

In the

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# Supreme Court of the United States

STATE OF VERMONT,

Plaintiff,

vs.

STATE OF NEW YORK, et al.,

Defendants.

No. 50 Original

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SUPREME COURT, U. S.

Washington, D. C.  
February 29, 1972

Pages 1 thru 47

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STATE OF VERMONT,

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Defendants.

No. 50 Original

Washington, D. C.,

Tuesday, February 29, 1972.

The above-entitled matter came on for argument at  
11:45 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:

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Vermont 05602; for the Plaintiff.

PHILIP WEINBERG, ESQ., Assistant Attorney General of  
New York, 80 Centre Street, New York, New York  
10013; for Defendant State of New York.

TAGGART WHIPPLE, ESQ., 1 Chase Manhattan Plaza, New  
York, New York 10005; for Defendant International  
Paper Company.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 50 Original, State of Vermont against the State of New York and others.

Mr. Parker.

ORAL ARGUMENT OF FRED I. PARKER, ESQ.,

ON BEHALF OF THE PLAINTIFF

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

This original jurisdiction suit is a suit by the State of Vermont against the neighboring State of New York and against a citizen of that State, namely the International Paper Company.

It is a controversy over a sludge bed which is sitting on the bottom of Lake Champlain, which lies over the interstate congruent between the two States.

We have alleged in our bill of complaint that that sludge bed constitutes a public nuisance, that it also constitutes a continuing trespass because it has encroached over the State line onto the lands of the State of Vermont. That it is giving rise to an interstate boundary question, because its presence is causing a shift of the channel in the direction of the State of Vermont, and that it is depriving and has deprived Vermont citizens of their right to freely use Lake Champlain.



It is my intention to spend some portion of the original part of this argument in discussing the facts, which I think are very important, and a very short time on the legal issues which I think are simple to comprehend, although they might be difficult to administer.

The States of Vermont and New York, as I said, are neighboring States. Lake Champlain lies along the boundary between the two States. It is a 107-mile long lake, a very narrow one, 12 miles wide at its widest point. And it flows in a northerly direction.

The situation that we describe, the sludge bed situation, is one which exists in the southerly portion of the lake, almost at what would be the headwaters if you were viewing this long lake as a stream.

Q Would you give me, for my benefit at least, a little better, more complete picture of the geography of the total size of Lake Champlain? What are its dimensions? You said 12 miles at its widest part, is that correct?

MR. PARKER: Yes, Your Honor. It's -- the length is 107 miles long; 12 miles at its widest part, which is about the midpoint of that 107-mile stretch; and it narrows down in the southerly portion, at the place that we're describing, to about a mile. And it narrows down in the northerly portion, where it joins, crosses the Canadian border, to about a mile. And I'd say that it fairly regularly narrows; that is, it starts about

a mile wide, expands to 12 miles, and then comes back to about a mile wide.

Q Well, I recall that, driving in that part of the country, it has the characteristics of a river rather than a lake; but I would like to get the true picture. How much of that total is affected directly by the sludge?

MR.PARKER: The evidence that was presented in the interstate conference that was held on this matter indicated that the sludgebed itself was approximately 300 acres, and that the water that it then affected was about 1600 acres.

Now, at that time there was a continuing discharge from the International Paper Company plant, which has since ceased. And I expect that now the waters being affected are somewhat less than they were at that time, because of the discontinuance of the discharge.

At the place where the sludgebed exists, there is a stream which is coming from New York, Ticonderoga Creek, which runs between Lake George and runs into Lake Champlain. And that stream, while the lake is running in a north-south direction, water flowing northerly, the stream joins the lake in a southeasterly direction; so that the waters of the stream run into the lake and buck the current that exists there in the lake. And, as a result of that, the -- well, let me back up for just a second.

The International Paper Company has been operating a

mill, a paper-producing mill and a pulp mill on Ticonderoga Creek for a period of 45 years. And it has discharged waste from those papermaking operations for that period into the stream.

The discharges have deposited out along the stream, and especially at the place where the stream joins the lake to such a point that it has formed this huge 300-acre sludge-bed which consists of organic and inorganic materials that are in a state of septic decay.

Q Now, that operation is now finished, is it? Isn't that plant now closed?

MR. PARKER: Yes, Your Honor, it has. It shut down partially in December of 1970, after this suit was instituted, and fully shut down in April of 1971. But the --

Q And a new plant has been built a few miles away?

MR. PARKER: That's correct.

Q Is it on the lake, the new plant?

MR. PARKER: The new plant is on the lake, and it contains a treatment system. At this point in time we haven't seen measurable degrading effects from the new plant, although we are monitoring that situation.

Q And so, as of now, there's no complaint against the operation of this new plant?

MR. PARKER: That's correct, Your Honor.

The situation that does exist --

Q Is the new plant discharging anything into the lake?

MR. PARKER: Yes, it discharges a treated effluent from the plant. Both the domestic sewage in the plant and the waste from the papermaking operation are treated and an effluent is discharged. We do see some discoloration, but so far we haven't measured detrimental effects.

The sludgebed, however, remains on the bottom of the lake and it is sitting on land of the State of New York. We believe that that sludgebed constitutes a continuing nuisance, in that it will continue to decay and take oxygen from the waters; it will continue in its decay to give off gaseous emissions causing a severe smell in that area; it will continue to constitute an interference with navigation. The situation is there that the sludge has actually filled in to depths of 12 feet to a point, at low water, in much of that area, you can't bring a boat through there.

And the situation has existed for many years that, as this sludgebed decays, the gases formed in the sludgebed cause huge mats of this sludge to rise to the surface and the prevailing westerly winds cause them to float on the water to the Vermont shore. We believe that this condition will continue.

