
**In The
Supreme Court of the United States
October Term, 1966**

STATES OF WISCONSIN, MINNESOTA, OHIO, AND PENNSYLVANIA, <i>Complainants,</i> <i>v.</i> STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <i>Defendants,</i> UNITED STATES OF AMERICA, <i>Intervenor.</i>	No. 1 Original
STATE OF MICHIGAN, <i>Complainant,</i> <i>v.</i> STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <i>Defendants,</i> UNITED STATES OF AMERICA, <i>Intervenor.</i>	No. 2 Original
STATE OF NEW YORK, <i>Complainant,</i> <i>v.</i> STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <i>Defendants,</i> UNITED STATES OF AMERICA, <i>Intervenor.</i>	No. 3 Original

MOTION TO REOPEN AND FOR A
SUPPLEMENTAL DECREE, PETITION, AND
BRIEF AND APPENDIX IN SUPPORT OF MOTION

Michael A. Cox Attorney General B. Eric Restuccia Michigan Solicitor General <i>Counsel of Record</i> P. O. Box 30212 Lansing, Michigan 48909 (517) 373-1124	S. Peter Manning Division Chief Robert P. Reichel Louis B. Reinwasser Daniel P. Bock Assistant Attorneys General Attorneys for Complainant
---	--

In The
Supreme Court of the United States
October Term, 1966

STATES OF WISCONSIN, MINNESOTA, OHIO, AND PENNSYLVANIA, <p style="text-align:right"><i>Complainants,</i></p> <i>v.</i> STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <p style="text-align:right"><i>Defendants,</i></p> UNITED STATES OF AMERICA, <p style="text-align:right"><i>Intervenor.</i></p>	No. 1 Original
STATE OF MICHIGAN, <p style="text-align:right"><i>Complainant,</i></p> <i>v.</i> STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <p style="text-align:right"><i>Defendants,</i></p> UNITED STATES OF AMERICA, <p style="text-align:right"><i>Intervenor.</i></p>	No. 2 Original
STATE OF NEW YORK, <p style="text-align:right"><i>Complainant,</i></p> <i>v.</i> STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <p style="text-align:right"><i>Defendants,</i></p> UNITED STATES OF AMERICA, <p style="text-align:right"><i>Intervenor.</i></p>	No. 3 Original

MOTION TO REOPEN AND FOR
A SUPPLEMENTAL DECREE

The State of Michigan, by and through the Attorney General of the State of Michigan, Michael A. Cox, respectfully asks this Court to reopen this matter and issue a Supplemental Decree in accordance with the Petition submitted herewith.

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

In The
Supreme Court of the United States
October Term, 1966

STATES OF WISCONSIN, MINNESOTA, OHIO, AND PENNSYLVANIA, <i>Complainants,</i> <i>v.</i> STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <i>Defendants,</i> UNITED STATES OF AMERICA, <i>Intervenor.</i>	No. 1 Original
STATE OF MICHIGAN, <i>Complainant,</i> <i>v.</i> STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <i>Defendants,</i> UNITED STATES OF AMERICA, <i>Intervenor.</i>	No. 2 Original
STATE OF NEW YORK, <i>Complainant,</i> <i>v.</i> STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <i>Defendants,</i> UNITED STATES OF AMERICA, <i>Intervenor.</i>	No. 3 Original

PETITION

The State of Michigan, by and through its Attorney General, Michael A. Cox, petitions this Court for a Supplemental Decree and, in support of this Petition, states as follows:

Jurisdiction of this Court

1. Pursuant to paragraph 7 of the 1967 Decree, as amended December 1, 1980:

Any of the parties hereto may apply at the foot of this decree for any other or further action or relief, and this Court retains jurisdiction of the suits in Nos. 1, 2, and 3, Original Docket, for the purpose of making any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy.¹ (App. 6a.)

2. Original jurisdiction is also proper here pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U.S.C. § 1251(a).

Introduction

3. This is a petition for a Supplemental Decree declaring that the conditions maintained by Defendants State of Illinois and the Metropolitan

¹ *Wisconsin v. Illinois*, 388 U.S. 426, 430 (1967); *Wisconsin v. Illinois*, 449 U.S. 48 (1980).

Water Reclamation District of Greater Chicago (District), and Intervenor United States of America, through the United States Army Corps of Engineers (Corps) – through the facilities for diversion of water from Lake Michigan that are the subject of the existing Decree are unlawful. Specifically, Michigan asks this Court to declare that to the extent the facilities created, operated, and maintained by those Defendants and Intervenor in connection with the diversion now allow the introduction of harmful aquatic invasive species into Lake Michigan and other connected waters, they constitute a public nuisance. Those facilities create a threat of irreparable injury to natural resources held in trust by the State of Michigan, as well as riparian and other rights of Michigan and its citizens. The Petition also seeks preliminary and permanent injunctive relief to prevent and abate the nuisance. The Petition does not seek to alter the quantity of water being diverted from Lake Michigan under the existing Decree, as most recently amended. Instead, the Petition seeks modification of the means created and maintained by Defendants and the Corps to accomplish the diversion.

Background

4. The matter in controversy originated more than 100 years ago with the Defendants' construction and operation of an artificial canal, now referred to as the Chicago Sanitary and Ship Canal (Canal), connecting the Chicago River with the Des Plaines and Illinois Rivers. (App. 27a, 52a-53a, 86a.)

5. As the Special Master appointed by the Court in this case observed, "the disposition of Chicago's sewage has been the dominant factor in the promotion, maintenance, and development of the enterprise by the State of Illinois and the Sanitary District."²

6. Before Defendants undertook the diversion project, sewage and industrial waste discharged into the Chicago River flowed into Lake Michigan, polluting water intakes for Chicago's municipal water supply. (App. 76a, 85a-86a.)

7. To address that problem, Illinois enacted laws creating the Sanitary District and providing for construction of a new canal connecting the Chicago River to the Illinois River and Mississippi watershed. Defendants constructed and operated facilities to reverse the natural flow of the Chicago River away from Lake Michigan, using water diverted from Lake Michigan to dilute and flush its wastes downstream.³

8. Defendants' diversion project engendered substantial environmental concerns. First, the State of Missouri and others sued Defendants, alleging that their discharge of polluted waters into the Mississippi was a public nuisance, threatening the health and safety of downstream water users.⁴

² *Wisconsin v. Illinois*, 278 U.S. 367, 415 (1929).

³ *Wisconsin v. Illinois*, 278 U.S. at 402-404.

⁴ See *Missouri v. Illinois*, 180 U.S. 208; *Missouri v. Illinois*, 200 U.S. 496, 572 (1906).

9. Second, it was soon recognized that the Defendants' diversion project lowered the level of Lake Michigan and other Great Lakes and connecting waterways, adversely affecting navigation and riparian rights. Defendants withdrew more water from Lake Michigan than authorized under permits issued by the Secretary of War.⁵ To protect the Great Lakes, the United States sued the District and obtained an injunction prohibiting withdrawals greater than allowed under the previously issued permits. This Court affirmed that injunction in *Sanitary District of Chicago v. United States*.⁶

10. While that litigation between the United States and the District was pending, several Great Lakes states, including Michigan, sought and obtained leave to file bills of complaint against Illinois and the District that were considered together and decided by this Court in *Wisconsin v. Illinois*, *Michigan v. Illinois*, and *New York v. Illinois*.⁷ It is those cases that Michigan now seeks to reopen.

11. Michigan and the other Complainant States alleged that Defendants' diversion of water from Lake Michigan was unlawful and injurious to their rights and the rights of their respective citizens.⁸ Among other things, the plaintiffs alleged that Defendants' diversion project had lowered the levels of Lakes Michigan, Huron, Erie, and Ontario,

⁵ Permits issued pursuant to 30 Stat. 1121.

⁶ *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925).

⁷ *Wisconsin v. Illinois*, 278 U.S. 367 (1929).

