

In the  
**Supreme Court of the United States**

STATE OF ILLINOIS,

Plaintiff,

vs.

CITY OF MILWAUKEE, WISCONSIN,  
et al.,

Defendants.

No. 49 Original

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**SUPREME COURT, U. S.**

Washington, D. C.  
February 29, 1972

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CITY OF MILWAUKEE, WISCONSIN,  
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Washington, D. C.,

Tuesday, February 29, 1972.

The above-entitled matter came on for argument at  
10:58 o'clock, a.m.

## BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

## APPEARANCES:

FRED F. HERZOG, ESQ., Special Assistant Attorney  
General of Illinois, State of Illinois Building,  
160 North La Salle Street, Chicago, Illinois 60601;  
for the Plaintiff.

HARRY G. SLATER, ESQ., Deputy City Attorney, City of  
Milwaukee, Room 800 City Hall, 200 East Wells Street,  
Milwaukee, Wisconsin 53202; for the Defendants.

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Harry G. Slater, Esq., for the Defendants	17

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 49 Original, the State of Illinois against the City of Milwaukee and others.

Mr. Herzog, you may proceed whenever you're ready.

ORAL ARGUMENT OF FRED F. HERZOG, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. HERZOG: Mr. Chief Justice, and may it please the Court:

This is a motion by the State of Illinois asking this Court for leave to file a bill of complaint against various Wisconsin municipalities, including and foremost the City of Milwaukee which, as you know quite well, contains within its boundaries the greatest concentration of people and industry in the State of Wisconsin.

Now, the bill of complaint is quite simple. It merely charges that huge amounts of raw sewage and inadequately treated sewage are dumped every day into the waters of Lake Michigan; that these waters thereby become contaminated, and that these polluted waters find their way into the Illinois territory where they severely, and I mean severely, endanger the life and health of many residents of the State of Illinois.

Actually, in this particular instance, the Department of Natural Resources of the State of Wisconsin, which is the agency which deals with water pollution matters in the State of

Wisconsin, has estimated that 200 million gallons a day -- 200 million gallons a day in the Milwaukee area alone are discharged into the waters of Lake Michigan. Now, this is not a small matter. And it is not a small matter as we in Illinois are concerned with it.

We in Illinois -- I must put here the matter straight in this instance -- have actually done everything possible to wipe out pollution. Of course there are some spots which are remaining, but it was through the efforts of our Attorney General, who is seated next to me here, that we have accomplished that.

And I might say here in this instance that we cannot tolerate and suffer that such an epidemic or possible epidemic lurks behind every wave which really finds its way into the Illinois region. We are familiar, unfortunately, in Illinois with such an epidemic. In the 1880's the City of Chicago dumped raw sewage into Lake Michigan. The consequence was one of the severest typhoid epidemics which ever hit the city of Chicago, which hit the population of Chicago.

And it was at that time that the Chicago Sanitary District was created, where the flow of the rivers, as you might know, is reversed, and where nothing goes into Lake Michigan in this instance.

Actually, here in this instance, we have really a situation where sovereign interests clash with each other.



Although the suit is filed pro forma against various Wisconsin municipalities, in reality, political reality and in effect it is directed against the State of Wisconsin.

As a matter of fact, the respondents all, in their briefs, say and emphasize that they are controlled by the Department of Natural Resources of the State of Wisconsin, which I just indicated is the agency which is in charge of water pollution matters, particularly those concerned in Lake Michigan.

Therefore, we have here, as I indicated, a clash of such sovereign interests, that the municipalities and State agencies merely being the bearers of the sovereign police power of the State of Wisconsin in the field of public health.

Under these circumstances, I respectfully suggest that if you have such a clash of sovereign interests, the exercise of truly original jurisdiction approaches the constitutional mandate, I might even say it becomes mandatory here in this instance.

We had an example here, too, in the case of Missouri vs. Illinois, although Illinois here, the State of Illinois, was made the pro forma party, the real culprit, if I may say so, was the Chicago Sanitary District, against which the complaint was lodged by the State of Missouri. And there the original jurisdiction was exercised.