We also believe that there will be a continuing trespass. We have measured, using older maps that showed the midpoint of the deepest channel in the lake, which constitutes

the boundary. We find that that deep channel has been filled in, such that the deepest channel now has moved toward the Vermont shore, and that the sludge sitting there constitutes a trespass and, in addition, it gives rise to a question of where the boundary will be.

The existence of that sludgebed over the years, and its continued existence in the water, deprives Vermont citizens of their right to fish in the water; the fish life there has been seriously depleted by virtue of the oxygen-robbing qualities of the sludge, and --

Q Is that admitted, Mr. Parker?

MR. PARKER: It's admitted in part and denied in part. I think that the posture of -- I don't mean to speak to the defendants. I think the defendants' posture at this point is that the continuing effect of the sludgebed will have no detrimental effect, as I understand their position.

Q Well, was there some action taken with a gill net recently, which produced results?

MR. PARKER: As I understand it, the studies of the defendants in this case indicate that the conditions in that area have improved, and our own studies indicate that the conditions have improved greatly since the discharge has ceased.

But our experts inform us that we can expect a continuation of the prior circumstances, based upon the fact

that the recent studies that were done were done last summer at a time when the water was unusually high down there, and the temperatures did not rise as much as they have in the past.

We expect that, given a situation where the water is lower and gets heated up, as it has in past years, that we'll return to the situation that existed over the past years, and probably not as severe because of the discontinuance of the discharges.

Q Mr. Parker, why can't the State of Vermont get relief as against International Paper, putting to one side the question of the State of New York, in their own courts, for the type of wrong that you've just described?

MR. PARKER: Well, if it turns out, in the proof of this case, that the remedy, the best remedy is removal of the sludge, then of course we may end up with incomplete relief, because New York is now taking the position that to remove the sludge would constitute a threat to the ecology of the lake.

New York has control over those waters, and New York owns that land. I assume that New York could prevent International Paper Company from removing the sludge from its land. And --

Q Under the Federal Act, you got as far as the Attorney General?

MR. PARKER: No, we didn't get that far, Your Honor.

Q How far did you get?



MR. PARKER: We got through two conferences, and a letter from the Secretary of the Interior suggesting action on the part of the State of New York. And then the then Secretary of Interior Hickel left and then the powers of the Interior were transferred to EPA, and we have requested action from EPA, but their response has been negative at this point; we haven't seen any action.

Q Have they declined to act, or just not answered your inquiry?

MR. PARKER: We invited them to join this suit, and they said they were very concerned about it, but didn't care to act at this point. And I understand that there -- and attached to the latest brief of the State of New York are indications that the State has corresponded with EPA, indicating that their recent studies show that nothing further should be done.

Q Well, as I read Section 10 of the Federal Act, subdivision (g), EPA may request the Attorney General to bring a suit on behalf of the United States to secure abatement.

MR. PARKER: That's correct, Your Honor. That's --

Q There's no -- that hasn't been changed to a must, or -- it's purely discretionary?

MR. PARKER: That's right. That's the frustrating business of attempting to deal through these conferences and with the Federal Government is that we have no way of getting

them to act if they don't care to.

And I have no way of knowing whether the Federal Government disagrees with our position or for some other reason has declined to act. But they have not gone forward.

Q In this respect, Mr. Parker, unlike in the -- what does Vermont feel that New York should do that it hasn't done at this point in the State?

MR. PARKER: We feel that that sludge either should be removed from the water or should be covered over so that it doesn't affect the water quality in the future.

Q Covered over, the entire 300 acres. Does the record show what kind of coverage would be required to be adequate?

MR. PARKER: I'm not sure that the record shows this, but the federal conferences that were held in this case, the Corps of Engineers did a study which suggested that a sand cover could be laid over the sludge. There's a disadvantage in that remedy, because we already have a problem with navigation which of course wouldn't be solved by leaving the sludge there.

Q Well, that's why I put that question, if you -- I don't know whether it's six inches or six feet of coverage that would be required; anything you put in would be a further interference with navigation, unless the interference with navigation is in such a small part that you could have a dredging operation first.

MR. PARKER: Well, I think that's one possibility, is a combination of the two remedies, to dredge some and to cover some. But I think that if this Court does take jurisdiction, those will be one of the problems that we'll be trying to work out in trying this case.

MR. CHIEF JUSTICE BURGER: We'll suspend until after lunch.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

## AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Parker, you may continue, you have 15 minutes remaining in all.

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

I indicated just prior to recess that we were seeking as remedies in this case either the removal of the sludgebed or its covering, whichever seemed most appropriate at the time when the remedy -- when we received the remedy. And, in addition, I should indicate that we do have a claim in this bill of complaints for money damages.

We have sought, over the years, alternative relief to litigation. Early in the 1960's, in the New England Interstate Water Pollution Control Compact, the State of Vermont began negotiations which lasted over a period of ten years with the State of New York, seeking some remedy of the situation which existed in Lake Champlain. And, as I recited earlier, under the Federal Water Quality Act we have -- there have been held two Federal conferences at the request of the State of Vermont.

In the first conference, held in 1968, it was determined that there was a problem in that area of the lake, and in between the two conferences studies were conducted by the Army Corps of Engineers and by the Water Quality Administra-

tion, which studies dealt with the question of how best to remedy the situation. One of them concluded that a major portion of the sludgebed did come from the International Paper Company plant; the other studies concluded that the best remedy was cessation of the discharge and removal of the sludge. And a technical committee of that conference concluded that the continued existence of the sludgebed in the lake would constitute a continuing problem.

The defendants of course disagree with that conclusion and that points up the reason why we have to litigate this case.

The legal issues involved, as we see them, the primary legal issue is whether --

Q Just before you move to that, do I understand that the sludgebed is on the bottom of the lake on the New York side of the boundary; right?

