

FILED

SEP 3 1959

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

No. 12 ORIGINAL

STATE OF ILLINOIS,
Complainant,
against

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

**ANSWER OF DEFENDANT STATE OF
NEW YORK**

✓ LOUIS J. LEFKOWITZ,
*Attorney General of the State of
New York,*

✓ PAXTON BLAIR,
*Solicitor General of the State of
New York,*

✓ RICHARD H. SHEPP,
*Assistant Attorney General of the
State of New York,*

✓ RANDALL J. LE BOEUF, JR.,
*Special Assistant Attorney General
of the State of New York.*

IN THE
Supreme Court of the United States

STATE OF ILLINOIS
Complaint,
against
STATES OF MICHIGAN, OHIO, PENNSYLVANIA,
MINNESOTA, NEW YORK AND
WISCONSIN,
Defendants.

October Term, 1959
No. 12 Original
ANSWER OF DEFENDANT
STATE OF NEW YORK

Defendant State of New York, by its Attorney General, Louis J. Lefkowitz, for its answer to the complaint herein alleges as follows:

1. Admits the allegations of paragraph 1 of the complaint.
2. Denies the allegations of paragraph 2 of the complaint, except denies knowledge or information sufficient to form a belief as to the alleged representations and threats made by the defendant States of Michigan, Ohio and Minnesota, and except admits that a controversy exists with respect to complainant's alleged right to withdraw Lake water, and further admits that letters from the Attorneys General of defendant States of Michigan and Ohio were sent to Elmhurst-Villa Park-Lombard Water Commission, and that a letter from the Deputy Attorney General of the defendant State of Pennsylvania was sent to the City Council of Elmhurst, and that copies of said letters are included in the appendix to the complaint.

3. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 3 of the complaint.

4. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 4 of the complaint, except admits that the State of Illinois, and the City of Chicago and some of its suburbs are located on the shore of Lake Michigan.

5. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 5 of the complaint.

6. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 6 of the complaint.

7. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 7 of the complaint.

8. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 8 of the complaint.

9. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 9 of the complaint.

10. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 10 of the complaint, except admits that letters from the Attorneys General of defendant States of Michigan and Ohio were sent to Elmhurst-Villa Park-Lombard Water Commission, and a letter from the Deputy Attorney General of the defendant State of Pennsylvania was sent to the City Council of Elmhurst on the dates alleged in said para-

graph, and that copies of said letters are included in the appendix to the complaint, and refers to each of said letters for the provisions thereof.

11. Denies the allegations of the first and second sentences of paragraph 11 of the complaint; denies the allegations of the third sentence of paragraph 11 of the complaint, except admits that the defendant State of New York has never brought proceedings against the City of Chicago to prevent the taking of water, and except denies knowledge or information sufficient to form a belief as to whether any of the other defendants have ever brought such proceedings against the City of Chicago; denies knowledge or information sufficient to form a belief as to the allegations of the fourth and fifth sentences in paragraph 11 of the complaint; denies knowledge or information sufficient to form a belief as to the allegations of the sixth sentence of paragraph 11 of the complaint, except admits that the Metropolitan Sanitary District of Greater Chicago disposes of its sewage effluent into the Mississippi watershed.

12. Denies the allegations of the second and fourth sentences of paragraph 12 of the complaint; denies knowledge or information sufficient to form a belief as to the allegations of the first and third sentences of paragraph 12 of the complaint.

13. Denies the allegations of paragraph 13 of the complaint, except admits that in December 1957, the defendant States applied to this Court for a reopening of the decree of April 21, 1930 so as to require complainant and the Sanitary District to return to Lake Michigan the sewage effluent resulting from the domestic pumpage withdrawn therefrom, or for the appointment of a special master to

take evidence on the questions presented; and further admits that after this Court denied the application with leave to renew, the said defendants filed in this Court an amended application for the reopening of said decree, and this Court granted said amended application, and appointed a special master to hold hearings and submit such reports as he may deem necessary.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, DEFENDANT STATE OF NEW YORK ALLEGES:

14. The complaint fails to state a claim against defendant State of New York upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE AND A FIRST COUNTERCLAIM, DEFENDANT STATE OF NEW YORK ALLEGES:

15. The jurisdiction of this Court is invoked under Article III, Section 2, of the Constitution of the United States.

16. The State of Illinois, by and through The Elmhurst-Villa Park-Lombard Water Commission, its instrumentality, threatens to withdraw waters from the Great Lakes watershed for both domestic and industrial purposes without returning the effluent therefrom to the watershed of the Great Lakes.