MR. HERZOG: Yes?

Q -- from a pollution point of view, is the way that Waukegan and Wilmette and Winnetka handle their raw sewage materially different from the way that Kenosha and Racine and Milwaukee handle theirs?

MR. HERZOG: Yes, they handle it presently different. First of all, as far as Wilmette is concerned, it belongs to the area of the Chicago Metropolitan Sanitary District, hence there an extensive treatment is provided and it doesn't go into Lake Michigan.

But as far as Waukegan is concerned, and the communities in the North Shore Sanitary District, they are presently under orders of our Pollution Control Board, of our Water Pollution Control Board not to emit any sewage into Lake Michigan. So they do handle it differently.

As I said, due to our efforts and the persistent efforts which we have made in this field.

Now, being here a class of inter-controversy involving sovereign interests, I have indicated that really original jurisdiction is almost mandatory in this instance. However, even if we elevate form over substance in this instance and say, Well, the complaint is really not directed officially against the State of Wisconsin, nevertheless I can only re-emphasize again that these State agencies and these municipal corporations -- and I might say that one of the agencies is

actually a State agency, namely the Milwaukee Sewerage Commission of the County of Milwaukee, where the members are appointed by the Governor of the State of Wisconsin.

But, as I said, even if we look at these municipalities, nevertheless they are the bearers of sovereign interest, they carry out within their territory the police power of the State of Wisconsin in the field of public health.

The question has been asked by this Court: if the Court exercises jurisdiction, what law would apply?

Well, we submit here that Federal common law must apply in such an instance. It must apply because the mere idea of sovereignty demands the application of such a law. It cannot be a State law, although maybe the Federal Court here can freely draw upon State resources of law. But the law which is applied is Federal law. A Federal law which has to take into consideration the quality of the sovereigns which are involved, and has to take into consideration the backdrop of various Federal laws which will come into play.

Q Mr. Herzog, is Congress free to specify the law or to fashion the law applicable in a suit like this?

MR. HERZOG: Congress is free, but I'm sorry to say, and I will quote later on from the congressional report here in this instance, that Congress has actually delegated the power here to the various States, as far as water quality standards are concerned.



Frankly, in my humble opinion, this is a drawback in this instance; that it is left to the individual States to control even water pollution and to control it, and where, actually, in these interstate disputes, their sovereign interests clash with each other.

Q Well, are we -- is this Court free, despite the decision of Congress, to leave this matter to the State ourselves to fashion a Federal standard that would govern in this case?

MR. HERZOG: No, Mr. Justice White, I really believe here in this instance that under the constitutional mandate of Article III, where the Court must really hear controversies which are in fact between States, this Court must fashion its own laws, in case --

Q Regardless of what Congress says?

MR. HERZOG: Regardless here in this instance of Congress -- unless there is an overriding law of Congress which says that in this instance Federal standards, Federal principles must be applied; which hasn't been the case here.

Q And if Congress said that Federal law is to govern cases like this, but this Court should borrow State law in deciding the case, could you -- would we be bound to follow that directive?

MR. HERZOG: Well, in this instance, frankly, I question whether Congress can tell this Court what law to apply

in cases of original jurisdiction to be decided upon the Article III of the Constitution.

Q Well, let's assume that it can, just for the moment. Let's just assume that it can. Has it?

MR. HERZOG: No. It hasn't really acted in this matter. It hasn't really, as far as the Federal law is concerned, it left to the individual States, really, the resolution of the problem. And it provided eventually, if the State asked for an interstate enforcement conference, and there it wasn't said what law should be applied here, or what rule should be applied here. So it was all left up hanging in the air, and frankly this is the whole drawback of these interstate enforcement conferences.

They haven't worked, and I will indicate why they haven't worked.