⁸ *Wisconsin v. Illinois*, 278 U.S. at 400.

their connecting waterways and of the St. Lawrence River by several inches, damaging uses of those waters for navigation, fishing, hunting, wildlife, habitat, recreation, and riparian property generally.⁹

12. After referring the matter to a special master, considering the master's report, and the arguments of the parties, this Court held that the Defendants' diversion was unlawful, except to the extent that the Secretary of War, by a permit issued in 1925, had temporarily authorized use of Lake Michigan water to remove sewage from the Chicago River in order to avoid interference with navigation in the Port of Chicago.¹⁰

13. The Court noted that because the Defendants had created a situation that violated the plaintiffs' rights, the plaintiffs "might properly press to an immediate shutting down by injunction of the diversion, save for any small part needed to maintain navigation in the [Chicago] river."¹¹ However, because of the potential hazard to public health absent another immediate means to dispose of sewage within the District, the Court, in exercise of its equitable powers, determined that it would frame a decree:

[A]s to accord to the Sanitary District a reasonably practicable time within which to provide some other means of disposing of the sewage, reducing the

⁹ *Wisconsin v. Illinois*, 278 U.S. at 400.

¹⁰ *Wisconsin v. Illinois*, 278 U.S. at 417-418.

¹¹ *Wisconsin v. Illinois*, 278 U.S. at 418.

diversion as the artificial disposition of the sewage increases from time to time, until it is entirely disposed of thereby, when there shall be a final, permanent operative and effective injunction.¹²

14. After again referring the matter to a special master, the Court entered a Decree requiring Defendants to reduce its diversion of water from the Great Lakes watershed through the Chicago Drainage Canal and its auxiliary channels according to a specific schedule existing through 1938.¹³ As noted above, the Court retained jurisdiction in paragraph 7 of the Decree.¹⁴

15. In 1933, because of Defendants' failure to proceed with construction of sewage treatment facilities necessary to comply with the 1930 Decree, the Court enlarged the Decree to require the State of Illinois to take "all necessary steps," including authorization or appropriation of funds to complete the sewage facilities required to comply with the Decree.¹⁵

16. The Court has, over several decades, continued to exercise jurisdiction in this matter at the request of the parties. Notably, in 1967, the Court entered a Consent Decree that, effective March 1, 1970, superseded the 1930 Decree, as

¹² *Wisconsin v. Illinois*, 278 U.S. at 419.

¹³ *Wisconsin v. Illinois*, 281 U.S. at 696.

¹⁴ *Wisconsin v. Illinois*, 281 U.S. at 696-698.

¹⁵ *Wisconsin v. Illinois*, 289 U.S. 395, 411 (1933).

enlarged in 1933.¹⁶ It enjoined Defendants from diverting any waters from the Lake Michigan watershed into the Illinois waterway in excess of an average of 3,200 cubic feet per second.¹⁷ The Consent Decree carried forward paragraph 7, quoted above, from the original 1930 Decree.

17. The Court again reopened the case and entered an amendment to paragraphs 3 and 5 of the 1967 Decree in 1980.¹⁸

18. Although not initially a party to this case, the United States later participated as an amicus curiae (App. 8a) and ultimately as an Intervenor. (App. 7a.) In a December 1978 Memorandum concerning the 1980 Amendment, the United States noted a number of potentially affected federal interests, including navigation and pollution, and that the Great Lakes system was a unique natural resource. It reported that it had consulted with both the Corps of Engineers and the Environmental Protection Agency regarding the proposed Amendment of the Decree. (App. 8a-9a.)

Current Status of the Diversion Project and Associated Infrastructure

19. As noted above, a central element of the diversion project initiated by Defendants was what is now referred to as the Chicago Sanitary and Ship Canal (Canal). (App. 27a, 52a-53a, 76a.) In addition

¹⁶ *Wisconsin v. Illinois*, 388 U.S. 426, 430 (1967).

¹⁷ *Wisconsin v. Illinois*, 388 U.S. at 427.

¹⁸ *Wisconsin v. Illinois*, 449 U.S. 48 (1980).

to its primary function as a means of managing wastewater discharges from within the District, the Canal serves as a means of navigation and is part of a larger waterway system connecting the Great Lakes with the Mississippi River. (App. 86a, 99a-102a.)

20. The Chicago waterway system, which is integral to the diversion project, includes, in addition to the Canal, two other artificial waterways:

- (a) The North Shore Channel connecting the Chicago River to Lake Michigan at Wilmette. (App. 76a, 83a, 86a.)
- (b) The Calumet-Sag Channel which connects the Canal to the Calumet River and was used to reverse the natural flows of those rivers away from Lake Michigan. (App. 76a, 83a, 86a.)

21. As a result of Defendants' diversion project, direct diversions of Lake Michigan water occur at three locations at or near the Lake:

- (a) The Wilmette Pumping Station, located where the North Shore Channel meets Lake Michigan. It is owned, operated, and maintained by the District. It includes a concrete channel, pumps, and a sluice gate. (App. 79a, 85a, 89a-90a.)

- (b) The Chicago River Controlling Works in Downtown Chicago where the Chicago River joins Lake Michigan. The control structure includes a concrete wall separating the river from Lake Michigan, sluice gates, and a navigation lock. The Corps of Engineers is responsible for maintenance and operation of the lock. The District is responsible for operation and maintenance of the remainder of the structure and the sluice gates. (App. 77a, 85a, 91a-92a.)

- (c) The Thomas J. O'Brien Lock and Dam is located on the Calumet River and controls the flows of the water between Lake Michigan and the Little Calumet River and, thereby, the Calumet-Sag Channel. The navigational Lock and Dam are operated and maintained by the Corps. The sluice gates are operated by the District. (App. 77a, 85a, 91a-92a.)

22. Under normal conditions, the combined flow of water entering the system through diversion, stormwater runoff, and discharges of treated wastewater flows south through the Canal to the Lockport Powerhouse and Lock, located one mile upstream from the junction of the Canal with the Des Plaines River. (App. 76a-77a.) The Powerhouse

is operated by the District and the navigational Lock is operated by the Corps. In addition, the District operates the Lockport Controlling Works two miles upstream from the Powerhouse and Lock to manage stormwater flows and, on occasion, divert them into the Des Plaines River. (App. 76a-80a.)

23. As a direct result of the diversion project and the associated infrastructure created, operated, and maintained by Defendants and the Corps, there are multiple water connections through which fish and other biota can move from the Illinois and Des Plaines Rivers below Lockport and into Lake Michigan. (App. 80a.) These water connections include, but are not necessarily limited to, the following:

- (a) The Lock at Lockport.
- (b) Sluice gates in the Lockport Dam.
- (c) The O'Brien Lock.
- (d) Sluice gates in the O'Brien Dam.
- (e) The Chicago Lock.
- (f) Sluice gates in the Chicago River Controlling Works.
- (g) The sluice gate at Wilmette Pumping Station. (App. 76a-80a.)

24. In addition, because of the creation and operation of the Canal, the North Shore Channel, Calumet-Sag Channel by Defendants, there is the potential for fish to migrate from the Canal into Lake Michigan through:

- (a) Reversals of water flow into Lake Michigan at the Wilmette Pumping Station under certain stormwater flow conditions.
- (b) Direct passage through the Calumet River into Lake Michigan at Indiana Harbor, if and when a temporary cofferdam recently installed as part of an ongoing environmental cleanup project at the Harbor is removed.
- (c) Direct passage through the Little Calumet River into Lake Michigan at Burns Harbor, Indiana. (App. 76a-80a.)

25. Furthermore, portions of the Canal located north of Lockport closely parallel two other nearby waterways – the Des Plaines River and the obsolete Illinois and Michigan Canal (I&M Canal). (App. 53a-56a.) As recently as 2008, the Des Plaines River flooded into the Canal. This drainage system may also allow water flow between the I&M Canal and the Canal. (App. 53a-56a.) Consequently, fish present in either that segment of the Des Plaines River or the I&M Canal may, under certain conditions, migrate into the Canal north of Lockport. (App. 54a-56a, 119a-120a, 122a.)

26. In sum, the Canal and associated infrastructure of Defendants' diversion project as created, maintained, and operated by Defendants and the Corps provides a conduit for the movement of fish and other biota between the Illinois River and the Great Lakes at multiple locations on the shore of Lake Michigan.