17. The State of New York is one of the sovereign states of the United States of America. The proposed diversion is in violation of its proprietary and sovereign rights. The State of New York's interests both in its proprietary capacity and in its sovereign capacity as representative or *parens patriae* of its citizens will be damaged by the diversion of waters as proposed by Complainant as more fully set forth below, which damage

would be greatly in excess of and disproportionate to any benefit or saving to the Complainant by the proposed diversion.

18. Lake Michigan is one of the Great Lakes, and part of a single common, great natural waterway consisting of Lake Superior, Lake Michigan, Lake Huron, Lake Erie, Lake Ontario, and the Niagara and St. Lawrence Rivers, together with certain connecting straits, rivers, harbors and canals. Any diversion of water from Lake Michigan, if said water is not subsequently returned to the Great Lakes-St. Lawrence system, results in a lowering of the level of each of said Lakes, the Niagara and St. Lawrence Rivers, and the aforesaid connecting straits, rivers, harbors and canals.

19. The State of New York has approximately 558 miles of continuous shoreline on Lakes Erie and Ontario, the Niagara River, and on that part of the St. Lawrence River forming the international boundary between the State of New York and Canada. The State of New York owns all of the beds of those lakes and rivers lying within its boundaries, subject only to the right of the public to navigate the same, and subject to the power of Congress to regulate interstate and international commerce thereon.

20. The State of New York has a right in and to the Great Lakes-St. Lawrence Waterway as a highway of commerce concurrent with the rights of the other states of the United States bordering upon said waterway, subject to the aforesaid power of the Congress, and is lawfully entitled to receive all of the waters from rivers and streams in the Great Lakes watershed without diminution by any other State for the purpose of keeping up and maintaining the waters in the Great Lakes-St. Lawrence Waterway.

21. In reliance upon said right to the undiminished waters of said watershed, the State of New York, its municipalities, and its citizens have expended great sums of money in making improvements in aid of navigation (obtaining appropriate permits from the United States where necessary) including the construction of docks, wharves, and slips, and the dredging of ports and harbors. In addition, the State of New York had built, and has maintained a system of barge canals connecting said waterway with the Hudson River and thereby with an outlet to the Atlantic Ocean at New York City, which has provided an avenue of intrastate, interstate, and international commerce.

22. During the present year (1959), there has been completed the St. Lawrence Seaway Project, built jointly by the Saint Lawrence Seaway Development Corporation, a corporation created by the Congress, and the St. Lawrence Seaway Authority, a corporation created under the laws of Canada. This joint international navigational project has, for the first time, enabled ocean going vessels of 27 foot draft to enter the Great Lakes system, and in reliance upon said navigational project substantial expenditures have been undertaken and planned by the State of New York, its municipalities and its citizens for navigational improvements to accommodate such vessels.

23. The City of Elmhurst and the Villages of Villa Park and Lombard, embraced within The Elmhurst-Villa Park-Lombard Water Commission district, are not littoral to Lake Michigan but lie 16 or more miles distant therefrom, and are not within the Great Lakes watershed.

24. There exist along the shores of the Great Lakes and elsewhere in the Great Lakes watershed, or adjacent thereto, numerous large and populous municipalities. If

The Elmhurst-Villa Park-Lombard Water Commission may be permitted to divert and permanently abstract water from the Great Lakes watershed, such other municipalities would be in a position to claim a like right of diversion. In that event, the withdrawal of water from the Great Lakes watershed for domestic and industrial purposes, without returning it to said Great Lakes system after usage and treatment, would result in the aggregate diversion of a large quantity of water.