But, be that as it may, we respectfully submit here that this is really a controversy between sovereigns, as I have repeatedly mentioned, and the controversy here in this instance which really pertains to the use of water. And if we have such a controversy pertaining to the use of water, Mr. Justice Brandeis here, speaking for this Court in the <sup>?</sup> Hinderlitzer case, which we have quoted in our brief, said the following: For whether the water of an interstate stream must be apportioned between the two States is a question of Federal common law, from which neither the statute nor the decision of either State

can be conclusive.

Now --

Q He was speaking there of course of the statutes of the State, not the Federal statute. Isn't that right?

MR. HERZOG: Correctly, Your Honor, but there is another point here. He refers here characteristically as authority to the case of New Jersey vs. New York, in which actually -- it was really New York City -- in which actually New York City dumped its garbage into the ocean and there the garbage was deposited, if there was an ill wind, on the shores of the State of New Jersey. And there were Federal laws in existence.

The Water Act of 1889 was at this time in existence. The Rivers and Harbors Act was in existence, and actually the harbor master of New York at that time gave to the City of New York the express permission to dump in the places where they dumped. Nevertheless here this Court took jurisdiction and this Court decided here in this particular instance that the action was improper.

I might say here that much is made by the defendants of the fact here that there is that Water Quality Act of 1965 for the Federal Pollution Control Act which provides for an enforcement conference as a remedy by the Attorney General of the United States if requested by the administrator, originally by the Secretary of the Interior, now by the

Administrator of the Environmental Protection Agency.

First of all, let me emphasize that this remedy is not a remedy which is given to the State. It is a remedy which is solely in the discretion of the Federal Government. And during 22 years there was one single case where the Attorney General actually utilized that remedy, apparently wasn't asked here either by the Secretary of the Interior or by the Administrator of the Environmental Agency.

And what did this Administrator say about the effectiveness of that remedy which he is supposedly and allegedly provided here in the Federal law? He simply said that it didn't work at all. We have pointed it out in our brief.

I want to quote from a letter to Representative Albert, the Speaker of the House. It says: This major support of pollution control of interstate waters have not proved sufficiently strong and effective.

Now, we are not really the persons who say that these remedies have not proved effective, it was the U. S. Senate who so held on November 2nd, 1971, barely three months ago. there on November 2nd when they passed unanimously, 86 to 0, a new Act -- the House hasn't acted upon it -- there the Committee on Public Works, after two years of study on the Federal water Pollution Control Program, and I am quoting: "concludes that the national effort to abate and control water pollution is inadequate in every vital aspect. Rivers, lakes,

and streams are being used to dispose of man's waste rather than to support man's life and health. And the use of any river, lake, stream, or ocean as a waste treatment system is unacceptable.

And they said this was due to the time schedules for abatement were slipping away because of failure to enforce lack of effluent controls and disputes over Federal-State standards.

This is the words, you might say, of Senator Muskie, who reported here this bill in behalf of the Committee on Public Works.

Now, what are the facts here of the Michigan State Enforcement Conference? It was the State of Illinois as the only State which, in 1967, asked for that convening of the conference because we were deathly afraid of those wastes which come every day into the State of Illinois. We were afraid because all our efforts would beset to naught, it would be futile, if we couldn't act here in this instance against the neighboring States.

And therefore we asked for the convening of the conference. This is unlike, I might say, Ohio vs. Wyandotte, where there was a Lake Erie Conference which was in existence only for one year before the suit was filed.

In '68 the first conference met, there were high-sounding declarations that the States should cooperate in the pollution control abatement programs, deadlines were set,



operation schedules were provided. But what came of it?

In 1969 the second conference met, and again there were broken deadlines, some of the municipalities didn't even start. As a matter of fact, one of the municipalities here involved has a 1967 deadline to enlarge their sewage treatment facilities. They have still not complied with this schedule.

In 1970, the third conference met, and it met significantly in the City of Milwaukee, because the chairman of the conference, who was a Federal official, turned to the representative of the State of Wisconsin, and I'm quoting what he said:

"But the point is that the biggest city in your State, Milwaukee, is one that discharges into Lake Michigan the water that we have a real high priority to protect is in real violation of this conference recommendation."