MR. PARKER: It is now on both sides of the boundary, Your Honor. It emanates from the New York side, and is spilling over onto Vermont land.

Q Yes. And there's something in the record to the effect that it's been building up over many years, and that there are other contributors to it in addition to -- many other contributors in addition to the paper company, this paper company. Is that -- do you find that the paper company is the sole cause of it?

MR. PARKER: I don't think that we'll be able to prove that they are the sole cause, but they're certainly the major contributor to it. And I think we can prove that. The paper company alleges that others are also involved, but they don't set out --

Q Yes.

MR. PARKER: -- the quantities. The Federal study done in pursuance of the first conference concluded that the major source of the bed was from the paper company plant.

Q And this is way down at the southern tip of the lake, is it?

MR. PARKER: That's right, Your Honor.

Q Down around Fort Henry?

MR. PARKER: South of there, at Ticonderoga.

Q Ticonderoga is not -- is Ticonderoga on the lake?

MR. PARKER: It's just off the lake and, yes, the city of -- the Ticonderoga boundary does have land along the lake. But the city of Ticonderoga and the place where the mill is is on Ticonderoga Creek, which is a tributary running into Lake Champlain.

Q How far from the lake?

MR. PARKER: About a mile, I believe.

Q Thank you.

MR. PARKER: As we see it, the major legal issue is whether jurisdiction is exclusive in this Court, and contributing



to the -- to that issue is whether we have an alternative forum or whether the principles of Ohio vs. Wyandotte apply. In addition, there is the legal question, just recently briefed, asked by the Court as to what law applies.

We think all of those legal issues turn on and are controlled by the question of whether New York is properly a party to this complaint. The defendants' claim that we are simply alleging maladministration of New York law in failing to control this situation over the years. That is not the case.

If we were to assume that there were no New York laws on this subject, we would still have a situation existing where the sludgebed lies on New York land. And New York has control over that land and over that situation. They are permitting and have permitted over the years the continuation of a nuisance which is causing us harm. And we think that once that question is resolved then the others fall into line. The jurisdiction is exclusive in this --

Q What is your cause of action against New York?

MR. PARKER: Maintenance of a public nuisance, Your Honor.

Q You're saying New York is doing that?

MR. PARKER: That's correct.

Q By permitting the sludge to accumulate on its lake bottom?

MR. PARKER: That's correct. On its property.

Q That's a Federal common law in this?

MR. PARKER: Yes, if we litigate for this Court, it will be a question of Federal common law. And that's the position that we took in the recently submitted memorandum.

Q Could you get into a Federal District Court?

MR. PARKER: I don't think we can, because the State of Vermont is not a citizen for purposes of diversity. And the - both the 28 U. S. Code, Section 1251, provides that this forum is the exclusive forum where we can litigate State versus State. So that so long as New York is a party to this litigation, this is the only place that we can bring the suit.

Q Well, if it is a Federal, if we just assume, for purposes of argument, that it is a federal common-law nuisance, could you litigate in the District Court?

MR. PARKER: I don't think -- as I understand the law, the District Court does not have jurisdiction to permit a suit between States.

Q But you've got two suits here: you've got one against International Paper Company and one against the State. I mean, at least you've got two parties.

MR. PARKER: Yes, Your Honor, and --

Q And you are --

MR. PARKER: -- we are viewing them as joint tort-feasors.

Q You would agree that you could litigate against

the International Paper Company in the District Court?

MR. PARKER: Yes, Your Honor, we could.

Q And the Federal law would control it?

If you're right.

MR. PARKER: Well, I think that -- that's the problem, if we conclude that State versus State, we look to federal common law in this Court; and if we treat this as a case of joint tort-feasors, both litigated here, then I think that this Court would apply federal common law against both defendants.

Q Let's assume you hadn't named New York at all. And you sued them in the Federal District Court, sued International Paper in the Federal District Court.

MR. PARKER: Yes, Your Honor.

Q You would be asking for the application of the same law that you would be asking here; correct?

MR. PARKER: I don't think so, Your Honor. I think at that point, then, the substantive law which controls would be State law.

Q Well, why is that?

MR. PARKER: The choice of law rules would have to apply.

Q Why is that?

MR. PARKER: Erie Railroad vs. Tompkins.

Q All right.

Q That's a diversity case. By definition, you said

the State is not a citizen of another State; it wouldn't and couldn't be a diversity case. And the Erie Railroad rule is applicable to diversity cases.

MR. PARKER: Well, I was assuming -- I think it would have to be a diversity case in order to get there, and that's why we can't go there.

Q Why, you would be --

Q Well, that presupposes a decision by this Court that you would -- that you are governed by the federal common law nuisance. And we've never so held. Have we?

MR. PARKER: In cases involving State versus other States, the Court has consistently held that --

Q Right.

MR. PARKER: -- these kind of cases are governed by interstate common law or federal common law nuisance. In suits between States and citizens of ther States, when a State was not involved, to me the law is unclear. I can't find any clear holdings of the Court.

Q Well, what would you say if you were suing International Paper alone in this Court, and, surely, that would be a case within our jurisdiction; and you were claiming that this sludgebed was a nuisance.

MR. PARKER: Yes.

Q You would be asking for the invocation of federal law, wouldn't you?

MR. PARKER: I would be, yes. But I would --

Q Why would you think that any different law would apply if you were suing in the Federal District Court, which has concurrent jurisdiction in that kind of a case?

MR. PARKER: Because, as I understand it -- well, the only way I could understand to get into a Federal District Court --

Q You're asking for a federal -- you're just suing on a federal question, as a matter of federal law.

MR. PARKER: I had never understood that to be the case.