Asian Carp

27. Several species of carp native to Asia have been imported to the United States for various reasons, including experimental use in controlling algae in aquaculture and wastewater treatment ponds. (App. 13a, 44a-45a.) Two species of Asian carp are of particular concern here:

- (a) Silver carp (*Hypophthalmichthys molitrix*) which can grow to lengths of three feet and weights of 60 pounds, feed almost continuously because they lack a stomach. In the presence of motorboats, silver carp may jump up to ten feet in the air.

- (b) Bighead carp (*Hypophthalmichthys nobilis*) which can grow to lengths of five feet and weights over 100 pounds and also feed almost continuously. (App. 13a-25a, 44a, 57-59a.)

28. Both silver and bighead carp readily adapt to varying environmental conditions, reproduce prolifically, and spread rapidly. (App. 110a-115a.)

29. Since being released from ponds in the lower Mississippi basin, both silver and bighead carp populations increased exponentially. They have rapidly migrated through, and become established in, rivers in the Mississippi basin, including the Illinois River. (App. 13a-14a.)

30. By aggressively consuming available nutrient sources, silver and bighead carp have substantially disrupted and in some areas largely displaced native fish populations in those rivers, impairing recreational and commercial fishing. (App. 18a-23a, 58a.)

31. Because of their large size and extreme jumping behavior, silver carp have injured boaters and caused property damage, thus impairing recreational boating. (App. 23a, 59a.)

32. As a result of their rapid spread, bighead and silver carp populations have been established in the Illinois River. (App. 15a.)

33. By 2009, silver carp were observed in the Canal, slightly south of the Lockport Dam and Lock. (App. 37a, 45a.)

34. Beginning in 2009, the Corps undertook a program of environmental surveillance for silver and bighead carp using environmental DNA (eDNA) methods developed by the University of Notre Dame. (App. 35a-37a, 40a.) In this method, samples of

water are collected, filtered, and their contents analyzed for the presence of genetic material that has been emitted or secreted by those species. (App. 35a-37a.)

35. A series of eDNA sample results from the Des Plaines River, the Canal, and other connecting waterways indicate that Asian carp are now present north of the Lockport Lock, in the Calumet-Sag Channel in the vicinity of the O'Brien Lock. (App. 39a-43a, 65a-66a, 72a-73a.) That location is less than eight miles from Lake Michigan itself. (App. 85a.)

36. As bighead and silver carp have migrated closer and closer to Lake Michigan in recent years, the United States, through both the Corps and the United States Fish and Wildlife Service, and Illinois, through its Department of Natural Resources, have recognized that the potential migration of silver and bighead carp, through the Canal and connecting waters into Lake Michigan, presents a grave threat of environmental and economic harm.

37. For example, the Corps recently acknowledged:

Asian carp have the potential to damage the Great Lakes and confluent large riverine ecosystems by disrupting the complex food web of the system and causing damage to the sport fishing industry. Two species of Asian carp, bighead carp (*Hypophthalmichthys nobilis*) and silver carp (*H. molitrix*),

have become well established in the Mississippi and Illinois River systems exhibiting exponential population growth in recent years. Certain life history traits have enabled bighead and silver carp to achieve massive population numbers soon after establishing. Currently, the Illinois River is estimated to have the largest population of bighead and silver carp in the world. The prevention of an inter-basin transfer of bighead and silver carp from the Illinois River to Lake Michigan *is paramount in avoiding ecological and economic disaster.* (App. 51a-52a, emphasis added.)

38. A 2004 United States Fish and Wildlife publication similarly stated:

Bighead and silver carp are in the Illinois River, which is connected to the Great Lakes via the Chicago Sanitary and Ship Canal. *Asian carp pose the greatest immediate threat to the Great Lakes ecosystem. . . .* Bighead and silver carp could colonize all of the Great Lakes and sustain high-density populations. High densities would likely result in declines in abundance of many native fishes.

* * *

Great Lakes sport and commercial fisheries are valued at \$4.5 billion dollars annually, without including the

indirect economic impact of those industries. Degradation of those fisheries would have severe economic impacts on Great Lakes communities that benefit from the fisheries. Waterfowl production areas are also at risk from Asian carp. Hunters spend more than \$2.6 billion annually on their sport in the Great Lakes, so reduction of waterfowl populations there would decrease the economic value to communities that benefit from hunting. (App. 15a, emphasis added.)

39. The Illinois Department of Natural Resources recently stated:

Asian carp could have a devastating effect on the Great Lakes ecosystem and a significant economic impact on the \$7 billion fishery. Once in Lake Michigan, this invasive species could access many new tributaries connected to the Great Lakes. These fish aggressively compete with native commercial and sport fish for food. *They are well suited to the water temperature, food supply, and lack of predators of the Great Lakes and could quickly become the dominant species.* Once in the lake, it would be very difficult to control them. (App. 44a-45a, emphasis added.)

**Preventative Measures Taken to Date by
Illinois and the United States are Inadequate**

40. Faced with the mounting threat of introducing bighead and silver carp into the Great Lakes through the Canal, the Corps, in cooperation with other federal and state agencies, has undertaken considerable, well-intentioned, but insufficient, efforts to prevent that occurrence.

41. The Corps has primarily relied upon an electrical "Dispersal Barrier System," comprised of underwater steel cables charged with electricity that is intended to deter the passage of invasive species. (App. 27a-33a.)

42. The first element of the Dispersal Barrier System – now referred to as "Barrier I" and located slightly north of the Lockport Dam, and approximately 25 miles from Lake Michigan, began operation in 2002. (App. 27a-33a.) It was conceived as an experimental means of deterring the movement of other aquatic invasive species that had infested the Great Lakes – such as zebra mussels and the round goby – from Lake Michigan through the Canal into

the Illinois and Mississippi River basin.¹⁹ By the time this began operation, the round goby had already become established downstream.

43. In 2004, the Corps began construction of a second electrical barrier – now referred to as "Barrier IIA," located approximately 1,300 feet downstream from "Barrier I." (App. 30a-31a.) Although construction of "IIA" was completed in 2006, it was not activated until early 2009, and even then, initially at approximately 25 percent of its electrical capacity. (App. 31a-32a.) In August, 2009, after results of eDNA testing for bighead and silver carp closer to Lockport Dam were reported, the Corps increased the electric settings on Barrier IIA somewhat. (App. 31a-32a.) But those settings still remain below their full design capacity. (App. 31a-33a.)

44. The Corps has announced plans for a third element of the Dispersal Barrier System – designated "Barrier IIB" to be located between

¹⁹ The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, as amended by the National Invasive Species Act of 1996, provided for a dispersal barrier demonstration program in which the Assistant Secretary of the Army (Civil Works) was directed to investigate: "[E]nvironmentally sound methods for preventing and reducing the dispersal of aquatic nuisance species between the Great Lakes-Saint Lawrence drainage and the Mississippi River drainage through the Chicago River Ship and Sanitary Canal . . . [and] ways to incorporate those methods into ongoing operations of the United States Army Corps of Engineers that are conducted at the Chicago River Ship and Sanitary Canal." 16 U.S.C. § 4722(i)(3).

Barriers IIA and I, but it has not yet been completed. (App. 32a-33a.)

45. Information available to the Defendants and the Corps demonstrates that even when completed, the Dispersal Barrier System cannot prevent the migration of bighead and silver carp through the Canal into Lake Michigan. Among other things:

- (a) The Barrier System is experimental and fish may be able to pass through it. (App. 15a.)
- (b) The Corps has acknowledged that the Barrier can be by-passed through the movement of water from carp-infested waters of the immediately adjacent Des Plaines River and Illinois and Michigan Canal, by means of flooding or cross-connections. (App. 51a-56a.) While the Corps is currently evaluating measures to reduce those risks, none have yet been implemented.
- (c) Most important, eDNA collected for the Corps indicates that Asian carp are already present at multiple locations in the Calumet-Sag Channel, north of the Barrier System, and as close as eight miles to Lake Michigan. (App. 39a-43a, 65a-66a, 72a-73a.)

46. Moreover, the Corps has determined that the existing Dispersal Barrier System – Barrier IIA – cannot be operated continuously and must be periodically turned off for maintenance.