25. Any withdrawal of waters from the Great Lakes results in proportionate reductions in the levels of Lake Erie and Lake Ontario, and the St. Lawrence and Niagara Rivers, as well as in the rest of the Great Lakes-St. Lawrence waterway, with the consequent reduction of navigability of the waterway and the New York Barge Canal, a loss of commerce to the State of New York and its citizens, and a loss in value of the navigational aids and facilities which have been constructed by the State of New York, its municipalities and its citizens. Such diversion, consequently, results in injury to the State of New York in its sovereign capacity as *parens patriae* of the rights of its municipalities and citizens, and in its proprietary capacity as owner of substantial portions of its shore line on the Great Lakes system, and of said navigational aids and facilities.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE AND A SECOND COUNTERCLAIM, DEFENDANT STATE OF NEW YORK ALLEGES:

26. Repeats and realleges each and every allegation of paragraphs 15, 16, 17, 18, 19, 20, 23 and 24.

27. The right to use the natural flow of the Great Lakes water system for the production of hydro-electric power

is a property right of the State of New York and of its citizens, subject to reasonable regulation by Congress insofar as it may affect interstate or international commerce. Such regulation has been exercised by Congress through the Federal Power Act (41 Stat. 1063, 16 U.S.C. §791 et seq.) as amended.

28. The State of New York has declared that those parts of the Niagara and Saint Lawrence River within its boundaries are natural resources of the State for the use and development of commerce and navigation in the interest of the people of the State and of the United States, and, in order to provide for the most beneficial use of said natural resources and for the creation and development of hydroelectric power in the interest of the people of the State, has declared such natural resources to be inalienable (New York Public Authorities Law §1001).

29. Pursuant to said declaration, the State of New York has created the Power Authority of the State of New York (hereinafter, the "Power Authority") as a corporate municipal instrumentality of the State of New York and a political subdivision of the State exercising governmental and public powers (New York Public Authorities Law §1002), to develop the hydroelectric resources of the State of New York existing in the Niagara and Saint Lawrence Rivers.

30. In compliance with the provisions of the Federal Power Act, the Power Authority has obtained, from the Federal Power Commission, a license for the construction of a hydroelectric Project No. 2000 on the Saint Lawrence River. Said Project No. 2000 has been constructed as one part of a combined hydroelectric project in cooperation with the Hydro-Electric Power Commission of Ontario.

Such combined hydroelectric project was authorized, pursuant to the United States-Canadian Boundary Waters Treaty of 1909 between the United States and Great Britain (36 Stat. (Part 2) 2448) by the International Joint Commission (Order of Approval of Power Works, October 29, 1952). By Executive Order No. 10500 dated November 4, 1953, the President of the United States declared the Power Authority the designee of the United States for the construction of the works referred to in said Order of Approval. The combined project has been constructed by the Power Authority and the Hydroelectric Power Commission of Ontario at a total cost of approximately \$665,000,000. The Power Authority has financed its portion of the project through the sale of approximately \$350,000,000 of its revenue bonds, including the sale of such bonds to citizens of the State of New York and others. The Power Authority is presently entitled to receive one-half of the total power and energy produced at the combined hydroelectric project.

31. The combined hydroelectric project has been constructed to utilize and does utilize the entire natural flow of the Saint Lawrence River, together with such additional flow as has heretofore been made available by international agreement, for conversion into hydroelectric power and energy. The Power Authority has contracted for the sale of all of its share of the entire output of hydroelectric energy from the combined hydroelectric project, to the United States, to municipalities and to corporations within the State of New York and to an agency of the State of Vermont. The provisions of these contracts were based upon an assumption that the Power Authority would have available for conversion into hydroelectric power and energy, half of such total flow of the Saint Lawrence River.

32. The diversion proposed by Complainant asserts that the needs of the specific The Elmhurst-VillaPark-Lombard Water Commission is presently estimated to be 30 cubic feet of water per second (cfs). However, Complainant alleges a program of selling additional amounts of water to other communities and industries without specifying the amount thereof. No limitation is proposed on the amount of the potential diversion. Diversion of one cfs from Lake Michigan would ultimately result in a loss of one cfs at the St. Lawrence plant. Such diversion of one cfs would result in a loss of 53,436 KWH of energy per year and 7.2 KW of capacity, resulting in an annual loss of revenue of \$229 at the rates at which the Power Authority is now selling power. The diversion of 30 cfs as initially proposed would result in corresponding losses of 1,603,000 KWH per year, 215 KW, and \$6,868 per year.