Q Well, of course, it hasn't really been decided.  
?  
Are you acquainted with the Pancke case from the Tenth Circuit?

MR. PARKER: Yes, I am acquainted with it, Your Honor. I don't fully understand it. It seems to stand alone in --

Q I guess that's a safe assertion.

MR. PARKER: Yes.

Q Well, let's assume that in -- you're suing in this Court International Paper Company alone, and this Court decided federal law applies. And then in an identical suit on the facts, between a State and another company, the suit is brought in the Federal District Court. Wouldn't you think the same law would apply?

MR. PARKER: I think if I were plaintiff in that suit in the Federal Court, I would urge that was the case; but

I don't find that to be the law at this point in time. I'm afraid that the Federal District Court wouldn't let you litigate, and therefore you'd be without a forum. You'd end up in State Court in your own State --

Q But they didn't in Pancke, did they?

MR. PARKER: Yes, they did, Your Honor. And that's the only one, so far as I know.

Q Well, it's the only way -- there isn't anything against it, either, is there? I would --

MR. PARKER: No, there are no holdings on --

Q Well, the only authority there is Pancke, is that it?

MR. PARKER: That's correct.

Q What did Wyandotte have to say on the subject, if anything?

MR. PARKER: Well, as I understand Wyandotte, that case said go back to the State Court. It did not direct the plaintiff in that case to go to the Federal District Court.

Q But perhaps that's explainable on the basis that the court understood that the State of Ohio was asserting an Ohio cause of action under the Ohio nuisance law.

MR. PARKER: That's possibly the case. And we may have there here in this case, if this Court does not take jurisdiction, we may very well end up back in a State Court in Vermont. But in that case we'd only be against International



Paper Company, and I don't believe that we could get complete relief.

And that is my argument.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Parker.  
Mr. Weinberg.

ORAL ARGUMENT OF PHILIP WEINBERG, ESQ.,  
ON BEHALF OF DEFENDANT STATE OF NEW YORK

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

To accept this case would be to undercut precisely what this Court held in Wyandotte, where the relief sought by the plaintiff was virtually identical; namely, an injunction against the alleged pollution of water of an interstate lake and damages therefor.

And it seems to us that Wyandotte is completely dispositive here, the Court there properly held that in a case such as that involving complex issues of fact and bottomed on local law, in which the factual questions were sharply contested, and in which, in this Court's phrase, novel scientific issues were involved, that, although concededly there was jurisdiction in this Court, it was precisely the sort of question that the Court should not get entangled in.

Q There's one very great big different, though, is there not? In Wyandotte there was no State who was a defendant. It was not a controversy between two States. Therefore, this

Court, while jurisdiction existed in this Court, it was not exclusive jurisdiction. A controversy between two States is exclusively within this Court's jurisdiction, is it not?

MR. WEINBERG: It certainly is, Mr. Justice Stewart, and it's precisely our point, that there is no genuine controversy between two States here.

Q Well, that is a separate point, but this -- that, on its face, is what differentiates this case from Wyandotte, among others.

MR. WEINBERG: That's certainly true.

Q Yes.

MR. WEINBERG: Once we go beyond the surface representation that two States are involved and look at the realities of the case, however, that, it seems to me, just falls apart because, in fact, New York was injected -- I don't want to characterize why New York was injected; but certainly the only reason for the presence of New York here is to obtain some sort of a possible jurisdiction in this Court, when, in fact, everything that Vermont wants they want from International Paper.

It's conceded on this record here that New York didn't contribute one scintilla of pollution to the lake; New York had no more to do with creating this sludgebed than China did. And that's beyond dispute. The sludgebed was created by International Paper and perhaps by other private

parties as well.

Q Except China had no authority to made International stop?

MR. WEINBERG: That's certainly true, Mr. Justice Marshall.

Q There's an assumption, though, in what I read in the quote from page 3 of your brief, from Wyandotte, that the State Court would decide the case under the same common law of nuisance on which our determination has to rest. That wouldn't be true if this is a federal common law nuisance, would it?

MR. WEINBERG: It would only be a federal common law of nuisance case, under our view of the law, if the State were a proper party, and if the genuine claim for relief existed as against New York.

Now, the answer, it seems to me, is that in contrast to other situations, such as the previous case that was argued this morning involving Milwaukee, New York has been more than diligent, it's actually been aggressive in dealing with this problem. We force International Paper to clean up the pollution that it was causing in Lake Champlain. We took them to court. The case is cited in our original brief. We obtained a consent decree, consent judgment of injunction directing International Paper to cease its active pollution, and it's conceded now that there is no longer any active pollution from

this source at all.

And following that, we represented to the enforcement conference, at which Vermont, New York, the Federal agencies were all parties. We represented to them that we would take whatever steps were necessary or appropriate to abate the pollution caused by the sludgebed. And pursuant to that we entered into a pilot study in which Vermont originally participated prior to their kicking over the traces and, subsequent to that, a study in which New York engaged a highly respected, independent consultant. And the conclusion based on that study, which has never been controverted by anyone except by Vermont in this lawsuit, not by any Federal agency, not by any New York agency, and not by anyone else except Vermont, was that the pollution, the active pollution had now completely ceased, that whatever damage the sludgebed was causing was due to the active pollution of the lake, and that, in fact, the problem was dissipating and the sludgebed itself was stabilizing.

The report, a copy of the summary of which is appended to our supplemental brief, plainly indicates that fish are now returning to that portion of the lake, and that of the various alternatives, by far the safest one, by far the most practical, and by far the most realistical from an environmental standpoint, is to simply leave the sludgebed alone. Because what's happening now is a natural process of stabilization, under

which fish and other marine life are returning to the lake; the pieces of mat and so on, and the bubbling which are complained of --

Q That really goes to the merits of the municipal remedy, doesn't it?

