judgment. We think the premise unsound (*supra,* pp. 9–15), and the conclusion falls with it. The case of *United States* v. *West Virginia,* 295 U.S. 463, on which the defendants rely, held that there was no justiciable controversy between the United States and the State because it was not alleged that the State had done or threatened to do anything which in any way interfered with any rights claimed by the United States. 295 U.S. at 472. In the case at bar, the defendants have threatened litigation to prevent operation of the project proposed by Illinois, and that threat has prevented execution of the project in the way intended by Illinois. We think that *United States* v. *West Virginia* is not applicable to the present circumstances.

III. The relative rights of the several States in the waters of the Great Lakes should be determined by the principle of equitable apportionment

The defendants urge that the principle of equitable apportionment is not applicable where, as here, the States involved follow riparian rather than appropriative rules of water law. Mich., Ohio and Pa. brief, 20–23. While this question goes to the merits of the case rather than to the question now before the Court of whether leave should be granted to file the complaint, we consider it appropriate to discuss it because some of our previous discussion has been prem-

ised on our understanding that the principle of equitable apportionment does govern the rights of the parties (*supra,* pp. 17–19).

In *Connecticut* v. *Massachusetts,* 282 U.S. 660, Connecticut sought to enjoin Massachusetts from diverting waters of the Ware and Swift Rivers, tributaries of the Connecticut River, out of their watershed to provide water for the city of Boston. Connecticut asserted the right as a lower riparian to have the river come to it "unimpaired as to quantity and uncontaminated as to quality." 282 U.S. at 669. The Court squarely rejected that claim, saying (282 U.S. at 670–671):

> The determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right. * * * As was shown in *Kansas* v. *Colorado,* 206 U.S. 46, 100, such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the States through which it flows. It means that the principles of right and equity shall be applied having regard to the "equal level or plane on which all the States stand, in point of power and right, under our constitutional system" and that, upon a consideration of the pertinent laws of the contending States and all other relevant facts, this Court will determine *what is an equitable apportionment* of the use of such waters. [Emphasis added.]

The Court proceeded to discuss cases illustrating the development of this principle, including *Missouri* v. *Illinois,* 200 U.S. 496, and *Wisconsin* v. *Illinois,* 278 U.S. 367 and 281 U.S. 179, involving diversion by Illinois from Lake Michigan into the Mississippi River watershed; *Wyoming* v. *Colorado,* 259 U.S. 419, involving appropriation States; and *Kansas* v. *Colorado,* 206 U.S. 46, between a riparian and an appropriation State (206 U.S. at 95). It is evident that the Court regards the rule of equitable apportionment as having universal applicability, although its application may differ under various circumstances.

Again in *New Jersey* v. *New York,* 283 U.S. 336, the Court refused to enjoin diversion of water out of the Delaware River basin to serve the city of New York, although it did impose various conditions on that diversion. As before, the Court declared equitable apportionment to be the applicable principle:

> We are met at the outset by the question what rule is to be applied. * * * Both States have real and substantial interests in the River that must be reconciled as best they may be. The different traditions and practices in different parts of the country may lead to varying results, but the effort always is to secure an *equitable apportionment* without quibbling over formulas. * * *
>
> This case was referred to a Master and a great mass of evidence was taken. In a most competent and excellent report the Master adopted *the principle of equitable division* which clearly results from the decisions of the

> last quarter of a century. Where that principle is established there is not much left to discuss. The removal of water to a different watershed obviously must be allowed at times unless States are to be deprived of the most beneficial use on formal grounds. * * *
>
> * * * * *
>
> * * * We are of opinion that the Master's report should be confirmed * * *. [283 U.S. 342–346; emphasis added.]

Finally, in *Wisconsin* v. *Illinois,* 281 U.S. 179, 200, the Court allowed Chicago, which draws its water from Lake Michigan, to discharge its sewage effluent into the Mississippi basin.

We think it clear from these authorities that there is no absolute rule that, as between riparian States, sewage effluent must be returned to the drainage basin from which the domestic water is drawn. On the contrary, equitable considerations will govern, and diversion to a different watershed will be permitted when, under all the circumstances, that seems to the Court the most reasonable course to follow. Of course we do not intend to express here any view as to what result should be reached on the merits of the case at bar. That question is not before the Court on the present motion, and could not be decided on the mere allegations of the complaint, the only pleading yet before the Court.

CONCLUSION

For the foregoing reasons, we conclude that the complaint asserts an actual controversy within the original jurisdiction of this Court; that it states a

cause of action against at least some of the defendants; that it seeks relief which is within the power of this Court to give; and that it presents a case of substantial urgency and importance, for which no other proper forum is available. In our view it will be appropriate for the Court to permit the complaint to be filed as against those defendants against whom a cause of action is stated.

Because of the similarity of this case to *Wisconsin* v. *Illinois,* Nos. 2, 3 and 4, Original, the Court may wish to consider whether this case should not be combined with those. In this respect, however, the Court should also take into consideration the alleged urgency of the complainant's need for relief in this case.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
OSCAR H. DAVIS,
JOHN F. DAVIS,
Assistants to the Solicitor General.
GEORGE S. SWARTH,
Attorney.

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