They are more than two years late on this inspection of the effluent, and the lack of putting out this inspection means that pollutants go in to the lake. Now, these are the bald facts, as I see them. The largest city in the State is not disinfecting its effluent.

Well, when they learned of this --

Q Mr. Herzog, doesn't the State of Illinois have any remedy under the existing Federal law for these broken deadlines?

MR. HERZOG: No, we have no such remedy. We can't

go to the Federal Conference, we can eventually ask for a hearing, but then after the hearing -- and by the way I might say that contrary to what is stated in the respondent's brief, we would not have a remedy under the Administrative Review Act, because under the Administrative Review Act such remedy would not be in existence if a decision is made by a representative body. I think it is Section 7 of the Administrative Review Act.

We would not have a remedy. As a matter of fact, we have no remedy under the State law, unlike Ohio vs. Wyandotte, we could not go into the State of Illinois. Yes, we could sue them under a long-time statute; how are we going to enforce? Particularly in an injunctive decree against Milwaukee, against the sovereign agency of another State. Yes, we recognize that the same is true with the Federal Court. We do not qualify as a citizen under the diversity proceeding, which is recognized also by this Court in the Wyandotte case.

We could not -- yes, we could go as suggested, and I can only take the suggestion as almost facetious, that we should go to the Department of Natural Resources of Wisconsin and ask for relief. This is as if you would say here the sheep should go to the wolf and ask here to mete out justice among them. This is the very person -- these are the very agencies which tolerate that condition here, and what did -- by the way, as far as the enforcement conference is concerned, what did Wisconsin say when the conference members said: But

you have changed these deadlines unilaterally? They said: Well, it's true we did so, but we consulted the Federal Water Quality Administration; and then they say here, and this is characteristic, this is a quotation from their report to the conference: It should be further noted that there are no published rules or regulations or guidelines that have been promulgated by the Department of the Interior to give specific guidance and details on how this whole area of joint enforcement of standards and recommendations should be administered.

We consider the lack of such rule to be a substantial weakness in conference procedures. That's the whole works. They really denigrate here the whole procedure as such, and nothing is left.

If it please this Court here, this is not the question, as I have said, of property, this is a question literally, and this is not high-sounding oratory, this is a question of human lives which are involved. We might be saying we are equally concerned with the lives of the citizens of Wisconsin, but we have known about this humane concern for the Wisconsin residents cannot be translated by us into regression; but it can be translated by us into regression as far as the residents of the State of Illinois are concerned.

And we are under a duty and the Federal Water Quality Act places a responsibility for action foremost in the States. This is the constant theme of the Federal Water Quality Act.

In the policy statement, that even in the statement where it deals with the enforcement provisions, which deals with the conference, there it says State action shall not be displaced by action of the Federal Government, unless a court order has been issued, which of course has not been done here.

So, under these circumstances, where there is no other remedy available to us, at least no other reasonable remedy, and where we surely are not going to subject our sovereign interests to an administrative agency of the State of Wisconsin, and where sovereign interests prevail, I must submit that the exercise of original jurisdiction is the only thing which is left. Every day which goes by causes irreparable harm. And to postpone the deadlines simply would not do any more.

We have waited three years, four years, now five years. And, by the way, the situation still hasn't been corrected. In the latest brief of the Milwaukee Sewerage Commission, on page 6, at the bottom of the page they talk of one of their treatment plants and say: primary treatment is operative at the other.

You know what this means in the parlance of the health authorities? Primary treatment means that the solids merely are taken out, which is nothing, absolutely nothing, as far as health is concerned.

Secondary treatment is demanded where at least 90, 85 or 90 percent of the solids are removed, and nowadays we

have recognized that even secondary treatment in many instances is not sufficient.

I respectfully urge this Court to exercise jurisdiction, unlike Wyandotte vs. Ohio, this is not where private individuals are involved, this is a suit between sovereigns; and, unlike Wyandotte, no other remedy, at least technical remedy, is available to the State of Illinois which will prevent irreparable harm.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Herzog.

