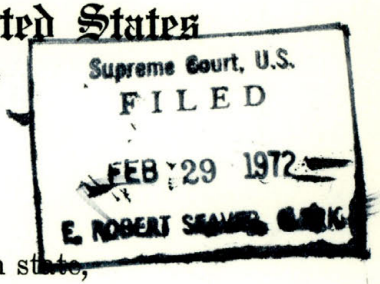
IN THE

Supreme Court of the United States

OCTOBER TERM, 1970



Original No. 50

STATE OF VERMONT, A sovereign state,
Montpelier, Vermont,

Plaintiff,

v.

STATE OF NEW YORK, A sovereign state,
Albany, New York

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,

Defendants.

SUPPLEMENTAL MEMORANDUM OF DEFENDANT STATE OF NEW YORK RELATING TO CHOICE OF LAW

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Introduction

This brief is submitted by the State of New York in response to this Court's request for supplemental memoranda from the parties in this original action on the following issue: Would federal or state law govern the substantive issues sought to be presented for decision in original actions, such as this one, seeking to invoke the jurisdiction of this Court in a nuisance action involving a sludge bed located on an arm of a lake? The choice of law

issue, were this Court to entertain this action, is complicated by the fact that federal law would govern resolution of Vermont's claims against New York—assuming that such claims were justiciable, which we vigorously deny—while state law would determine Vermont's claims addressed to the corporate defendant.

It is impossible to explore the choice of law issue divorced from the specific factual context of this litigation. And in fact no public nuisance or legally cognizable alteration of interstate boundaries or impediment to navigation exists in this case. New York reiterates its point, supported by this Court in a long line of cases, culminating in its recent decision in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, that this Court is not the appropriate forum for the litigation as a *nisi prius* tribunal of factual issues traditionally handled by state courts, bottomed on local law, and involving complex and technical disputed questions of fact.

However, in a series of cases involving legitimate complaints dealing with genuine problems of serious magnitude, this Court has established a body of law relating to the question presented in this memorandum. From those decisions it is clear that as to Vermont's claims against the State of New York, "federal common law" must govern, and that as to Vermont's claims against the International Paper Company, this Court's decision must be based on the relevant state law.

POINT I

"Federal common law" would govern the substantive issues in an original action between two states were there genuine issues to be resolved here as between Vermont and New York.

Despite the oft-quoted holding of the Court in *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 78, a diversity case, that there is no "federal general common law," this Court has

long acknowledged that where competing state rights are concerned, the Court will look to "interstate common law." See *Kansas* v. *Colorado,* 206 U.S. 46, 97-98:

> "Whenever, as in the case of *Missouri* v. *Illinois,* 180 U.S. 208, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this Court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this Court is practically building up what may not improperly be called interstate common law."

The Court subsequently amplified the logic of its decision, stating that in suits between states, the Court would be guided by "federal, state, and international law." *Connecticut* v. *Massachusetts,* 282 U.S. 660, 670:

> "[T]he laws in respect of riparian rights that happen to be effective for the time being in both States do not necessarily constitute a dependable guide or just basis for the decision of controversies such as that here presented. The rules of the common law on that subject do not obtain in all the States of the Union, and there are variations in their application.
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> * * *
>
> "For the decision of suits between States, federal, state and international law are considered and applied by this Court as the exigencies of the particular case may require. 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. *Kansas* v. *Colo-*

> *rado,* 185 U.S. 125, 146. And, while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight.
>
> * * *
>
> "The development of what Mr. Justice Brewer, speaking for the Court in *Kansas* v. *Colorado,* 206 U.S. 46, 98, refers to as interstate common law is indicated and its application for the ascertainment of the relative rights of States in respect of interstate waters is illustrated by *Missouri* v. *Illinois,* 200 U.S. 496; *Kansas* v. *Colorado, supra;* and *Wisconsin* v. *Illinois,* 278 U.S. 367, 281 U.S. 179."

In a decision handed down the same day as *Erie R. Co.* v. *Tompkins, supra,* the Court reaffirmed the limited existence of a "federal common law." *Hinderlider* v. *La Plata Co.,* 304 U.S. 92, 110:

> "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either States can be conclusive."