47. The Corps turned off Barrier IIA between December 2 and December 4, 2009 for such maintenance. (App. 63a.) At the same time, to mitigate the risk that Asian carp would pass through that segment of the Canal, a multi-agency, Asian Carp Rapid Response Workgroup, coordinated by the Illinois DNR, and supported by staff and resources of various federal and state agencies, including, among others, the Michigan Department of Natural Resources, applied a fish poison – rotenone – to an approximately 5.7 mile-long portion of the Canal near the Barrier System. (App. 61a-62a, 64a.)

48. Although many of the fish killed as a result of the rotenone application apparently sank to the bottom of the Canal, the Illinois DNR reported that thousands of other fish that floated to the surface and were recovered included at least one bighead carp. (App. 61a.) When found on December 3, 2009, that carp were located approximately 500 feet north of the Lockport Lock and Dam. (App. 61a.) The Illinois DNR noted that "[B]iologists with the workgroup believe there is a high probability that additional Asian carp were killed during the toxicant application but may not be found . . . [and that because of cold water temperatures] 'far more fish are sinking to the bottom of the waterway than will float to the top.'" (App. 64a-65a.)

49. During the recent temporary shutdown of Barrier IIA and associated rotenone application and dead fish recovery effort, the United States Coast Guard temporarily restricted navigation in the Canal.²⁰ (App. 64a.)

50. The Corps also kept the O'Brien Lock closed between December 1 and December 7, 2009. (App. 68a.) During that time the Asian Carp Rapid Response Workgroup used fishing nets to collect fish in a segment of the Calumet-Sag Channel near the O'Brien Lock. (App. 68a.) Although no bighead or silver carp were found among the several hundred fish netted in that process, the fishing effort could not and did not recover all fish present in that area, and thus did not establish that no Asian carp were present. (App. 68a, 121a.)

51. By reopening the O'Brien Lock on December 7, 2009, the Corps re-established a direct water connection at that point through which bighead and silver carp present in the Calumet-Sag Channel – including those previously detected through the Corps' own eDNA testing – can migrate into Lake Michigan. (App. 80a, 120a-121a.)

52. In addition, as described in paragraphs 21-26 above, there are several other locations within the Canal and associated infrastructures maintained by Defendants and the Corps, through which bighead and silver carp present in the Illinois and Des Plaines Rivers and the Canal can migrate into Lake Michigan. (App. 80a.)

²⁰ Safety and Security Zone, Chicago Sanitary and Ship Canal, Romeoville, Illinois, 74 Fed. Reg. 65439 (2009).

53. Neither Defendants nor the Corps have implemented reliable and effective measures to prevent such migration of bighead and silver carp into Lake Michigan.

Public Nuisance

54. At common law, including the common law of Illinois, a condition, action, or failure to act that unreasonably interferes with a right common to the general public is a public nuisance.²¹ The attorney general may bring an action for injunctive relief to prevent or abate such a public nuisance.²²

55. The waters and aquatic resources of Lake Michigan and the other Great Lakes are held in trust for the benefit of the public by Michigan and other Great Lakes states, within their respective jurisdictions.²³ The public rights in those waters and resources include, but are not limited to, fishing, boating, commerce, and recreation.²⁴

56. As Illinois and as the United States, through the Corps and the United States Fish and Wildlife Service, have properly acknowledged, the migration of bighead and silver carp from the Canal into Lake Michigan, and thereby other Great Lakes

²¹ *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 366 (Ill. Sup. Ct. 2004).

²² *Missouri v. Illinois*, 180 U.S. 208 (1901).

²³ *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 455-458 (1892).

²⁴ *Illinois Central R.R. Co. v. Illinois*, 146 U.S. at 452; *Glass v. Goeckel*, 473 Mich. 663, 678-679 (2005).

and connected rivers and waterbodies, will cause enormous and irreversible harm to the public rights in those waters. (App. 15a, 19a-25a, 45a, 51a, 54a-55a.)

57. If bighead or silver carp enter and become established in Lake Michigan and other connecting waters of the Great Lakes, the resulting harms to public rights will include, among other things:

- (a) Substantial damage to and displacement of existing fish population. (App. 19a-23a, 45a, 49a, 116a.)
- (b) Significant impairment of existing recreational and commercial fishing activity in the Great Lakes, which has an estimated economic value of \$7 billion. (App. 45a, 117a.)
- (c) Significant threats to the health and safety of persons operating motorized boats in the vicinity of silver carp. (App. 23, 59a.)

58. The substantial and unreasonable nature of the harm that will be caused by Defendants' and the Corps' failure to prevent the migration of bighead and silver carp into Lake Michigan is further illustrated by the fact that such an introduction of harmful invasive species is contrary to federal statute. For example:

- (a) The Lacey Act²⁵ prohibits the interstate transport of injurious wildlife species. Pursuant to that statute, the United States Fish and Wildlife Service (USFWS) has issued a final rule listing silver carp as such an injurious species.²⁶ A similar listing for bighead carp remains under review.
- (b) The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, as amended by the National Invasive Species Act²⁷ requires that the Aquatic Nuisance Species Task Force, which includes the USFWS and the Corps, to take action to minimize the risk of certain introductions of aquatic nuisance species:

– Whenever the Task Force determines that there is a substantial risk of unintentional introduction of an aquatic nuisance species by an identified pathway and that the adverse consequences of such an introduction are likely to be substantial, the Task

²⁵ 18 U.S.C. § 42.

²⁶ 72 Fed. Reg. 37459 (July 10, 2007) (codified at 50 C.F.R. § 16.13(2)(v)).

²⁷ 16 U.S.C. § 4701 *et seq.*

Force shall, acting through the appropriate Federal agency, and after an opportunity for public comment, carry out cooperative, environmentally sound efforts with regional, State and local entities to minimize the risk of such an introduction.²⁸

59. As noted above, the present risk that bighead and silver carp will migrate into Lake Michigan exists precisely because Defendants created and implemented the diversion project that is the subject of this action and because the Defendants and the Corps are maintaining and operating the infrastructure of that project in a manner that allows those fish to migrate from the Illinois River into Lake Michigan.

60. By creating and maintaining conditions through which these injurious species are likely to enter the Great Lakes, Defendants and the Corps will cause severe and foreseeable injury to public rights.

61. In sum, to the extent that the actions and omissions of the Defendants and the Corps allow bighead and silver carp to migrate into Lake Michigan, they have created and are maintaining a continuing public nuisance.

Judicial Review of Unlawful Agency Action

62. The United States long ago intervened in this action, representing the interests of the Corps.

²⁸ 16 U.S.C. § 4722(c)(2).

(App. 7a.) The Corps has participated and continues to participate in the maintenance and operation of facilities through which the diversion project that is the subject of this action is being implemented. (App. 76a-78a.) Accordingly, this Court has jurisdiction over the conduct of the Corps in that regard pursuant to paragraph 7 of the Decree.

63. In addition, pursuant to the Administrative Procedures Act (APA),²⁹ the Court has jurisdiction to review "agency action" by the Corps as defined in 5 U.S.C. § 551(13).

64. Under 5 U.S.C. § 702, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

65. 5 U.S.C. § 706(2) provides, in part, that a court may:

[h]old unlawful and set aside agency actions, findings and conclusions found to be –

(a) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

66. 5 U.S.C. § 551(13) provides that "'agency action' includes the whole or a part of an agency rule,

²⁹ 5 U.S.C. § 702.

order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. . . ."

67. 5 U.S.C. § 551(8) provides that "'license' includes the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. . . ."

68. Here, the Corps has, in several respects, taken action, or failed to act, in accordance with law. Such unlawful agency action, includes, but is not necessarily limited to, the following:

- (a) The Corps selected, designed, constructed, and operated as its primary means of deterring the migration of invasive species into the Canal the system it refers to as Dispersal Barrier IIA that is incapable of preventing the migration of bighead and silver carp into Lake Michigan. (App. 27a-35a).
- (b) Despite receiving multiple reports from its own contractor that eDNA samples of water collected north of the Dispersal Barrier in the Canal and Calumet-Sag Channel indicate that bighead and silver carp have migrated to those locations, the Corps has continued to open and operate the O'Brien and Chicago Locks, maintaining direct water

connections through which bighead and silver carp may pass into Lake Michigan. (App. 80a.)

- (c) The Corps has failed to develop and implement effective, environmentally sound efforts to minimize the risk of introducing bighead and silver carp to Lake Michigan through the Canal and connected waterways.