33. In compliance with the provisions of the Federal Power Act and of the Public Law 85-159 (71 Stat. 401, 16 U.S.C. §836), and the Niagara River Water Diversion Treaty of 1950 (1 U.S.T. 694), the Power Authority has obtained, from the Federal Power Commission, a license for the construction of hydroelectric Project No. 2216 on the Niagara River. Said Project No. 2216 is now being constructed by the Power Authority, and approximately \$185,000,000 have been expended on its construction as of July 31, 1959. It will be completed in 1963, at a total estimated cost of \$720,000,000, which is being financed through the sale of Power Authority revenue bonds, including the sale of such bonds to citizens of the State of New York and others, of which \$400,000,000 of such bonds have already been sold.

34. Said Project No. 2216 is being constructed to utilize the entire United States share of the natural flow of the Niagara River, available for power purposes under the Niagara River Water Diversion Treaty of 1950. The Power Authority has under negotiation and will contract for the sale of the entire output of hydroelectric energy from said Project No. 2216, to municipalities and citizens of the State of New York and to agencies and citizens of other States.

35. The diversion proposed by Complainant asserts that the needs of the specific The Elmhurst-Villa Park-Lombard Water Commission is presently estimated to be 30 cubic feet of water per second. However, Complainant alleges a program of selling additional amounts of water to other communities and industries without specifying the amount thereof. No limitation is proposed on the amount of the potential diversion. Diversion of one cfs of water from Lake Michigan would ultimately result in a loss of one cfs at the Niagara plant. Such diversion of one cfs would result in a loss of 198,000 KWH of energy per year and 32.3 KW of capacity, resulting in an annual loss of revenue of \$917 at the rates at which the Power Authority is now selling power. The diversion of 30 cfs as initially proposed would result in corresponding losses of 4,900,000 KWH per year, 970 KW and \$27,550 per year. The total annual loss in revenue for a diversion of 30 cfs from both the Niagara and St. Lawrence plants would be \$34,400. Assuming the diversions range from 30 cfs presently to 50 cfs by the year 2000 the total present worth of all of the annual power losses over the life of the projects would be not less than \$1,000,000.

36. If the diversion by The Elmhurst-Villa Park-Lombard Water Commission sought by Complainant is

authorized, it may become a precedent for similar diversions by numerous municipalities along and adjacent to the Great Lakes. Such diversions in the aggregate could amount to large flows of water. Each 1,000 cfs so diverted would cause an annual loss at the St. Lawrence and Niagara Falls plants of 251,400,000 KWH, 39,500 KW and \$1,146,000.

37. Any loss of hydroelectric capacity or energy now produced or to be produced by the two Projects Nos. 2000 and 2216 would have to be replaced with steam generated capacity and with energy produced by steam-generating sources, at increased cost to the domestic, rural, commercial and industrial consumers of the State of New York. The increased cost of steam-produced power and energy would be prejudicial to the expansion, economic operation, or the continuation of numerous commercial and industrial establishments which have located within the State of New York in reliance upon the existence of low-cost hydroelectric energy, and would thus be prejudicial in the employment of the citizens of the State of New York and to the tax revenues of the State of New York and its municipalities.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE AND A THIRD COUNTERCLAIM, DEFENDANT STATE OF NEW YORK ALLEGES:

38. Repeats and realleges each and every allegation of paragraphs 15, 16, 17, 18, 19, 20, 23, 24 and 28.

39. The right to use the flow of the Great Lakes water system, without diminution by any other State, for recreational purposes is a sovereign and proprietary right of the State of New York and all its citizens, subject to reasonable regulation by Congress insofar as it may affect

interstate or international commerce, and the State of New York and its citizens, subject to said aforesaid power of Congress, are lawfully entitled to receive all of the waters from rivers and streams in the Great Lakes watershed provided by nature, for the purpose of keeping up and maintaining the waters in the Great Lakes-St. Lawrence Waterway in their natural state for recreational purposes.

40. In reliance upon said right to the undiminished waters of said watershed, the State of New York, its municipalities and its citizens have expended and are expending great sums in making recreational improvements along the shores and on the islands of Lakes Erie and Ontario, and the St. Lawrence and Niagara Rivers, including State and municipal parks, beaches, and marinas, and in addition thereto, numerous private beaches, bathing docks, marinas and docks, slips, and wharves for recreational boating and fishing.