More recently, the Court reaffirmed the necessity of applying federal law for the equitable adjudication of "conflicting state interests." *Dyer* v. *Sims,* 341 U.S. 22, 26-28. The existence and use of federal or interstate common law for the limited purpose of resolving genuine disputes between two states in an original action in this Court is thus beyond question. Here, however, as we have contended since the service of Vermont's proposed complaint, there is no such genuine issue between the two states as would warrant the discretionary exercise of this Court's original jurisdiction. Whatever meaningful issues of fact and law exist here are between Vermont and the corporate defendant; and the inclusion of New York,

which in no way created the sludge bed, and which on the contrary took active steps to terminate the polluting of the lake by defendant International Paper, was in the nature of a ploy or pretext to invoke the original jurisdiction of this Court, bypassing the less dramatic but plainly available forum of the state courts.

POINT II

State law would govern the substantive issues concerning Vermont's claims against the International Paper Company.

It has been established that in original actions between two states, or in those involving competing states' rights, federal rights are by definition involved, and federal or interstate common law is applied to resolve the disputes. Where the substantive issues do not involve competing state rights, however, there is no inherently federal question or right before the Court, and different considerations apply.

In determining whether federal or state law should govern in an original action not involving competing state interests, as is the case regarding Vermont's alleged claim against the International Paper Company, the choice of law question depends on the specific nature of the complaint. Here, Vermont's claim against International Paper Company, like its spurious claim against New York, is grounded in the doctrine of public nuisance.* This

* Vermont also alleges an alteration of State boundaries and an impediment to navigation (Complt. ¶¶ XXI, XXII). These arguments are makeweights, having no basis at all in fact. Further, this Court has held that any such alterations or impediments must be of serious and significant magnitude before its jurisdiction will be invoked. *Louisiana* v. *Mississippi,* 202 U.S. 1, 36; *New York* v. *New Jersey,* 256 U.S. 296, 309; *Missouri* v. *Illinois,* 200 U.S. 496, 521. To the extent that these questions relating to state boundaries and navigable waters involve federal concerns, federal law would apply. *Hinderlider* v. *La Plata Co., supra.*

Court has long declined the exercise of its jurisdiction for the settlement of inherently local disputes which could more "wisely be solved by cooperative study and by conference and mutual concession" on the state level, where proper resolution of the matter should ultimately lie. *New York* v. *New Jersey,* 256 U.S. 296, 313. As New York stated in its original brief in opposition to Vermont's motion for leave to file its complaint, it too believes that cooperative study is the best avenue for solving the problem; and indeed, the comprehensive study it entered into last March with an independent consultant firm, in which Vermont was invited to participate but declined to join, has shown that the alleged sludge bed pollution no longer exists, and that natural forces and elements are once again asserting their dominance over man-made intrusions (Brief of defendant N.Y., pp. 3-5; copies of the summary of this independent consultants' report, and of a letter from New York State Environmental Conservation Commissioner Henry L. Diamond to United States Environmental Protection Administrator William D. Ruckelshaus, are annexed hereto as Appendix A.)

As this Court pointed out only last spring, public nuisance complaints are essentially "bottomed on local law," *Ohio* v. *Wyandotte,* 401 U.S. 493, 497, requiring reference to state law for their ultimate resolution. In that original action, brought by the State of Ohio against out-of-state corporations, the Court stated (*Wyandotte, supra,* at 500):

> "The Courts of Ohio * * * have a claim as compelling as any that can be made out for this Court * * * and they would decide it under the same common law of nuisance upon which our determination would have to rest."

Continuing along the same line, the Court noted that "an action such as this * * * would have to be adjudicated under state law. *Erie R. Co.* v. *Tompkins* * * *." (*Wyandotte, supra,* at 498, fn. 3).

There is but one reported case expressing an opposing view. In *Texas* v. *Pankey,* 441 F. 2d 236 (10th Cir. 1971), Texas sued a group of New Mexico ranchers in the federal court in public nuisance, alleging that the spraying of a pesticide would impair the water quality of a river running through Texas. The Court of Appeals reversed the district court, holding that Texas had a quasi-sovereign ecological right which was governed by the federal common law, and hence a "federal right" supporting federal jurisdiction under 28 U.S.C. § 1331(a). No attempt was made to seek review of that decision here. But whether *Pankey* was correct—in which case Vermont has an available forum in the appropriate federal district court—or was not, it is of no assistance to Vermont in its attempt to invoke this Court's jurisdiction. At all events *Pankey* stands alone, supporting its decision with nothing more than its belief that there ought to be a body of federal law and a federal right protecting a state's environment from outside impairment, a laudable theory but one which has not yet found acceptance (see Pearson, *Toward A Constitutionally Protected Environment,* 56 Virginia L. Rev. 458 [1970]).