Mr. Slater.

ORAL ARGUMENT OF HARRY G. SLATER, ESQ.,

ON BEHALF OF THE DEFENDANTS

MR. SLATER: Mr. Chief Justice, and if the Court please:

I do not propose to get into any controversy with the State of Illinois on a factual demonstration. We may differ sharply, but I do not think this is the forum where that should be presented.

This matter, I think, has also been somewhat exaggerated in the presentation that has been made, and we ought to very briefly look at the background here to ascertain just what the situation is.

I should like to also say, in defense of my City, we are a progressive, we are a good city, and we respect the rights of our citizens and the rights of other citizens, and we



do what is absolutely at our disposal to make that situation obtain.

Q Well, what about these deadlines, Mr. Slater?

MR. SLATER: The only deadline that I'm aware of, Mr. Chief Justice, is the deadline that is promulgated by the State Department of Natural Resources. I believe this was promulgated in 1970, and they reviewed this situation in an impartial, noncontroversial or partisan manner, and determined that the City of Milwaukee shall have until 1977 to make these broad and overwhelming changes in the sewer system and in the manner of handling sewage.

Now, I should like to state here that the State Department of Natural Resources is created under Wisconsin statutes. It is a quasi-judicial body. It is impartial. It has the same respect for Illinois as it does for Wisconsin. And this body has promulgated orders after making findings and has said what I have just stated, namely, that we shall have until 1977 to make these effective changes.

Q Well, that's, of course, a unilateral action on the part of Wisconsin. Were there any deadlines in the interstate conference?

MR. SLATER: Mr. Chief Justice, I know of none. I do not even know that Illinois complained against that deadline. And I should also like to state that this conference came about in 1967, the then Governor of Illinois asked for

this conference from the United States Secretary of Interior. And this conference was called. And we had four participating States. You had Michigan, Indiana, Illinois, and Wisconsin. And they all came on a cooperative basis to effectuate a remedy for this important problem.

Now, this problem didn't come overnight; it came over a long period of years, and, by the same token, it cannot be solved overnight, even though every municipality, every State, and every individual would like to solve the problem of pollution in a quick and easy and effective manner.

Q Mr. Slater, that was 1967 you said?

MR. SLATER: The conference was first asked for, Mr. Justice, in 1967; it was convened in 1968, in January 1968. It went on for a couple of months and, as a result of that, the State Department of Natural Resources -- and I don't think it is fair to make this an agent of the City of Milwaukee. It is an administrative agency of the State of Wisconsin.

Q Let me get back to my question. That was 1967?

MR. SLATER: That is correct.

Q And now you are preferring, I think, 1977 as the date; that's a full decade.

MR. SLATER: Let me explain, Mr. Chief Justice, why that is required. And I think it also demonstrates very effectively that the great pressing circumstances which have been dramatically displayed here today are not exactly in that

status.

But let me get to this point. What is involved in this correction procedure? The direction that this order takes is that the City of Milwaukee will have to separate its combined sanitary and storm sewers.

Now, this, as we understand from our own engineering instruments, and we think they're fair, would take, over-all, approximately a half a billion dollars; \$300 million would have to come from local taxation; \$200 million would have to come from property owners who would have to make the necessary and essential improvements to complement that which the City of Milwaukee does.

Now, it does not take any stretch of the imagination, that no municipality today, or perhaps in the immediate future, is going to be in a position to formulate a financial program that is going to permit these overwhelming expenditures. We're doing our job, we're trying to meet the situation. But how do you raise \$300 million through local taxation, when you're already burdened with the day-to-day operations of your own municipal government and with the social programs essential to a number of people in order to carry out their municipal operations?

So, when you look at that situation and recognize that that type of money and the burden of doing the mechanical work itself, and the necessary manpower which will accomplish

it, is so great, I must respectfully suggest, Mr. Justice, that 1977 does not appear to be unreasonable.