MR. WEINBERG: Yes, sir, it does. But it's simply unavoidable to discuss it, it seems to me, in the context of, as this Court said in Wyandotte, whether in prudence or in discretion it ought to accept this case.

Q Well, Mr. Weinberg, doesn't it also go to why New York may be -- New York State may be a necessary party? This sludgebed is largely on the subsurface of the lake on the New York side of the line, and it's Vermont's contention that the way to abate this nuisance and get rid of it is to remove the sludgebed. And New York strenuously says: No, that's absolutely the wrong thing to do.

So if the Court should order the paper company to remove the sludgebed, and then New York would just step in and say, I'm sorry, we enjoin you from removing this sludgebed; it's on our territory.

Isn't that a reason why New York is a necessary party, to clean up these factual issues in this litigation? To negotiate the remedy.

MR. WEINBERG: The first answer to that, it seems to me, Mr. Justice Stewart, is that these are issues which the

State Court or perhaps even the Federal District Court could address itself to. And if International Paper were ordered by the State Court of either Vermont or New York to remove the sludgebed, then at that point it would be under an injunction, and it would have to do so. And if New York wanted to step in, New York could do so in its courts.

Q It could enjoin the removal of this sludgebed?

MR. WEINBERG: Well, it could, and that question would then be litigated in the State Court --

Q Where?

MR. WEINBERG: -- of either Vermont or New York. that's one answer to it.

A second answer to it is that Vermont alleges in its own Complaint that part of the sludgebed is on its own territory. Now, Vermont has had as much to do with putting that sludgebed there as New York did; namely, nothing.

Q Perhaps you didn't understand me. I was addressing myself to the -- questioning the reason why New York State might be a necessary party as of course it could not be in either a State or Federal Court, except for this Court. Is that right?

MR. WEINBERG: That's certainly true.

But it's highly speculative, I think, to assume that New York would attempt to block an injunction if Vermont could obtain one in its own courts or in New York State Courts.



Q You certainly strenuously assert in your brief, and you've just begun now to assert orally, that the removal of the sludgebed is exactly what would be the wrong thing to do.

MR. WEINBERG: Yes, but this is something that could be litigated as between Vermont and International Paper in the State Courts. And if New York wanted to become a party, New York could certainly be free to intervene, as New York has done as a plaintiff or a defendant in numerous occasions in its own courts; and I don't see any reason why it couldn't do it in the Vermont courts as well.

?

It seems conceivable under Texas v. Pancke that there is some sort of federal cause of action here. In any event, there are certainly two and possibly three forums where all these difficult factual questions could be resolved. And if New York wanted to --

Q But not with New York as a defendant?

MR. WEINBERG: No, but there's no -- I don't see the reason for making New York a defendant here, when --

Q Well, I just suggested a possibility.

MR. WEINBERG: If New York wanted to interpose, assuming that an injunction were granted, a mandatory injunction requiring the sludgebed to be removed, if at that point New York elected to step into the case, it could move to intervene. And if it didn't, then it would have waived whatever objection it has.

So it seems to me that that's not a reason for having this Court hear the case in the first instance.

Q Well, Mr. Weinberg, does New York concede that if Vermont sued International Paper either in the Federal Court in Vermont or in the State Court in Vermont, without New York being a party or an intervenor, and Vermont got a decree of final relief calling for the abatement of the sludgebed, that the State of New York would be bound by that decree so that it couldn't interfere with carrying it out?

MR. WEINBERG: In situations like that, Mr. Justice Rehnquist, which I personally have been involved in, New York has simply executed a consent under which the private party can remove whatever it is. We had a case like that involving pollution of the Hudson by the Marathon Battery Company.

The case was heard in the Southern District Court. It was brought by the United States Attorney. New York was made a party defendant solely to that purpose, or intervened, I believe it was, solely to that purpose, and we simply executed a consent permitting the defendant, under the consent decree, to go on the underwater land and remove what was allegedly causing the disturbance.

I think the point to remember here in regard to all of this is that when one talks about a State owning underwater land or owning the water of a lake, any water pollution, whether it's done by a municipality or by any sort of an industry,

could be with the same logic that Vermont is asserting here, be blamed on the State, just as Ohio sued the Wyandotte Chemical Company and the other defendants in that case, it could have sued the State of Michigan or the Province of Ontario, if it wanted to, using the same logic, that they were depositing toxic material into Lake Erie and that, consequently, it was the responsibility of the State.

And had that happened, we would have had the same situation we have here; namely, the spurious injection of the State in order to provide some sort of a bootstrap jurisdiction for this Court which, in fact, is improper.

And every one of the reasons why this Court, in the exercise of its prudence and discretion, rejected the suit in Ohio v. Wyandotte are applicable here.

There are many State bodies, including the Potomac right here, as well as all of the Great Lakes, the Hudson River, the Delaware River, and others, where the same sort of logic would apply. Obviously, all the lands on one side or the other of those interstate boundaries, the underwater land is owned by one State or the other.

And using the reasoning which Vermont is using here, you could name the State as a party defendant and have any one of those plethora of cases litigated in this Court.

Now, in contrast to what we heard earlier in Case No. 49, where there was a history of, I believe it's fair to say,

failure to grapple with serious pollution problems in Lake Michigan on the part of the municipal authorities there, New York has aggressively acted and, as I indicated, took the State of Vermont -- took the International Paper Company to court.

Thereafter we had the study, the summary of which is appended to my brief, and, with the Court's permission, I'd like to hand up, by giving to the Clerk, at the conclusion of my argument, a copy of the full report.

