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Supreme Court of the United States

OCTOBER TERM, 1958 ~~1959~~. No. 15, ORIGINAL 12

STATE OF ILLINOIS,

Complainant,

against

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

Defendants.

BRIEF OF THE STATE OF NEW YORK IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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POINT I

The proposed suit by Illinois constitutes an action against the defendant states for the sole benefit of the Water Commission, over which the original jurisdiction of this Court does not extend.

The principal grievance of Illinois' proposed complaint concerns certain letters written by the Attorney General of Michigan, the Attorney General of Ohio and the Deputy Attorney General of Pennsylvania which allegedly threatened proceedings to halt the abstraction of water from the Great Lakes by the Elmhurst-Villa Park-Lombard Water Commission. The complaint alleges, in substance (para. 10), that because of these threats the Commission has been unable to complete delivery of its bonds, and without the bond proceeds it cannot carry forward its water supply

project. The proposed prayer for relief asks for a judgment declaring that the Commission is entitled to proceed with its project and for an injunction against the other Great Lakes States from interfering with the construction of the Commission's water supply system or with the withdrawal of water for the uses of the Commission's customers. The design of Illinois is clear in the light of further allegations in its complaint which assert (para. 11) that its rights to withdraw water from Lake Michigan for the domestic purposes of the Chicago area have already been established and, further, that (para. 13) the Commission itself has no function or power with respect to disposition of wastes and that the question of return of sewage effluent from the area is already involved in a proceeding presently pending before this Court.

The most immediate aspect of the proposed complaint is that the State of Illinois is attempting to litigate in an original action before this Court the peculiar and limited grievance of the Commission. The State obviously is not acting in its sovereign capacity in behalf of all its citizens. And it is seeking to avoid the fundamental issue whether waters extracted by the Commission should be returned to the watershed after use, in order to preserve the regime of the Great Lakes System. Accordingly, we submit that the complaint does not give rise to a proper original action in this Court (*New Hampshire* v. *Louisiana,* 108 U. S. 76 [1883]). Further, this Court has declined to extend its jurisdiction over the type of class action which Illinois attempts to bring here (*New Jersey* v. *New York,* 345 U. S. 369, 373 [1953]).

POINT II

The action for a declaratory judgment as sought by Illinois should not be entertained by this Court.

In its complaint (para. 12), Illinois states that the quantities of water involved are estimated somewhere between 30 and 50 cubic feet per second. It is obvious that Illinois is attempting to bring an extremely limited factual issue before this Court rather than to wait for the defendant States to bring their proper grievances in relation to the whole effect of Illinois' withdrawal of waters from the Great Lakes System. We submit that, in the light of the holdings of this Court, Illinois has failed to set forth a controversy which has heretofore been considered justiciable by this Court. Thus, this Court has held, particularly in relation to suits involving the diversion of interstate waters, that it will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence (*Connecticut* v. *Massachusetts,* 282 U. S. 660, 669 [1931]). The burden on the complaining State is greater than that generally required in a suit between private parties (*North Dakota* v. *Minnesota,* 263 U. S. 365, 374). Accordingly, Illinois has failed to establish facts warranting the relief by declaratory judgment.

POINT III

The grievance, if any, of Illinois properly should be raised in the proceeding presently pending before this Court.

As noted heretofore, the State of Illinois asserts that its right to withdraw water from Lake Michigan for the domestic purposes of the Chicago area has already been established by this Court. The complaint sets forth the fact (para. 7) that the City of Elmhurst and the Villages of Villa Park and Lombard are located within the Metropolitan Area of Chicago and that the communities proposed to be served are also within suburban Chicago. It recites (para. 11) that part of the communities to be served by the Water Commission are actually within the Metropolitan Sanitary District of Greater Chicago and that the District as well as the other communities involved dispose of their sewage effluent into the Mississippi watershed.

Illinois is correct, of course, in its position that the issues have already been raised concerning the diversion of water for domestic and sanitary purposes in the Chicago area (*Wisconsin* v. *Illinois,* 278 U. S. 367). The law governing the parties has been established (*Wisconsin* v. *Illinois,* 281 U. S. 179, 196). This Court has retained jurisdiction to modify its decree (*Wisconsin* v. *Illinois,* 281 U. S. 696).

Accordingly, Illinois is not without remedy to raise any proper grievance before this Court involving the abstraction of waters from the Great Lakes System in the Chicago area. It should seek this Court's sanction to re-open the decree to determine such grievance, if any.

Parenthetically, we note that the original suits left unfinished the determination of rights of New York involving

the use of the waters of the Niagara and St. Lawrence Rivers for the development of power. There, a motion of Illinois to strike out the paragraph of New York's complaint in relation to the use of the waters of the Niagara and St. Lawrence Rivers for the development of power was granted without prejudice "so that the plaintiff State, if later on in a position to do so, may be free to litigate the questions which the paragraph is intended to present." (*New York* v. *Illinois*, 274 U. S. 488, 490 [1927]). By motion before this Court addressed to the present open-end decree, New York contends that it is now in a position to present the legal question. The New York State Power Authority today is making actual use of the waters involved. We submit that Illinois should not be permitted to test the relative sovereign rights of the Great Lakes States on a piecemeal basis. The test should include the whole problem involving the whole Great Lakes Basin.

Dated: May 12, 1959.

Respectfully submitted,

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