69. Those agency actions are not in accordance with laws in that they:

- (a) Contribute to the maintenance of a common law public nuisance.
- (b) Contribute to the threatened interstate movement of injurious species prohibited by the Lacey Act.³⁰
- (c) Violate the mandatory duties imposed by the Nonindigenous Aquatic Nuisance Prevention and Control Act.³¹

70. In addition to its reserved authority under paragraph 7 of the Decree, and its authority under the All Writs Act³² to issue appropriate

³⁰ 18 U.S.C. § 42.

³¹ 16 U.S.C. § 4722(c)(2).

³² 28 U.S.C. § 1651.

injunctive relief, the Court may also grant injunctive relief pursuant to 5 U.S.C. § 705.

Request for Relief

Accordingly, the State of Michigan requests that the Court:

1. Reopen Nos. 1, 2, and 3, Original, granting Michigan leave to seek a Supplemental Decree.

2. Grant Michigan's concurrently filed Motion for Preliminary Injunction.

3. Enter a Supplemental Decree:

(a) Declaring that to the extent the conditions at facilities constructed, maintained, or operated by the State of Illinois, the District, and the Corps in connection with the diversion project that is the subject of this action will allow the migration of bighead or silver carp into Lake Michigan, those conditions and facilities constitute a public nuisance or are otherwise unlawful.

(b) Granting a Permanent Injunction requiring the State of Illinois, the District, and the Corps to take all appropriate and necessary measures to

expeditiously develop and implement plans to permanently and physically separate carp-infested waters in the Illinois River basin, the Canal, and connected waterways from Lake Michigan so as to prevent the migration of bighead carp, silver carp, or other harmful aquatic invasive species into Lake Michigan.

4. Grant the State of Michigan such other relief as the Court determines just and proper.

5. If the Court were to determine that Michigan should have filed a new Bill of Complaint rather than seeking a Supplemental Decree pursuant to the Court's continuing jurisdiction retained in paragraph 7 of the Decree, then Michigan respectfully requests that the Court treat the Petition for Supplemental Decree as Michigan's Bill of Complaint and allow Michigan to proceed on the basis of the papers filed here.

Respectfully submitted,

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

**In The
Supreme Court of the United States
October Term, 1966**

STATES OF WISCONSIN, MINNESOTA, OHIO, AND PENNSYLVANIA, <i>Complainants,</i> <i>v.</i> STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <i>Defendants,</i> UNITED STATES OF AMERICA, <i>Intervenor.</i>	No. 1 Original
STATE OF MICHIGAN, <i>Complainant,</i> <i>v.</i> STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <i>Defendants,</i> UNITED STATES OF AMERICA, <i>Intervenor.</i>	No. 2 Original
STATE OF NEW YORK, <i>Complainant,</i> <i>v.</i> STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <i>Defendants,</i> UNITED STATES OF AMERICA, <i>Intervenor.</i>	No. 3 Original

BRIEF AND APPENDIX IN SUPPORT OF MOTION
TO REOPEN AND FOR A SUPPLEMENTAL DECREE

Michael A. Cox Attorney General B. Eric Restuccia Michigan Solicitor General <i>Counsel of Record</i> P. O. Box 30212 Lansing, Michigan 48909 (517) 373-1124	S. Peter Manning Division Chief Robert P. Reichel Louis B. Reinwasser Daniel P. Bock Assistant Attorneys General Attorneys for Complainant
---	--

QUESTION PRESENTED

This case arose because the Defendants, the State of Illinois and the Metropolitan Water Reclamation District of Greater Chicago District,³³ undertook a massive engineering project to divert water from Lake Michigan through new artificial waterway connections into the Illinois River basin.

In these consolidated cases, the State of Michigan and several other Great Lakes states sought to enjoin Defendants' diversion of water from Lake Michigan. The Complainant States alleged that the diversion was not authorized by federal law, and that it was significantly lowering water levels in the Great Lakes and connecting waterways, substantially impairing public uses of those waters for navigation, fishing, hunting, recreation, and other riparian rights.

The Court held that the diversion of water was indeed unlawful, except to the very limited extent needed to maintain navigation in the Chicago River. In 1930, it entered a Decree requiring gradual reduction of the diversion and retaining jurisdiction to enter further orders or decrees. The United States later intervened on behalf of the United States Army Corps of Engineers. A Consent Decree entered in 1967 and amended in 1980 further specifically limited the diversion and again retained jurisdiction.

³³ The District was originally known as the Chicago Sanitary District and later the Metropolitan Sanitary District of Greater Chicago.

The question now presented is whether, because of changed circumstances, the Court should reopen Nos. 1, 2, and 3, Original, to consider Michigan's request for a Supplemental Decree to address a new and substantial infringement of Michigan's rights – the threatened invasion of the Great Lakes by injurious fish species – resulting from the Lake Michigan diversion project created and as now maintained by Illinois, the District, and the Corps that is the subject of this case.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
SUMMARY OF ARGUMENT	3
STATEMENT OF THE CASE.....	10
ARGUMENT	14
I. The Court should reopen the case and exercise its continuing jurisdiction under paragraph 7 of the Decree to consider Michigan's request for supplemental relief based upon changed circumstances.	14
A. The Court properly exercised and retained its original, exclusive jurisdiction over the Defendants' Lake Michigan diversion project in the 1930 Decree and the 1967 Decree....	14
B. The plain language and evident purpose of paragraph 7 of the 1967 Decree warrants reopening this matter to consider Michigan's request for supplemental relief.	15

C. Michigan's requested supplemental relief directly relates to the subject matter in controversy – Defendants' diversion project – and is needed to prevent substantial injury to its rights caused by that project.....20

II. The claims now asserted by Michigan regarding the diversion project are, in any event, within this Court's original jurisdiction and warrant consideration by the Court.31

CONCLUSION.....36

TABLE OF AUTHORITIES

Page**Cases**

<i>Arizona v. California</i> , 460 U.S. 605 (1983)	6, 16, 17
<i>City of Chicago v. Beretta U.S.A. Corp.</i> , 213 Ill. 2d 351 (Ill. Sup. Ct. 2004).....	9, 29
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982)	19
<i>Connecticut v. Massachusetts</i> , 282 U.S. 660 (1931)	19
<i>Glass v. Goeckel</i> , 473 Mich. 667 (Mich. 2005)	30
<i>Idaho ex rel. Evans v. Oregon</i> , 462 U.S. 1017 (1983)	19
<i>Illinois Central R.R. Co. v. Illinois</i> , 146 U.S. 387 (1892)	29, 30
<i>Mississippi v. Louisiana</i> , 506 U.S. 73 (1992)	9, 31, 32
<i>Missouri v. Illinois</i> , 180 U.S. 208 (1901)	29, 32, 33
<i>Nebraska v. Wyoming</i> , 325 U.S. 589 (1945)	19
<i>Nebraska v. Wyoming</i> , 507 U.S. 584 (1993)	7, 18, 19
<i>New Jersey v. Delaware</i> , 295 U.S. 694 (1935)	14
<i>New Jersey v. New York</i> , 283 U.S. 336 (1931)	19

<i>New Jersey v. New York</i> , 283 U.S. 805 (1931)	14
<i>New Jersey v. New York</i> , 347 U.S. 995 (1954)	14
<i>Wisconsin v. Illinois</i> , 278 U.S. 367 (1929)	1, 4, 5, 10, 11, 20, 31
<i>Wisconsin v. Illinois</i> , 281 U.S. 696 (1930)	1, 5, 11, 15, 32
<i>Wisconsin v. Illinois</i> 289 U.S. 395 (1933)	1, 6, 9, 17, 34, 35
<i>Wisconsin v. Illinois</i> , 352 U.S. 945 (1956)	6, 18
<i>Wisconsin v. Illinois</i> , 388 U.S. 426 (1967)	1, 2, 5, 12, 15, 18, 20
<i>Wisconsin v. Illinois</i> , 449 U.S. 48 (1980)	1, 6, 18
<i>Wyoming v. Colorado</i> , 309 U.S. 572 (1940)	19

Statutes

28 U.S.C. § 1251(a)	2, 3, 9, 14, 36
---------------------------	-----------------

Constitutional Provisions

Art. III, § 2	9, 14
Art. III, § 2, cl. 2.....	2, 3

Miscellaneous

Illinois Fish and Aquatic Life Code, 515 Ill.