Vermont attempted to steer around the Wyandotte case, saying, in effect, that it is clear that the sludgebed must be removed. But, in fact, no agency with jurisdiction over the sludgebed has ever said so. The Army Engineers has plenary jurisdiction over the State waters, navigable waters, and they have never so much as suggested that it was any interference with what little navigation may exist on this part of the lake. New York has been in constant communication with the Department of the Interior, and after that with the EPA.

There is a letter from New York State's Commissioner Diamond to Secretary Hickel, annexed to International Paper's first brief; there's a subsequent letter to Mr. Ruckelhaus. There was never any reply to any of those letters, which indicated the slightest displeasure on the part of the federal authorities of the course that New York's been taking, and New York has kept them apprized continually. There just isn't the problem here that Vermont insists there is.

Q I understood the Corps of Engineers has authority only over permits to make new discharges into navigable waters. That's from a rather recent inquiry of them.

MR. WEINBERG: Yes, sir. But they certainly have authority to abate any impediments in navigation, such as Vermont alleges there is there.

Q But their objection doesn't run to navigation, but to health. Am I wrong?

MR. WEINBERG: It's my understanding, Mr. Justice Douglas, that the Army Engineers have the power --

Q I mean that Vermont is complaining about the health qualities of water, and swimming, but not navigation in the --

MR. WEINBERG: Well, they do throw in as a sort of a --

Q Yes.

MR. WEINBERG: -- de minimis or makeweight argument that there are impediments in navigation --

Q Yes.

MR. WEINBERG: -- although they've never complained to the New York authorities about that, except by bringing this suit.

Q This is primarily a health case, isn't it?

MR. WEINBERG: Well, I don't want -- Vermont certainly alleges both. We submit that there's no merit to

either claim. And in direct contrast to every other pollution case this Court has ever accepted, including Georgia v. Tennessee Copper, and Michigan v. Illinois, and all the rest, where there were the most serious dangers of epidemic and large-scale pollution of interstate waters and so on, there's nothing of the sort involved here.

What we have here is a sludgebed which is rapidly stabilizing itself in any event, which is only less than a half a square mile in size, and in fact there's an existing suit, which is referred to in our brief, --

Q You make it sound that, in practice, every State should have one.

[Laughter.]

MR. WEINBERG: I'm not suggesting that it's attractive, I'm simply suggesting that there's nothing to the massive course of action here that Vermont insists there is. And that we have to put the case in its proper context, in contrast to Georgia v. Tennessee Copper and other cases, nearly all of which, in any event, antedated the whole arsenal of statutory remedies which are available in a situation like this.

Any water pollution, by definition, that's in an interstate body of water is on some State's underwater lands, and if there is any sort of sediment or anything, that is going to fall on lands owned by one State or the other. And to hold that this Court had jurisdiction solely on that basis



would be to effectively overrule Wyandotte in any case involving an interstate body of water, and to simply permit the plaintiff State to elect to name the other State which it shares the body of water with as a party defendant.

And for these reasons we maintain that Vermont has an ample forum in the courts of either State, and its motion for leave to file this complaint should be denied.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Weinberg.  
Mr. Whipple.

ORAL ARGUMENT OF TAGGART WHIPPLE, ESQ.,

ON BEHALF OF DEFENDANT INTERNATIONAL PAPER CO.

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

I represent International Paper Company. Our position in this litigation is, I'll say at the outset, three-fold.

We agree with Vermont that the complaint does not state a real justiciable claim against the State of New York.

Secondly, that this Court should refuse to exercise jurisdiction, as it did in Wyandotte.

And thirdly, that as far as governing law goes, the governing law in the State of Vermont's claim against New York is federal law; but, as far as Vermont's claim against the International Paper Company goes, it should be State law.

Before I get into the law, I'd like to perhaps



amplify slightly on some of the factual questions that were asked this morning.

With respect to your question, Mr. Chief Justice, about the area involved and so on. I've visited the area, I've tramped through the two mills, one of which is closed and the new mill which is now open. I think you should try to visualize this part of the lake as a very narrow, almost like the closing mouth of a funnel. If you fly over the latter part of the lake, you will see that the latter part of the lake, including Ticonderoga and Crown Point, is muddy throughout. As the lake broadens, it gets to be clear and much different.

The sludgebed itself, which lies at the mouth of Ticonderoga Creek, which empties into Lake Champlain, covers some 300 acres. Some of it is covered by marsh grass. In fact, it amused me when I was there to see that one of the colored postcards that's sold at Fort Ticonderoga shows the view over the sludgebed. So there's no aesthetically difficult proposition here.

The area involved, in contrast to the whole area of Lake Champlain is a very limited area, indeed.

Finally, Mr. Justice Stewart and, I believe, Mr. Justice Blackmun talked about the new mill. I'd like to say a word about that.

The paper company has long been concerned about the discharge problem in the old mill. Over five years ago it

planned this new mill. It cost \$76 million. It contains the most modern water treatment facilities that were available, which cost between three and four million dollars. And the State of Vermont said this morning there's no problem about the discharges from that mill.

In fact, you can drink the water when it comes out of those treatment facilities; and people have done it.

As to fish life, which is a legitimate ecological concern, we disagree with the statement this morning by Mr. Parker, that while fish life has improved substantially since the discharge has stopped from the old mill, as they did complete in April 1971, that there's going to be a reversion to a minor and poor fish life. In fact it's not true, as I understand it, that conditions this summer, when the tests were conducted by a firm of consultants were unusually favorable.

The temperature of the water rose to high levels sooner than it normally did, and stayed there for a longer time.