Now --

Q How much has been done in the five years? You're halfway, aren't you?

MR. SLATER: What is that?

Q You're halfway along, you're five years.

MR. SLATER: Yes, that is true. What is now being done, and there has been some concentrated effort --

Q Well, let me change my question. What has been done other than talking and planning?

MR. SLATER: The preparations are going forward. I must confess this, that the --

Q To what extent?

MR. SLATER: -- that the problem of money is so great that we cannot have just a practical answer to that question. I wish, Mr. Justice, we did.

Q Oh, yes, I think you could make an honest answer: nothing.

MR. SLATER: Nothing from a financial point of view, except the day-to-day --

Q Well, am I correct on that?

MR. SLATER: Well, I would have to confess that we have not done much more than the day-to-day sewer construction, which already constitutes a financial burden.

Now, let me also point out this: there are the practical considerations. Assume you have a special master appointed, we're not determining whether or not there should be corrections. I think that's already been determined by the orders of the Department of Natural Resources. What is the special master going to address himself to?

He's going to have to address himself to the very problems that we're talking about, because, in order to make him -- we would want to comply with an order, but how does a city of the size of Milwaukee, with a substantial debt already and with a maximum debt fixed by the Constitution, go out and raise this kind of money?

What we have to do is look to the Federal Government for assistance, for cooperation, and to grant it. Now, short of that, I don't know where a special master will be able to accomplish any more.

If this was a case to determine what is the degree of pollution; what is the city's reaction to it; perhaps the special master could play a role. But let me say this, the Department of Natural Resources has issued these orders. We have not appealed from them. These orders stand.

There's been no delay. If we were looking for a delay, we could have had reviews of these orders. But they have not been submitted on that basis. They have been accepted by the City of Milwaukee in good faith, and we do propose to



act on them.

Q As you know, years ago New York City took its garbage out to the sea on rafts, and dumped it, and then the tides brought it into New Jersey. That's pretty much what Milwaukee is doing to Illinois, is it not?

MR. SLATER: I would not suggest that that is the situation. We --

Q Well, sewage, not garbage, but I mean it's the same --

MR. SLATER: Mr. Justice, we do what I think is a good constructive job, and we're not getting all of it, I must confess. And the problem is with that excess. But I do not --

Q Well, am I correct --

MR. SLATER: -- want to demean our own efforts. We have an excellent sewerage commission that has done a marvelous job.

Q I'm sure you do. I'm not -- my question was merely this: Where do you recommend that Illinois go, into the Wisconsin courts?

MR. SLATER: Yes, I would recommend first this, if the Court please.

Q What do you say about the Pelican case? Our Pelican case.

MR. SLATER: If the Court please, I think this is somewhat different. You have to bear in mind --

Q That was the case where Wisconsin was not wanting to go into the State court.

MR. SLATER: Well, I understand that. I've been on the other side of this question in water diversion.

Q Yes; true.

MR. SLATER: So I realize that there may be different sides.

But in this case I do not think that that is true. I think there is one side, and I'm trying to explain to the Court just what it is. And that side is simply this: You did have a conference. The Congress has set up the machinery for this conference. It was held in good faith.

Now, if the Department of Natural Resources, after this conference and after all the review, had done nothing, I would say Illinois would have reason to complain.

But the Department of Natural Resources has already demonstrated its impartiality and its good faith. How? By issuing the very orders that have been issued against the City of Milwaukee, against Racine, against Kenosha, and against others.

Q Well, as far as the conference goes, I followed all of them, I think there are about 57 up until last year, and then I gave up because there were so many other things happening. But I didn't find but one that had resulted in anything being accomplished. Has anything happened, do you

know? Have you followed those 57?

MR. SLATER: I have not. I am concerned about our own. I think that we have accomplished --

Q Well, where is the bite in the conference? Isn't it more or less just a get-together and having a few drinks and talk things over?