41. Any diversion of waters from the Great Lakes watershed results in some degree in a lowering of the levels of Lakes Erie and Ontario, and of the Niagara and St. Lawrence Rivers, with consequential changes in the contours of the shore lines at the sites of the aforementioned State, municipal, and private recreational improvements, and changes in the depths of the bottoms at the sites of such recreational improvements. There is therefore a consequent reduction in the usefulness and value for recreational purposes of the shorefront property and recreational improvements, all of which improvements have been constructed with reference to present levels as maintained by the existing flow into the Great Lakes watershed. Said reduction of the usefulness and value for recreational purposes of such shorefront property and rec-

reational improvements damages the State of New York both in its proprietary capacity as owner of much of said shorefront property and recreational improvements, and in its sovereign capacity as representative or *parens patriae* of its citizens.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE AND A FOURTH COUNTERCLAIM, DEFENDANT STATE OF NEW YORK ALLEGES:

42. Repeats and realleges each and every allegation of paragraphs 15, 16, 17, 18, 19, 20, 23, 24 and 28.

43. The State of New York and its citizens have a right in and to the waters of Lakes Erie and Ontario, and the Niagara and St. Lawrence Rivers for domestic, municipal, and industrial purposes, subject to the afore-said power of Congress, and are lawfully entitled to receive all of the waters which would flow into said lakes and rivers from the other rivers and streams in the Great Lakes Waterway without diminution by any other State.

44. In reliance upon said right to the undiminished waters of said Waterway, the State of New York, its municipalities, and its citizens have expended sums of money in providing means for utilizing said waters for domestic, municipal and industrial purposes with, however, said waters being returned to the Great Lakes-St. Lawrence watershed after such uses.

45. Any diversion of waters from the Great Lakes watershed lowers the level of Lakes Erie and Ontario and the St. Lawrence and Niagara Rivers. The water supply systems of the aforementioned municipalities and citizens have been constructed in reliance upon the level of waters maintained by the present flow in the Great Lakes Water-

way, and any substantial diversion of said flow will require extensive and expensive additional works in order to attempt to maintain an adequate supply of water to the citizens thereof.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE AND A FIFTH COUNTERCLAIM, DEFENDANT STATE OF NEW YORK ALLEGES:

46. Repeats and realleges each and every allegation of paragraphs 15, 16, 18, 20, 27, 30 and 33.

47. The diversion proposed is in violation of the prohibitions of the Rivers & Harbors Act of March 3, 1899. (30 Stat. 1151, 33 USC §403)

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE AND A SIXTH COUNTERCLAIM, DEFENDANT STATE OF NEW YORK ALLEGES:

48. Repeats and realleges each and every allegation of paragraphs 15, 16 and 18.

49. The diversion of water from Lake Michigan, as sought in the complaint, would violate the United States-Canadian Boundary Waters Treaty of 1909 between the United States and Great Britain (36 Stat. (Part 2) 2448) and the Niagara River Water Diversion Treaty of 1950 (1 U. S. Treaties and other International Acts 695); and if effectuated without prior consultation with and approval of the Government of Canada and of the International Joint Commission this diversion would be in violation of accepted principles of international law. Appended hereto and marked Appendix A is the Note of April 9, 1959 sent by the Government of Canada to the Government of the United States protesting against any diversion of water from the Great Lakes Basin as being the means of causing injury to the interests of the Govern-

ment and people of Canada, which under international law have rights and interests in the Great Lakes Basin, which rights and interests the Government of the United States, the states thereof bordering on such Basin, as well as their citizens, should respect and refrain from causing injury thereto. Also appended hereto is the answer, dated June 12, 1959, sent by the State Department of the Government of the United States to the Government of Canada, marked Appendix B, which, although taking exception to the aforesaid Canadian Note, nevertheless suggests that consultations between our two governments be undertaken for the purpose of attempting to solve the differences between them. Also appended hereto, marked Appendix C, is the further Note of August 20, 1959, sent by the Government of Canada to the Government of the United States, further protesting against any diversion of water from the Great Lakes Basin. Within the information and knowledge of these defendants up to the date of this Answer, no agreement or understanding has been arrived at between the Government of the United States and the Government of Canada with respect to the diversion proposed in the complaint by the State of Illinois and its instrumentality, The Elmhurst-Villa Park-Lombard Water District.