Further, the Court has made it clear that even where federal rights are concerned, state law will govern where the matter is one of traditional state cognizance, as is the case here. See *DeSylva* v. *Ballentine,* 351 U.S. 570, 580, holding that even where a federal claim for relief exists under the Copyright Act (17 U.S.C. §§ 1 *et seq.*), state law still determines issues within the historical ambit of the states' governance, such as who constitute the "children" of a copyright holder.

Public nuisance suits, whether between residents of the same state or by one state against citizens of another, are based in local law and bottomed on facts and traditions which have always been matters of state concern. See *Ohio* v. *Wyandotte, supra,* at 497. It is precisely this paramount state concern in matters of this nature which has resulted in this Court's decision holding state law

applicable on substantive matters before federal courts. *Erie R. Co.* v. *Tompkins, supra.* Precedence of federal law over state law has been the rare exception rather than the rule. *United States* v. *Yazell,* 382 U.S. 341, 354:

> "This Court's decisions applying 'federal law' to supersede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation."

No such claim has been made here, nor could it be, given the traditional historical development of the law of public nuisance in the several states.

The manifest applicability of local or state law to the claims of Vermont against the International Paper Company further underscores the inappropriateness of this Court as an original forum for the hearing of this suit. Vermont's claim against International Paper, the only real defendant in this suit, should be heard in the state court of either state, which can render its decision using traditional choice of law rules governing the application of state law.

CONCLUSION

As to Vermont's claims against the State of New York, federal law governs. As to Vermont's claims against the International Paper Company, state law applies.

Dated: New York, New York, February 18, 1972.

Respectfully submitted,

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Appendix A

STATE OF NEW YORK

DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

ALBANY

(EMBLEM)
HENRY L. DIAMOND
Commissioner

January 27, 1972

Dear Bill:

This is to bring you up to date on the progress we have made in abating pollutional discharges and discovering the best method of handling sludge deposits in Lake Champlain in accordance with New York State's commitment to the Federal Enforcement Conferees.

We have exceeded the goals we set forth in our letter to you of December 15, 1970. The International Paper Company plant in the Village of Ticonderoga has ceased to be an active pollutant of the lake and all of the technical studies show the sludge beds are not a threat to the water quality of the lake or to the State of Vermont.

Observation and testing of these beds indicate that they are not a source of pollution to the interstate waters of Lake Champlain and should not be disturbed. The disturbance of the beds might well create an ecologically damaging condition in the lake of an unknown, but protracted, duration, as well as degrading land areas that are now biologically productive.

As I advised you previously, most of the active pollutional discharge from the International Paper Company plant had been reduced by December 1, 1970, with the remainder to be terminated on July 1, 1971. This program has been carried out with International Paper closing down completely its operations in Ticonderoga and moving to a new plant some four miles north.

Appendix A.

To determine the pollutional effects of the sludge beds in the lake, the engineering firm of Quirk, Lawler and Matusky was engaged to review the problem. Additionally, the Department of Environmental Conservation conducted water quality surveillance during the summer months of 1971, and the Department's Division of Fish and Wildlife inquired into the possible impact of dredging upon fish and wildlife in the lake, in Ticonderoga Creek and adjacent marsh areas.

The findings of the Quirk, Lawler and Matusky report, entitled "Evaluation of the Bottom Deposits in Ticonderoga Bay, Lake Champlain, New York" are enclosed. They concluded that a full-scale dredging operation would release organic carbon, nitrogen and phosphorus to the overlying waters, and that disturbances caused by covering or dredging would increase the turbidity in the entire area.

In summary, Quirk, Lawler and Matusky recommended that the bottom deposits in Ticonderoga Bay be left undisturbed. This recommendation was based upon the conclusion that neither covering nor dredging will improve on either the dissolved oxygen concentrations expected in the area or the ecological community that appears to be developing in the associated marshland.

In its water quality surveillance, the Department established a patrol to observe the conditions in the lake during the period of greatest bacterial action within the sludge beds and when the dissolved oxygen in the overlying waters would be the lowest. From July 13 to September 2, 1971, this patrol, consisting of technical personnel from this Department and volunteers from the State of Vermont, was on the lake for representative periods of every day in the week and the entire range of daylight hours. In addition to making visual observations, 362 samples for dissolved oxygen were collected and analyzed.