I want to emphasize what Mr. Weinberg said. There is a long-standing dispute as to the best way to deal with this debt. Mr. Chief Justice, you mentioned the possibility of covering it. There are at least three possibilities: one is to leave it where it is, cover it or not in some way; the second is to remove it, and if you remove it, what happens? I want you to visualize this bed as a light and feathery substance, as Mr. Diamond's letter to Mr. Ruckelhaus, attached

to the New York State's supplemental brief, points out. It's not a thick, heavy bed. Any attempt to dredge and remove this operation, we are told, would destroy the ecological balance of the lake in a most harmful fashion, indeed.

And there's another question, too: if you remove it, where do you put it, and what happens?

Certainly it would have to be removed to some place fairly near the lake, and if it were done, the best evidence from the scientists is that a lot of it will leach back into the lake. So removal does not seem to be a realistic alternative.

Now, as to the law, I don't mean to add anything, I think, to Mr. Weinberg's position, which is basically that the complaint states a cause of action for maladministration against New York of its own laws.

However, as to whether this Court should exercise the jurisdiction, we don't dispute the Court has jurisdiction. We contend that reasons of policy and principle militate against the exercise of the Court's jurisdiction.

Even insofar as Vermont's claim against New York is concerned, the State against State claim, the way the law has developed, as we understand it, even though the jurisdiction was given to this Court of State against State cases is exclusive, it is not mandatory. In many cases this Court has refused to exercise jurisdiction for strong and compelling reasons of policy.

In Wyandotte, while that was a State against citizen case, and obviously we are distinct here in the sense that New York is a party as well as the paper company, we contend that the same considerations which militated against the exercise of this Court's jurisdiction in Wyandotte should lead this Court to refuse to exercise jurisdiction here.

These factors are familiar, but I would like to just recite them in relation to the facts of our case.

In Wyandotte, the Court pointed out that the Court would be plunged into a morass of novel, difficult, scientific, technical problems. The existence and the manner of treating this sludgebed, so far as we know, are entirely novel. That is why we tried to get the best engineering experts we could last summer to look at it, and advise us and advise the State of New York as well what ought to be done about it.

The mere differences that have come out this morning between Mr. Parker's statement and Mr. Weinberg's illustrate and underline the difficulty of these problems.

I think it's beyond any argument that if this Court were to take the case, the master would be plunged into an extremely difficult problem of fact-finding and recommending. And I don't think, as Vermont might suggest later on, to say that a master can do it all, because, as we understand it, even after the master does it, as Mr. Justice Stone pointed out in Georgia v. Pennsylvania: There still remains in this

Court the duty of independently examining the evidence itself.

Moreover, it seems to us that the Court would be entering into an area that Congress has expressly refused to pre-empt and, rather, has left to the States. The policy course we think would be great if this Court were to be drawn off into the morass of tort litigation arising from water pollution at the expense of its ability to deal with the ever-broadening range of problems that come before this Court in massive numbers and are federally oriented.

If you were to take this case, it's difficult for us to see how you could pick and choose between other pollution cases which would be sure to come here, and with the environmental concerns that surround the country now, we think it's inevitable they would come here; we therefore suggest this case should be resolved at the lower level.

We suggest that the proper course of action is for the Court to refuse to take this case, and to remit Vermont to the type of procedure that the Court has said again and again should prevail in these matters, and that is conference, concessions, cooperation at the lower level, where these things could and should be resolved.

Q Mr. Whipple.

MR. WHIPPLE: Yes, sir.

Q Do you concede that International Paper is amenable to service of process in Vermont?

MR. WHIPPLE: We contend, Your Honor, and I was just about to get to that, that we are suable in Vermont, we're suable in New York, we're ready to stand suit there, there's no question about that. This is the really available alternative that the State of Vermont has against us insofar as remedy goes. There's no doubt about that.

And I'll put to one side for a moment, but I want to just avert to it in a word: the availability of the administrative remedies which we contend Vermont has failed to exhaust, and I would suggest to this Court respectfully that in deciding whether to exercise the Court's discretion to take a case of this nature, one should look long and hard to the question as to whether the State that brings the case or seeks to bring the case here has in fact exhausted its administrative remedies in the circumstances.

Q     Isn't that a sort of a primary jurisdiction argument, or --

MR. WHIPPLE: Well, I don't know, I would characterize it as an exhaustion of administrative remedies, Mr. Justice Stewart. I think you could call it primary jurisdiction, too. It might be both. They might well be.

But my point here is I don't think that the State should come in here and call upon the really extraordinary remedy of original jurisdiction, which this Court has said time and again should be sparingly exercised, and only in unusual



circumstances, when it is refused, that the State of Vermont refused in the fall of 1970 to proceed with engineering studies which Mr. Weinberg related to the Court, the door was slammed; and it seems to me an anomaly for a State to stand before this Court and try to try to invoke the original jurisdiction which should be sparingly exercised, and which, when it's been called into play in water pollution cases, has raised a host of difficulties.

Mr. Justice Holmes spoke about this as early as 1900, 72 years ago. And it's certainly not any easier today than it was then.

So I would suggest that an element, and a strong element, in this Court's discretion should be not only the availability of alternative litigating forum, and we are subject to suits in Vermont. We never have questioned it. Also in New York.

But also that the State has made a positive and a genuine effort to exhaust their administrative remedies. And I contrast this case against some other cases I have heard argued here this morning. I think there's every difference in the world between them.

Q Well, in terms of the applicable law, you say State law should control --

MR. WHIPPLE: Yes, sir.

Q Let's assume you're sued in Vermont, what would



be the governing law?

MR. WHIPPLE: I would think the State of Vermont law, Mr. Justice White. First --

Q And the suit in New York the same?

MR. WHIPPLE: I would think so, that in common law, common law covers judicial nuisance, it's one of the oldest types of complaint known to mankind. I would think this --

Q Well, what if New York says --

MR. WHIPPLE: Let me clarify one thing. May I? You said if we are sued in Vermont, the same thing. I think probably the law at the place of injury should govern.