WHEREFORE, the defendant State of New York demands: that the complaint herein be dismissed; and that judgment be entered herein declaring that the Complainant, State of Illinois, and its instrumentality, The Elmhurst-Villa Park-Lombard Water Commission have no right in law or equity to divert any waters whatsoever from the Great Lakes watershed unless the effluent, after proper purification, be returned thereto, and enjoining any such diversion, or, if this Court should determine that such

diversion should not be absolutely enjoined, then determining the extent of the injury to this defendant and its citizens resulting from such diversion, insofar as said injury can be measured in monetary terms, and enjoining such diversion unless Complainant or its instrumentality compensate this defendant and its citizens for said injury; and that the said The Elmhurst-Villa Park-Lombard Water Commission be made a party hereto so that it will be bound by said judgment; and that costs be assessed against the Complainant and The Elmhurst-Villa Park-Lombard Water Commission.

Respectfully submitted,

LOUIS J. LEFKOWITZ,
*Attorney General of the State of
New York,*

PAXTON BLAIR,
*Solicitor General of the State of
New York,*

RICHARD H. SHEPP,
*Assistant Attorney General of the
State of New York,*

RANDALL J. LE BOEUF, JR.,
*Special Assistant Attorney General
of the State of New York.*

September 2, 1959

APPENDIX A

[No. 184]

HON. CHRISTIAN A. HERTER,
Acting Secretary of State,
Department of State, Washington, D.C.:

I have the honor on instructions from my Government to refer to proposals for legislation in the United States concerning an increase in the diversion of water from Lake Michigan through the Chicago drainage canal. It is noted that one proposal to this effect has been approved by the House of Representatives and will shortly be considered by the Senate.

During a period of many years there have been numerous occasions on which the Government of Canada has made representations to the Government of the United States of America with respect to proposals concerning the diversion of water from Lake Michigan out of the Great Lakes watershed at Chicago.

Many of these representations have been directed toward particular proposals then under discussion by U. S. authorities. Because of the importance of the question, the Government of Canada believes it timely to reexamine the considerations which it regards as most important concerning any proposals for additional diversion of water from the Great Lakes watershed. Accordingly, in order that there may be no misunderstanding as to the views of the Government of Canada, I have been instructed to bring the following considerations to your attention.

Every diversion of water from the Great Lakes watershed at Chicago inevitably decreases the volume of water remaining in the basin for all purposes. The Government of Canada is opposed to any action which will have the

effect of reducing the volume of water in the Great Lakes Basin. Careful inquiry has failed to reveal any sources of water in Canada which could be added to the present supplies of the basin to compensate for further withdrawals in the United States.

The Government of Canada considers that many agreements and understandings between the United States and Canada would be broken if unilateral action were taken to divert additional water from the Great Lakes watershed at Chicago and directs attention to provisions of two treaties in particular:

(a) The Boundary Waters Treaty of 1909: The applicability of either article II, paragraph 2, or article III of this treaty depends upon the interpretation of physical facts.

If Lake Michigan physically flows into the boundary water Lake Huron, article II preserves to Canada the right to object to such a diversion which would be productive of material injury to the navigation interests in Canadian waters.

If, as has been asserted by eminent U. S. jurists, article III of the treaty applies, no further diversion shall be made except with the approval of the International Joint Commission.

(b) Niagara Treaty of 1950: This treaty allocates water for scenic and power purposes. The amount of water which shall be available for these purposes is the total outflow from Lake Erie. The specific inclusion of certain added waters in article III of the treaty emphasizes the underlying assumption that existing supplies will continue unabated.

In addition to these treaty provisions, there is a further agreement of far-reaching importance. Power development in the Provinces of Ontario and Quebec is predicated

upon agreed criteria for regulation of the flows of the St. Lawrence River. The order of approval of the International Joint Commission of October 29, 1952, as supplemented on July 2, 1956, and accepted by both our governments, forms the basis for the construction and operation of the hydroelectric power installations in the international section of the St. Lawrence River. Criterion (a) of this order of approval assumes a continuous diversion out of the Great Lakes Basin limited to the present 3,100 cubic feet per second at Chicago.