MR. SLATER: I do not believe so. I do not believe so for this reason, Mr. Justice: The State Department of Natural Resources can impose very heavy fines against anybody that --

Q Oh, I'm not talking about that; I'm talking about the interstate conference.

MR. SLATER: I must confess I did not participate. I don't know how they were run. I do know the results of the conference was the promulgation of orders that I've already alluded to. And this is all that I can say about them, because we are not the State of Wisconsin, and I say this because Illinois has argued that this is a contest between the State of Illinois and the State of Wisconsin. It doesn't fit in trying to get this case away from the very excellent constructive rule in the Ohio v. Wyandotte Chemical case. But that's not the fact.

Now, why didn't Illinois bring Wisconsin in the State of Wisconsin, I'm speaking of; and this is my own observation. They did not bring them in because they found that the State of

Wisconsin was cooperating very beautifully with Illinois. They had this conference, they did issue these orders, these orders are directed against the municipalities. Now, what more can Wisconsin do?

Wisconsin has --

Q Are you suggesting, Mr. Slater, that there is no barrier to joining, appropriately joining the State of Wisconsin here?

MR. SLATER: Mr. Chief Justice, I am not permitted to speak for the State of Wisconsin, I do not have that right. I would say this, that Illinois chose the parties that they wanted to bring in this action. They chose not to bring the State of Wisconsin, perhaps for two reasons. I can offer a second reason: they may have felt that <sup>if</sup> the State of Wisconsin came in there might be some kind of a cross-complaint against some of the municipalities in Illinois. And maybe that was one of the reasons.

I am purely conjecturing on that point. But I do say that when the argument is made here that this is against the State of Wisconsin, it is not; it is against municipal corporations, and you're just one small step away from a private corporation. And so you have exactly the same situation here as you had in the Wyandotte Chemical case. I see no distinction.

And what was true in the Wyandotte Chemical case is equally true here. There is no difference.

Q Mr. Slater, on the failure to join the State of Wisconsin, one reason might be that they thought Milwaukee, Racine, and Kenosha were dumping pollutants into the Lake, and the State of Wisconsin wasn't, mightn't it?

MR. SLATER: Well, that's correct. The State of Wisconsin was not. The State of Wisconsin was issuing orders to try and correct the situation.

But, having put Wisconsin out of this litigation for the moment, does not this bring our situation squarely within the Wyandotte Chemical case, which was issued just about a year ago? And there is nothing new in this situation which should emphasize this case as a distinction against the position that was made in their case.

That is our position, and we have tried to present it in a straight-forward manner. We recognize that we are the -- we have had orders issued against us. We do not try to mitigate that situation. We recognize that there's a problem. We are working on meeting that problem. We have a terrific financial burden, that we have to work out, because no city across the nation today, with all the needs of the city, and there's a great pressing demand for tax-sharing, is in a position to meet this kind of an overpowering burden.

While there may not be an excuse for pollution, there is a practical situation that the special master would likewise have to deal with, because this will not go away with



the waving of a magic wand. The problem is there. It's got to be solved. We're doing our best to solve it.

Q Mr. Slater, if the State Commission in Wisconsin felt exactly the same way about this whole problem as the State of Illinois feels about it, what is the scope of the power of that Commission to either direct Milwaukee and the other municipalities to stop dumping sewage, or what? Could you suggest what their powers are?

MR. SLATER: Mr. Chief Justice, are you speaking about the State Department of Natural Resources?

Q Yes.

MR. SLATER: I would think that the State Department of Natural Resources felt that we were not showing good faith, and the response which they had a reasonable right to anticipate, they could go into court and deal with us accordingly. I am satisfied, too, that if they felt that way they would not hesitate to do it, notwithstanding that Illinois' claim is that this is a totally partisanship arrangement.

Q Well, could they -- specifically could they just simply say: On January 1st, 1973, no discharges into Lake Michigan will be permitted. Solve your problem in your own way, but no discharge.

MR. SLATER: I assume they could say it. But I assume that they are also practical engineers, and they know that by saying it this cannot be accomplished ipso facto. I

wish it could. This is not the ordinary problem.