Appendix A.

I am enclosing the report of this surveillance patrol, which found a definite improvement in water quality of Lake Champlain in vicinity of Ticonderoga Bay. The patrol also determined that the residual sludge deposits in and around the Bay are actively decomposing as evidenced by observations of rising gas bubbles and generally undersaturated dissolved oxygen levels in the overlying lake waters.

Also enclosed are findings of the Division of Fish and Wildlife of the Department of Environmental Conservation which show the Ticonderoga marsh and bay area is obviously responding rapidly to the cessation of paper mill waste discharges. Biological conditions reflect the generally good dissolved oxygen levels reported this summer. Although suspended silt and floating pulp was observed, obnoxious odors no longer dominate the area and gas bubbles appear about normal for marsh conditions. Productivity is expected to improve even more once all sources of upstream pollution are eliminated and the sludge beds completely stabilized.

In addition to these three inquiries, the New England Interstate Water Pollution Control Commission solicited the opinion of Mr. Ralph H. Scott, Chief, Paper and Forest Industries Research at the Environmental Protection Agency's Pacific Northwest Water Laboratory. Mr. Scott advised that relocation of the sludge deposits would take a number of years and result in extensive lake turbidity as well as redistribution of some portion of the solids over a greater area.

The conclusions of all these documents have been carefully studied. They all agree that the sludge beds are not a source of pollution that will result in the contravention of the dissolved oxygen standards of the interstate waters of Lake Champlain. There is agreement that any attempt to move the beds will have a deleterious effect on the lake

that will last for an indefinite period and that placing the dredged material on land will cause irreparable damage to the land while the beds show signs of stabilizing and become a productive bottom for aquatic organisms.

Bacterial action is occurring within the deposits. The observations during 1971 indicated that the rate was insufficient to cause the rising of the large sludge mats that occurred previously and were a source of complaint as well as odor. It is expected that as the top layers of the sludge stabilize and mineralize, they will increase in density and support rooted vegetation. As a result a seal will be established that will prevent the bacteria from receiving additional nutrients and also prevent the escape of any gas. Thus there should be no deterioration of conditions that were observed in 1971.

At the time of the Federal Enforcement Conference we were aware of three pollutional sources in the area with the potential to contravene interstate water quality standards; the International Paper Company plant in the Village of Ticonderoga, the sludge beds and the Village of Ticonderoga. We have eliminated the discharges from the International Paper Company plant.

The sludge beds are not now contributing to the contravention of interstate water quality standards. A satisfactory solution to the discharges from the Village of Ticonderoga is inhibited only by the current lack of both federal authorization and funds.

Sincerely,

HENRY L. DIAMOND,
Commissioner

Mr. William Ruckelshaus
Administrator
Environmental Protection Agency
U.S. Department of the Interior
Washington, D. C. 20242

Appendix A.

January 4, 1972

Sludge Beds
Ticonderoga Bay
Lake Champlain

Summary

Quirk, Lawler and Matusky

The bottom deposits in Ticonderoga Bay should be left undisturbed. Neither covering nor dredging will improve on either the dissolved oxygen concentrations expected in the area or the ecological community that appears to be developing in the associated marshland.

The foregoing is based on:

1—Much of the bottom deposits in the Ticonderoga Bay area are light and feathery. Disturbances caused by covering or dredging would increase the turbidity in the entire area. The suspended materials would increase the oxygen demand in the overlying water during the period either activity is taking place. The resulting effect on the ecological community could be significant.

2—Full-scale dredging operation would release organic carbon, nitrogen and phosphorous to the overlying waters. In addition, the initial leachate returning from a sludge spoils area has an appreciate oxygen demand. The magnitude of the impact of these materials on the Ticonderoga Bay area has not been determined.

3—The benthic oxygen uptake rates determined for the existing bottom deposits in the Ticonderoga Bay area are the same or less than rates determined for other areas in Lake Champlain.

4—The dissolved oxygen concentrations in the critical area of Ticonderoga Bay can be maintained above 4 mg/1 on

the average with the existing benthic oxygen demand if the daily flow in Ticenderoga Creek is greater than 27 cfs during the warm summer month. (Since 1955 all but one single daily flow has exceeded 31 cfs) As far as the area of Ticonderoga Bay outside of the cove is concerned, natural reaeration alone should provide sufficient oxygen for standards to be met.

5—The floating sludge mats reported during years prior to 1971 were not observed. Gassification within the bottom deposits was continuing but nothing was being lifted.