Navigation and commercial interests depend upon the maintenance of the basis upon which channel enlargements have been designed in order that vessels of deep draught may proceed with full load to and from ports of the upper Great Lakes. In this connection I would refer to the following matters:

(a) The construction of the St. Lawrence Seaway: Legislation in the two countries and the several exchanges of notes concerning the construction and operation of the seaway now just completed are based on the assumption and understanding that there will not be unilateral action repugnant to the purposes of the legislation. Withdrawal of water from the Great Lakes Basin would materially affect the operation of the St. Lawrence Seaway;

(b) Dredging: By agreement contained in the various exchanges of notes between the two countries, profiles have been prepared for the excavation which has taken place or is about to take place in the International Rapids Section of the river, in the Amherstburg Channel and in the St. Clair River. These agreements are based on the implied understanding that material changes would not be made in the volume of water available for navigation;

(c) New channel: In an exchange of notes dated February 28, 1959, it has been agreed that a new channel should be constructed to eliminate the so-called Southeast Bend of the St. Clair River. The agreement by the Government of Canada to this proposal was based on the understanding that there would be no artificial interference with the present supplies of water.

Because of the importance attached by the United States and Canada to the honoring of international undertakings in letter and in spirit, the Government of Canada views with serious concern any possible impairment of agreements and undertakings relating to the Great Lakes Basin. Furthermore, the alarms created by repeated proposals for diversion which inevitably disturb the people and industry of Canada are a source of profound irritation to the relations between our two countries which we can ill afford.

I am instructed, therefore, to express the hope of the Government of Canada that the United States will view this matter with equal concern and will be able to give satisfactory assurances that unilateral action will not be taken which would imperil the present regime of the waters in the Great Lakes Basin and the status of the agreements and understandings to which I have referred.

Please accept, sir, the renewed assurances of my highest consideration.

A. D. P. HEENEY.

WASHINGTON, D.C., *April 9, 1959.*

APPENDIX B

June 12, 1959

Excellency:

I have the honor to refer to your note No. 184 of April 9, 1959 expressing the concern of your Government with regard to legislative proposals to increase the diversion of water from Lake Michigan at Chicago, which are now pending before the United States Congress:

The Department transmitted copies of this note to the Committee on Public Works of the United States Senate on April 16, 1959. Additionally, the Department has been giving careful study to its contents with particular regard to the allegations therein that certain enumerated agreements and understandings between the United States and Canada would be broken should unilateral action be taken to increase the diversion from the Great Lakes watershed at Chicago. It is to be noted in this connection that the Department is not in accord with all of the points made by your Government in the aforesaid note and consequently must reserve its position with respect to those allegations of a legal nature contained therein.

The Department considers that further consultation between representatives of our two Governments might prove useful. Accordingly, we would be pleased to receive the views of your Government on the desirability of such consultation taking place in the near future.

Accept, Excellency, the renewed assurances of my highest consideration.

For the Acting Secretary of State:

His Excellency

A. D. P. HEENEY,

Ambassador of Canada

APPENDIX C

CANADIAN EMBASSY

No. 530

WASHINGTON, D. C.

August 20, 1959

Sir,

I have the honour to refer to my Note No. 184 of April 9, 1959 concerning legislative proposals to increase the diversion of water from Lake Michigan at Chicago.

I am instructed to inform you that the Government of Canada has taken note of the recent legislative developments in the United States concerning this matter. In this connection, I am to advise you that the Government of Canada explicitly reaffirms the position set forth at length in the above-mentioned Note. In the view of my Government any additional diversion of water out of the Great Lakes watershed would be inconsistent with existing agreements and arrangements which together constitute an agreed regime with respect to these waters. The proposed unilateral derogation from the existing regime therefore occasions serious concern in Canada.

Please accept, Sir, the renewed assurance of my highest consideration.

A. D. P. HEENEY

Ambassador

The Honorable

Christian A. Herter,
Secretary of State of the United States
Washington, D.C.