Comp. Stat. 5/5-59, 35

Illinois Level of Lake Michigan Act, 615 Ill.

Comp. Stat. 50/1 *et seq.*9, 35

INTRODUCTION

The State of Michigan submits this brief in support of its motion to reopen Nos. 1, 2, and 3, Original, in order to obtain a Supplemental Decree addressing a new and substantial infringement of Michigan's rights caused by the Lake Michigan diversion project that is the subject of this case. Specifically, because of changed circumstances, the diversion project, as currently maintained by Illinois, the District, and the Corps, now serves a conduit for the passage of highly-damaging fish species into Lake Michigan, threatening ecological and economic havoc to the Great Lakes.

In earlier stages of these cases, the Court held that the State of Illinois and the District had unlawfully diverted water from Lake Michigan through artificial waterways connected to the Illinois River basin, harming the rights of Michigan and several other Great Lakes states.¹ The Court entered Decrees in 1930, 1933, and 1967 restricting the diversion.²

As a result of changed circumstances since the Court last considered and amended the Decree in 1980,³ Michigan now petitions the Court to reopen the case and seeks supplemental relief. First,

¹ *Wisconsin v. Illinois*, 278 U.S. 367, 418-421 (1929).

² *Wisconsin v. Illinois*, 281 U.S. 696 (1930); *Wisconsin v. Illinois*, 289 U.S. 395 (1933); *Wisconsin v. Illinois*, 388 U.S. 426 (1967).

³ *Wisconsin v. Illinois*, 449 U.S. 48 (1980).

Michigan seeks a preliminary injunction requiring Defendants and the Corps to take all available measures within their respective control, consistent with the protection of public health and safety, to prevent the migration of the bighead and silver carp through the diversion project infrastructure into Lake Michigan. Second, Michigan requests that the Court enter a Supplemental Decree declaring that to the extent the facilities created, maintained, and operated by Defendants and the Corps allow the passage of bighead and silver carp into Lake Michigan, they constitute a common law public nuisance and the actions of the Corps in that regard are otherwise contrary to law. Finally, as part of a Supplemental Decree, Michigan seeks permanent injunctive relief requiring Defendants and the Corps to expeditiously modify the facilities they control in connection with the diversion project so as to permanently and reliably prevent the introduction of the harmful invasive species into Lake Michigan.

JURISDICTION

Michigan invokes this Court's retained jurisdiction under paragraph 7 of the 1967 Decree in *Wisconsin v. Illinois*.⁴ The Court has original jurisdiction under Art. III, § 2, cl. 2 of the Constitution of the United States and 28 U.S.C. § 1251(a).

⁴ *Wisconsin v. Illinois*, 388 U.S. 426 (1967).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Art. III, § 2, cl. 2:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.

28 U.S.C. § 1251(a), Original Jurisdiction:

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

SUMMARY OF ARGUMENT

The State of Michigan asks the Court to exercise its retained authority under the 1967 Decree entered in Nos. 1, 2, and 3, Original, to address a substantial new harm that flows from the activities that are the subject of this case – the multi-decade engineering project that created, and diverted Lake Michigan water into, an artificial waterway system connecting the Great Lakes with the Mississippi River basin. Defendants, the State of Illinois and the Metropolitan Water Reclamation District of Greater Chicago (District), established and control the diversion project, together with the United States Army Corps of Engineers (Corps), an agency of Intervenor, the United States. The new harm from this activity was not only unforeseen at the time the original case was heard and decided by the Court, but

remained unforeseen when subsequent proceedings were initiated and Decrees were entered.

And the harm is substantial. There is a very real risk that two destructive, invasive species of fish, the bighead and silver carp, are poised to enter the Great Lakes. (App. 15a, 73a, 80a, 120a-122a.) This potential invasion is the direct result of the diversion project because the waterway system at its core has created a connection for these fish to the Great Lakes. (App. 27a, 46a-47a, 80a.) If this imminent harm is not addressed through a Supplemental Decree by this Court enjoining the manner in which the diversion infrastructure is now operated, it will not only result in substantial injury to Michigan and its citizens, but will impact all of the Great Lakes states and Canadian provinces.

This case was brought by Michigan and other affected Great Lakes states in the 1920s to address the significant impact from this project – the diversion of massive amounts of water from Lake Michigan, and ultimately the entire Great Lakes system.⁵ Before the project was undertaken, sewage and industrial waste dumped into the Chicago River flowed into Lake Michigan, polluting water intakes that supplied drinking water.⁶ To solve that problem, Illinois and the District, the entity created under state law for that purpose, constructed the Chicago Sanitary and Ship Canal (Canal), which established a new artificial connection between the Chicago River

⁵ *Wisconsin v. Illinois*, 278 U.S. 367 (1929).

⁶ *Wisconsin v. Illinois*, 278 U.S. at 402.

and the Des Plaines River. (App. 85a-86a.) Massive quantities of water were then diverted from Lake Michigan in order to reverse the flow of the Chicago River away from the Lake and into the Canal, diluting sewage in that river and flushing it southwesterly into the Des Plaines, Illinois, and ultimately the Mississippi Rivers. (App. 86a.) As a secondary purpose, the diversion and artificial waterway expanded opportunities for navigation inland from the Chicago River.⁷

The diversion lowered the water levels of four of the Great Lakes and connecting channels.⁸ The Complainant Great Lakes states argued that the diversion substantially impaired public uses of the Great Lakes and connected waters for navigation, fishing, hunting, recreation, and other riparian rights.⁹ The Court agreed, determining that the diversion was unlawful, except to the limited extent that it was needed to flush sewage from the Chicago River that would otherwise impair navigation in that river.¹⁰

The original Decree, entered in 1930, included a broad reopener provision that was carried forward in the 1967 Decree that superseded it.¹¹ That provision allows any party to seek, and retains the

⁷ *Wisconsin v. Illinois*, 278 U.S. at 433-434.

⁸ *Wisconsin v. Illinois*, 278 U.S. at 407-408.

⁹ *Wisconsin v. Illinois*, 278 U.S. at 408.

¹⁰ *Wisconsin v. Illinois*, 278 U.S. at 418-421.

¹¹ *Wisconsin v. Illinois*, 281 U.S. at 698; *Wisconsin v. Illinois*, 388 U.S. at 430.

Court's jurisdiction to enter, "any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy." (App. 6a.) Accordingly, the Court has, on several occasions, enlarged or modified its decrees in this case because of changed circumstances, most recently in 1980.¹²

Cases construing decrees with similar provisions have required that a party seeking to modify or supplement such a decree show that the circumstances giving rise to the modification are new or unforeseen.¹³ Such is the case here. The possibility that bighead and silver carp imported into aquaculture and wastewater lagoons in the Lower Mississippi River Valley would disperse into the environment was not even contemplated until the 1990s when catastrophic flooding of the Mississippi River released them into the wild. (App. 13a, 19a.) And the movement of those fish up the Mississippi and Illinois Rivers and into the Chicago waterway system was even more remote. The current threat that these harmful species are about to enter the Great Lakes through the diversion project infrastructure was not contemplated by the parties in and, therefore, could not have been addressed when the case was last before the Court in 1980.

This Court's decisions also require a party seeking to modify or supplement an existing decree to show that the relief sought relates to the subject

¹² *Wisconsin v. Illinois*, 289 U.S. at 398; *Wisconsin v. Illinois*, 352 U.S. 945 (1956); *Wisconsin v. Illinois*, 449 U.S. 48 (1980).

¹³ *Arizona v. California*, 460 U.S. 605 (1983).

matter of the proceeding at issue, and that absent the requested relief, the complaining party will suffer substantial injury.¹⁴ Both of those criteria are met here.