Q Well, if you're sued, what if the -- what if under the New York law the maintenance of the sludgebed is not a nuisance?

MR. WHIPPLE: Well, I find it hard to accept that hypothesis, but I will arguendo. If we're sued in New York, I would think that the New York Court would look to the Vermont law, because that's the place where the injury occurred..

Q Well, they're saying that the -- Vermont says that the injury is occurring from New York maintaining on its land this sludgebed.

MR. WHIPPLE: No, but the thrust of the injury, the harm visits itself across the border in Vermont, on Vermont shores. That's where the injury occurs, I think. The existence of the bed is mainly, almost entirely, in the State

of New York. But it's in Vermont, it's the citizens of Vermont, at least in the complaint, where Vermont sues as *pariens patriae*, quasi-supporting capacity, there the people are the ones who suffer. The impact is felt there across the border, and I would think the State law of Vermont should govern.

Q Well, you know that in some of the interstate river cases, where a State sues a private company; what has been the applicable law?

MR. WHIPPLE: Well, there is a -- I'm not sure what case you're suggesting, you're thinking of, Your Honor.

Q Well, in Wyoming v. Colorado, when there was some litigation there about a stream and it was between the State and a private company, didn't the doctrine of equitable apportionment of the federal law apply rather than what the --

MR. WHIPPLE: Well, if the case is dealing with the apportionment of interstate waters, and particularly with an interstate compact, then I think it's clear --

Q No interstate compact.

MR. WHIPPLE: All right, put that aside, then. If you're dealing with the apportionment, the apportionment of interstate waters, then it seems to me that federal common law would govern; but here you are dealing with an environmental concern. And I would like to call Your Honors' attention again to the revisions of the Federal Water Pollution Control Act that were mentioned in Wyandotte, where the congressional

policy was clearly and explicitly stated, to recognize, preserve, and protect the primary responsibilities and the rights of the States in preventing and controlling water pollution.

Q Would you see anything inconsistent with your position to suggest that perhaps there might be a federal common law of nuisance cause of action but also a State one?

MR. WHIPPLE: No, I don't. I thought about that a good deal, and I've looked at some of your decisions, and you talked about the DeSilva yesterday, and in Commissioner v. Stearn which is not cited in our brief, at 357 U.S., this Court stated: Uniformity is not always the policy.

And it pointed out, in the Bankruptcy Act for example, the validity of a transfer of property in Florida v. Creditors is governed by the laws of the State, and it added that you could have 50 different laws governing.

I don't see a real inconsistency. I will admit, when I first thought about this case, the notion of a uniform federal common law, blanketing all the rivers in the country, seemed appealing. But I think when you think about it, and you realize that what this Court would be doing would be evolving a new federal common law and laying a tier of new federal common law nuisance on top of the existing State laws, the result would be not to hinder and help this pressing problem of pollution that rides the back of the country, but it would be years before people could know what the federal common law

of nuisance would be.

Q Now, Mr. Whipple, there is litigation now, Zahn against your client --

MR. WHIPPLE: Yes, sir.

Q -- in the United States District Court for Vermont; is that it?

MR. WHIPPLE: There is.

Q And the federal jurisdiction is bottomed on what?

MR. WHIPPLE: Diversity.

Q Not on federal questions; on diversity.

MR. WHIPPLE: I don't think it is, no, Your Honor. It's a straight complaint of nuisance and then it picks up and parrots most of the complaint that's on file here. I would like to add one thing --

Q How far has that litigation gone? I'm just curious to know whether --

MR. WHIPPLE: Well, it was a --

Q -- as to just how the District Court there feels about it.

MR. WHIPPLE: Well, I'll tell you just what --

Q What kind of substantive law is applicable.

MR. WHIPPLE: The case was brought shortly after this one. It's a class action. We contested the class action --

Q Who is Zahn? Who does he represent?  
The townspeople or --

MR. WHIPPLE: Zahn and three other plaintiffs are landowners or lessees along the eastern shore of the lake, opposite the sludgebed.

Q Yes.

MR. WHIPPLE: And the class they contend they represent -- may I finish my sentence?

Q Certainly.

MR. WHIPPLE: -- consists of the class along the lake in this county. It's a class of 200. New York's brief mistakenly says 600.

We contested the class action before the District Judge in Vermont; he agreed with us. The case is now on appeal under a 1292(b) certification to the Second Circuit. That's the status of the case.

Q Just as to the propriety of the class?

MR. WHIPPLE: Exactly.

Yes. Thank you.

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

Mr. Parker, you have three minutes left, I think.

REBUTTAL ARGUMENT OF FRED I. PARKER, ESQ.,

ON BEHALF OF THE PLAINTIFF

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

It seems clear to me that the Court has well in mind the issues in this case, and I don't have anything further,

except that I hate to leave the record reflecting the New York allegations of diligence in pursuing International Paper Company in this case.

The discharges into Lake Champlain occurred for 45 years. For many, many years there were no suits whatsoever.

It was several years after Vermont began pushing New York before any litigation was initiated, and never before was any litigation ever sought of preliminary injunction. In fact, what happened in each case was that International Paper Company would come forward with its schedule as to abatement, and New York would agree with it. And that there were delays and there were numerous changes of deadlines until such time as the paper company finally did construct and begin operation in its new mill, at which point the question of lawsuit became moot.

Unless there are some questions, I have nothing further.

MR. CHIEF JUSTICE BURGER: Apparently none.

Thank you, Mr. Parker.

Thank you, Mr. Whipple, and Mr. Weinberg.

The case is submitted.

[Whereupon, at 1:44 o'clock, p.m., the case was submitted.]