Lake Champlain Basin—Water Quality Surveillance—Ticonderoga Bay—New York State Department of Environmental Conservation. This report is indirectly related to the sludge deposits in Ticonderoga Bay. New York State had promised the State of Vermont that it would control sources of pollution within the state so that the dissolved oxygen values at the New York-Vermont state line would be maintained at 5 mg/1 or above. The survey was undertaken to determine if this commitment was met. The period selected was the one when the greatest effects from the sludge deposits on the dissolved oxygen could be expected. This is the time when the water is the warmest, there is the greatest bacterial action within the sludge beds and the lowest saturation value for dissolved oxygen in the overlying waters.

Conclusion

The existing sludge beds do not interfere in any way with the ability to maintain a dissolved oxygen concentration of 5.0 mg/1 or higher at the New York-Vermont state line.

This conclusion is arrived at from the following:

1—362 samples were collected between July 13 and September 2, 1971

2—The sampling periods covered the entire range of the daylight hours (5:30 a.m. to 8 p.m.)

3—The dissolved oxygen values were between 6.2 mg/1 and 9.4 mg/1. Of the 362 determinations, 8 were at 6.2 mg/1, 127 in the range of 6.3 to 7.0 mg/1, 204 between 7.1 and 8.0 mg/1, and 23 in excess of 8.0 mg/1.

4—While there was bacterial action within the deposits as evidenced by gas bubbles, this did not result in the floating sludge mats reported from previous years.

Evaluation of Potential Disposal Sites, Ticonderoga Creek —Lake Champlain Sludge Deposits, Divisions of Fish and Wildlife—New York State Department of Environmental Conservation. The biologists in the department's Division of Fish and Wildlife were asked to evaluate in terms of ecological trade-offs the areas that the Corps of Engineers had indicated might be suitable from a physical standpoint as spoil areas if the sludge was dredged. In their visits to the area for this purpose they also observed what was happening in the bay itself. Their conclusions were that the environmental losses will far outweigh any gains derived from moving the sludge.

This is supported by the following statements:

1—All available evidence indicates the polluted area is rapidly stabilizing and recovering; dredging will only retard this recovery.

2—Gill nets were set for three hours in the marsh area just west of the railroad tracks on September 2 and collected yellow perch, golden shiners, longnose gar, chain pickerel, pumpkinseed, smallmouth bass and largemouth bass. Schools of small fish were observed east of the tracks and in Ticonderoga Creek. In contrast, only gar pike, bowfin and rednose suckers were captured in a

June 1970 sample. Minnows and the wakes of large fish were observed on each trip to the marsh. Fishermen were active in the area when visited on August 5; bullhead fishing was reported as reasonably good.

3—(Area below Fort Ticonderoga) No samples were taken, but numerous fish were observed on July 27, 1971. The shoreline was literally teeming with the cast skins of burrowing mayfly nymphs (Hexogenia)—another indication of a healthy and productive environment.

Letter from Mr. Ralph H. Scott, Chief, Paper and Forest Industries Research, Pacific Northwest Water Laboratory, Environmental Protection Agency. (Mr. Scott did not have available the reports reviewed above with the possible exception of a preliminary draft of the Lake Champlain Basin-Water Quality Surveillance. Thus he was speaking from experience and the Corps of Engineers Report dated January 1970.)

Conclusions: The deposits do not need to be moved to meet the water quality standards from the dissolved oxygen standpoint. Covering might be desirable to reduce floating mats.

These are based on the following:

1—While the sludge deposit area remains a biological desert until significant mineralization has occurred, the DO concentrations over the deposit should, by diffusion and circulation, remain sufficiently high to satisfy both states' water quality requirements from the dissolved oxygen standpoint. From the dissolved oxygen standpoint alone then, I cannot believe that the present deposit will be objectionable.

2—The digestion and mineralization of top layers of sludge no doubt increases the specific gravity and the concen-

tration of total solids in this lens of the sludge deposit. This may weigh down the deeper deposits sufficiently to keep solids confined in the sludge mass as well as reduce influx of nutrients needed to maintain higher rates of decomposition and gas formation. (Covering would assist here.)

3—My main concern with any proposal involving relocation of the deposit involves the secondary effects which will develop in the dredging and transport processes. Efforts along this line will take a number of years and result in extensive lake turbidity as well as redistribution of some portion of the solids over a greater area.