The subject matter of this case is the Defendants' diversion of water from Lake Michigan through the artificial waterway system created for that purpose. The Chicago Sanitary and Ship Canal (Canal) was and remains the central and essential feature of the diversion project. (App. 27a, 86a.) The artificial waterway system was later expanded, through the North Shore Channel and Calumet-Sag Channel, so that it also reversed the flow of the Calumet Rivers and today links the Canal to Lake Michigan at five separate locations. (App. 52a-53a, 78a, 85a-86a.) Water is diverted from Lake Michigan at three of those points. (App. 89a.) This infrastructure, parts of which were constructed and are now managed by the Corps, and the remainder by Illinois and the District, contains various components, including locks and sluice gates, through which both water and fish can pass. (App. 76a-80a.) But for this project, the bighead and silver carp that now infest the Illinois River basin and the Canal itself, would not threaten to invade Lake Michigan. (App. 80a.) In sum, that threat was created by and is inextricably related to the diversion project that is the subject of this case.

Second, unless the Court grants the equitable relief sought by Michigan in its Petition and Motion

¹⁴ *Nebraska v. Wyoming*, 507 U.S. 584, 601 (1993).

for Preliminary Injunction, Michigan, its citizens, and indeed all users of the Great Lakes in the United States and Canada, will suffer substantial injury. Bighead and silver carp are huge, fecund, and voracious fish that can consume forty percent of their body weight daily, thereby out-competing native fish populations for food. (App. 13a, 116a-117a.) They readily adapt to varying environments, spread rapidly and disrupt established sport and commercial fisheries. Silver carp, which are formally classified as an "injurious species" under federal law (App. 15a, 58a, 117a), also jump several feet in the air in the presence of motorboats, causing personal injuries and property damage. (App. 23a, 59a.)

Bighead and silver carp are now poised to enter Lake Michigan through the Canal. (App. 15a, 43a, 73a.) It is widely recognized that if bighead or silver carp enter Lake Michigan and reproduce, grave environmental and economic harm is likely to occur. (App. 57a-59a, 117a.) Illinois has acknowledged that "Asian carp could have a devastating effect on the Great Lakes ecosystem and a significant economic impact on the \$7 billion fishery . . . [and] Once in the lake it would be very difficult to control them." (App. 45a.) The United States, through the Corps, has similarly observed that "prevention of an inter-basin transfer of bighead and silver carp from the Illinois River to Lake Michigan is paramount in avoiding ecological and economic disaster." (App. 51a.)

Because the diversion project, as created and currently maintained by Illinois, the District and the Corps, imminently threatens to allow the transfer of these injurious species and is thereby likely to

unreasonably interfere with the aquatic resources of the Great Lakes and public use of those resources, those conditions constitute a common law public nuisance.¹⁵ The Court can and should grant Michigan's request to reopen this case and grant equitable relief to prevent and abate that nuisance as requested in the Petition.

Finally, even if the Court determines that this request for relief is not properly brought under the existing case, it has jurisdiction to hear Michigan's claims as a new original action. Under Article III, § 2 of the Constitution and 28 U.S.C. § 1251(a), the Court has original and exclusive jurisdiction over claims between states. The Court previously determined that, with respect to the diversion, Illinois is responsible for the activities of its "creature and agent," the District.¹⁶ Illinois remains directly involved both in the diversion project and in the control of fish in its waterways.¹⁷ As such, it is a necessary party to this dispute. Thus, Michigan has no alternative forum available to seek the equitable relief requested here. For that reason, and because the interests asserted by Michigan in protection of the Great Lakes are matters of sufficient "seriousness and dignity"¹⁸ to warrant the exercise of the Court's

¹⁵ See, e.g., *City of Chicago v. Berretta U.S.A. Corp.*, 213 Ill.2d 351, 366 (Ill. Sup. Ct. 2004).

¹⁶ *Wisconsin v. Illinois*, 289 U.S. at 399-400.

¹⁷ See, e.g., Illinois Level of Lake Michigan Act, 615 Ill. Comp. Stat. 50/1 *et seq.*, and Illinois Fish and Aquatic Life Code, 515 Ill. Comp. Stat. 5/5-5.

¹⁸ *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

jurisdiction, the Court should accept Michigan's Petition as a Bill of Complaint in a new original action.

STATEMENT OF THE CASE

This litigation arose because Defendants, the State of Illinois and the Metropolitan Water Reclamation District, created a massive engineering project to divert water from Lake Michigan through new artificial waterway connections into the Illinois River basin. (App. 86a.) Although the diversion project was primarily intended as a means for disposing sewage and industrial wastes that were otherwise polluting public water supplies drawn from Lake Michigan, the project also expanded opportunities for inland navigation beyond the Chicago River.¹⁹

In this case, and other consolidated cases invoking this Court's original jurisdiction, the State of Michigan and several other Great Lakes states sought to enjoin Defendants' diversion of water from Lake Michigan.²⁰ The Complainant States alleged that the diversion was not authorized by federal law, and that it was significantly lowering water levels in the Great Lakes and connecting waterways.²¹ As a result, the diversion substantially impaired public uses of those Great Lakes and connected waters for

¹⁹ *Wisconsin v. Illinois*, 278 U.S. at 433-434.

²⁰ *Wisconsin v. Illinois*, 278 U.S. at 367.

²¹ *Wisconsin v. Illinois*, 278 U.S. at 407-408.

navigation, fishing, hunting, recreation, and other riparian rights.²²

The Court determined that the Defendants' diversion of water from Lake Michigan was indeed unlawful, except to the very limited extent necessary to avoid impairment of navigation in the Chicago River that would otherwise result from the deposit and accumulation of wastes from Chicago into the river.²³ Because an immediate injunction against further diversion would have threatened public health absent other means of sewage management, the Court fashioned a Decree gradually reducing the rate of diversion as improved wastewater treatment systems were built.²⁴

In its Decree, the Court expressly authorized any party to apply for "any other or further action or relief" and retain jurisdiction in these cases "[f]or the purpose of making any order or directive, or modification of this decree, or any supplemental decree, which it may deem to be proper in relation to the subject matter in controversy."²⁵

In 1967, following further proceedings, and the intervention of the United States of America, the Court entered a Consent Decree that specifically restricted the quantity of water that Defendants may

²² *Wisconsin v. Illinois*, 278 U.S. at 408.

²³ *Wisconsin v. Illinois*, 278 U.S. at 418-421.

²⁴ *Wisconsin v. Illinois*, 278 U.S. at 418-421.

²⁵ *Wisconsin v. Illinois*, 281 U.S. at 698.

divert from Lake Michigan.²⁶ That Decree contained language identical to the original 1930 Decree retaining jurisdiction.²⁷ (App. 6a.)

As a result of changed circumstances since the Court last considered the Decree in 1980, Michigan now petitions the Court to reopen the case for the purpose of seeking supplemental relief. Over the last several years, two species of non-native fish – the bighead carp and silver carp – imported from Asia for experimental use in aquaculture and sewage treatment ponds in the lower Mississippi River basin, but that escaped into the wild, have rapidly spread through the Missouri, Mississippi, and Illinois Rivers, among others. (App. 13a, 18a-19a.) Because these species reproduce and spread rapidly, and voraciously consume nutrients upon which native fish depend, they have seriously disrupted the ecosystem and fisheries where they have become established. (App. 13a, 15a, 58a, 116a-117a.)

Bighead and silver carp are now poised to enter Lake Michigan, and the rest of the Great Lakes through the infrastructure of the Defendants' diversion project. (App. 15a, 43a, 73a.) The Chicago Sanitary and Ship Canal, created and maintained by Defendants, which was and remains at the heart of the diversion project, connects the Illinois and Des Plaines Rivers to the Chicago River, the Calumet-Sag Channel, the Calumet River, and, ultimately, at five separate locations, Lake Michigan.

²⁶ *Wisconsin v. Illinois*, 388 U.S. at 426.

²⁷ *Wisconsin v. Illinois*, 388 U.S. at 430.

(App. 72a, 78a, 85a-86a.) Water is diverted from Lake Michigan at three of those points. (App. 89a.)

This infrastructure contains various components, including locks controlled by the Corps and sluice gates controlled by Defendants, through which fish, including bighead and silver carp, can pass into Lake Michigan. (App. 76a-80a.) At least one bighead carp was recently observed above the Lockport Dam in the southern end of the Canal, and biologists working with Illinois believe there is a high probability that additional carp are present in that area. (App. 64a-65a.) Environmental DNA sampling commissioned by the Corps indicates that bighead and silver carp have migrated into the Canal and Calumet-Sag Channel to locations less than eight miles from Lake Michigan. (App. 49a, 72a-73a.)