Q Well, I'm not talking about the practical side, I'm just trying to get the scope of the power.

MR. SLATER: Oh, yes, Mr. Chief Justice, I assume that they could do that under the broad powers that they have under Chapter 144 of the Wisconsin Statutes. Yes, I would have to answer yes.

At least that's my observation.

Q But you say they'd have to go into court to enforce any --

MR. SLATER: That is right, Mr. Justice, --

Q -- order to make that right?

MR. SLATER: -- because the State Department of Natural Resources is not a judicial body, it is a quasi-judicial body, it's primarily administrative and it would have to act through the Attorney General of the State of Wisconsin.

Q And have to go into a court?

MR. SLATER: That is correct. And may I also add --

Q And where you could interpose a variety of defenses, I suppose?

MR. SLATER: Well, if we had any, except the few that I've mentioned here today --

Q Well, impossibility.

MR. SLATER: -- as practical ones.

Q Impossibility would be one, wouldn't it?

MR. SLATER: Well, this is an equitable consideration. I assume if you go into court to try to get an injunction against us, this would be within the broad scope of the equitable powers of the reviewing tribunal. So that the courts are there. And may I add this, I don't think that Illinois need have any fear, we have very excellent, very fair courts, and we assume the same would be true if we had to go into Illinois. I see no problem there.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Slater.

Mr. Herzog, do you have anything more?

MR. HERZOG: Just a minute.

MR. CHIEF JUSTICE BURGER: You have four minutes left.

REBUTTAL ARGUMENT OF FRED F. HERZOG, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. HERZOG: Mr. Chief Justice, and may it please the Court:

About this huge expenditure of money. Let me quote only here one instance from the conference, the third conference, which took place in 1970. There the question arose: how much it would cost to disinfect the sewerage, meaning get the bacteria out, the deadly bacteria out from the sewage. And the man that represented the Department of Natural Resources said \$6 million. Whereupon, all the conferees said: My God,

\$6 million and you don't do anything about it?

And Mr. Stein, Murray Stein, who was in charge of the conference said: Yes, and who has to be spending it? That is the point, Mr. Flanders, if the people in the area feel perfectly comfortable paying \$30 a month for an electric bill and \$20 a month for a telephone bill, and get excited when they have to pay five or six dollars for a water bill and treat their effluent, we are going to still be in trouble.

And this is the basic problem. And this, Your Honors, is the situation here.

First of all, let me say only -- and I don't obviously attempt to run the affairs here of the State of Wisconsin -- but Illinois just voted \$750 million toward the cleaning up of everything toward trying to get air and water pollution cleaned up, \$750 million.

It seems to me that six million dollars is not too high a price in this instance.

Q That estimate was for what, Milwaukee, Kenosha, Racine only?

MR. HERZOG: Milwaukee alone.

Q Milwaukee.

MR. HERZOG: The Milwaukee area, to clean it up.

And I might say here in this instance, unlike the Ohio case, where there were other remedies available, where the State of Michigan had filed -- where in Michigan a suit had

been pending and a court decree was issued. Here I might emphasize again there is no other possibility. And the damage, we cannot wait, frankly, until 1977.

I cannot say how they can raise some money, but they haven't done anything for five years. And if they do, they have it in the drawing stage. And we cannot simply wait in this instance. The public health cannot wait.

Q Has Illinois been involved in other conference proceedings under the Federal Act?

MR. HERZOG: No, this is the only conference proceeding --

Q It has gone on for five years?

MR. HERZOG: Yes. We have asked for it. And, Mr. Justice Douglas, I might state here that --

Q You might be encouraged to note that some of them that I was following last year have gone on for eleven years without anything happening.

MR. HERZOG: Well, I might say that the utmost glaring example is the Potomac River conference, which was called in August 22nd, 1957. And I don't have to inform here this Court, which is much more expertise in this instance, what has happened in this instance.

This conference hasn't led to anything. And we are in dire need of help.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Herzog.