Under these circumstances, Michigan has also concurrently filed a Motion for Preliminary Injunction. That motion is supported by the Affidavit of Tammy A. Newcomb, Ph.D., a fisheries biologist in the Michigan Department of Natural Resources (App. 109a-137a), the Affidavit of Thomas E. Knueve, a civil and environmental engineer in the Michigan Department of Environmental Quality (App. 74a-102a), and other publicly available documents contained in the Appendix, many of which were prepared by Illinois, the Corps, and the United States Fish and Wildlife Service.

The Motion for Preliminary Injunction requests that the Court enjoin Illinois, the District, and the Corps to take all available measures within their respective control, consistent with the

protection of public health and safety, to prevent the migration of bighead and silver carp through the diversion project infrastructure into Lake Michigan. That interim relief, as more fully described in the motion is sought to preserve the status quo – Lake Michigan not yet infested with these harmful invasive species – pending the Court's consideration of the merits of Michigan's Petition for Supplemental Decree.

ARGUMENT

- I. **The Court should reopen the case and exercise its continuing jurisdiction under paragraph 7 of the Decree to consider Michigan's request for supplemental relief based upon changed circumstances.**
 - A. **The Court properly exercised and retained its original, exclusive jurisdiction over the Defendants' Lake Michigan diversion project in the 1930 Decree and the 1967 Decree.**

Since these cases involved claims by the States of Michigan, Wisconsin, Ohio, Minnesota, Pennsylvania, and New York against the State of Illinois, they were and remain within the Court's original, exclusive jurisdiction under Art. III, § 2 of the Constitution of the United States and 28 U.S.C. § 1251(a). Consistent with its common practice²⁸ in

²⁸ See, e.g. *New Jersey v. New York*, 347 U.S. 995, 1005 (1954); *New Jersey v. Delaware*, 295 U.S. 694, 698 (1935); *New Jersey v. New York*, 283 U.S. 805, 807 (1931).

exercising its equitable authority over complex interstate disputes of this kind, the Court, in both the 1930 Decree²⁹ and the 1967 Decree,³⁰ expressly retained jurisdiction to enter further orders, modifications of the Decree, or a Supplemental Decree.

B. The plain language and evident purpose of paragraph 7 of the 1967 Decree warrants reopening this matter to consider Michigan's request for supplemental relief.

Paragraph 7 of the 1967 Decree provides:

Any of the parties hereto may apply at the foot of this decree for *any other or further action or relief*, and this Court retains jurisdiction of the suits in Nos. 1, 2, and 3, Original Docket, for the purpose of making *any order or direction, or modification* of this decree, or any *supplemental* decree, which it may deem *at any time to be proper in relation to the subject matter in controversy*.³¹ (App. 6a.)

This broad language explicitly preserves the parties' rights to advance and the Court's authority to

²⁹ *Wisconsin v. Illinois*, 281 U.S. 179 (1930).

³⁰ *Wisconsin v. Illinois*, 281 U.S. at 179.

³¹ *Wisconsin v. Illinois*, 388 U.S. 426, 430 (1967) (emphasis added).

consider requests for modification or supplementation of decrees as the need arises. Such flexibility is particularly appropriate in cases such as this where the Court has carefully fashioned an equitable decree resolving significant disputes between states that involve complex and potentially changing facts.

In *Arizona v. California*,³² the Court interpreted a virtually identical provision to mean that the parties could seek modification of an existing decree based on changes in the surrounding factual circumstances. That case involved a dispute over rights to waters of the Colorado River among Arizona, California, Nevada, Utah, New Mexico, the United States, and five Indian Tribes. The United States and the Tribes sought to invoke a provision of the Court's equitable decree which was substantially identical to paragraph 7 in the Decree in the instant case, and reopen litigation on the grounds that a factual issue (the amount of practicably irrigable acreage on the Indian reservations) had been incorrectly determined.³³

The Court declined to reopen litigation on the grounds that the amount of practicably irrigable acreage on the reservations had been litigated, and the Court would not reopen its decree "absent changed circumstances or unforeseen issues not previously litigated."³⁴ The Court specifically held that Article IX (the reopener provision) "was mainly a

³² *Arizona v. California*, 460 U.S. 605 (1983).

³³ *Arizona v. California*, 460 U.S. at 615-616.

³⁴ *Arizona v. California*, 460 U.S. at 619.

safety net added to retain jurisdiction and to ensure that we had not, by virtue of *res judicata*, precluded ourselves from adjusting the decree in light of unforeseeable changes in circumstances."³⁵

While the Court found that the specific issue raised in *Arizona v. California* had already been litigated, that is not true here. In this case, the Court did consider and entered Decrees to abate some of the harms to the Great Lakes caused by the Defendants' diversion project, i.e., the impairment of navigation, fishing, hunting, recreation, and other riparian rights associated with reduced water levels. But the new additional harms threatened by the same project – the impending movement of harmful fish through the Canal into Lake Michigan – was neither anticipated nor decided at any earlier point in this case. Therefore, the present Asian carp threat and the diversion project's present role as a conduit for the introduction of invasive species to the Great Lakes represents a "changed circumstance or unforeseen issue not previously litigated" which necessitates supplementation of the existing Decree.

The history of this case itself illustrates the Court's exercise of its retained jurisdiction to supplement and modify its Decrees as changes in circumstances warrant. For example, the Court enlarged its original Decree in 1933 to place additional obligations on Illinois because of the District's financial inability to timely construct facilities mandated in the 1930 Decree.³⁶ In 1956, the

³⁵ *Arizona v. California*, 460 U.S. at 622.

³⁶ *Wisconsin v. Illinois*, 289 U.S. at 395.

Court temporarily modified its injunction on the rate of diversion because of a navigational emergency in the Mississippi waterway.³⁷ A new Decree was entered in 1967³⁸ and amended in 1980 at Illinois' request to accommodate changed circumstances relating to Illinois' uses of diverted water and the methods used to account for them.³⁹

Where, as here, a state invokes the court's continuing original jurisdiction and seeks modification or supplementation of an existing decree, the court has held that the party seeking modification must show that it will suffer a substantial injury in the absence of the modification. In *Nebraska v. Wyoming*, which involved requests both to enforce and modify a decree governing an interstate water dispute, the Court explained:

[T]o the extent Nebraska seeks modification of the decree rather than enforcement, a higher standard of proof applies. The two types of proceeding are markedly different. In an enforcement action, the plaintiff need not show injury. . . . When the alleged conduct is admitted, the only question is whether that conduct violates a right established by the decree. . . . In a modification proceeding, by contrast, there is by definition no pre-existing

³⁷ *Wisconsin v. Illinois*, 352 U.S. at 945.

³⁸ *Wisconsin v. Illinois*, 388 U.S. at 426.

³⁹ *Wisconsin v. Illinois*, 449 U.S. at 48.

right to interpret or enforce. At least where the case concerns the impact of new development, the inquiry may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment.⁴⁰

The Court later stated specifically that Nebraska would be required to show "substantial injury" in order to modify the existing decree.⁴¹ This is in keeping with the Court's earlier statement that a modification "may well entail the same sort of balancing of equities that occurs in a proceeding to establish an equitable apportionment,"⁴² because the standard for a party to establish an equitable apportionment is that it must show "by clear and convincing evidence some real or substantial injury or damage."⁴³

In the instant case, it is clear that unless the Court's 1967 Decree is supplemented to prevent Asian carp from invading the Great Lakes through the diversion project, the State of Michigan will

⁴⁰ *Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993) (citing *Wyoming v. Colorado*, 309 U.S. 572, 581 (1940); referencing *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)).

⁴¹ *Nebraska v. Wyoming*, 507 U.S. at 601.

⁴² *Nebraska v. Wyoming*, 507 U.S. at 592.

⁴³ *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1027 (1983) (citing *Colorado v. New Mexico*, 459 U.S. 176, 187-188, n. 13 (1982); *Connecticut v. Massachusetts*, 282 U.S. 660, 672 (1931); see *New Jersey v. New York*, 283 U.S. 336, 344-345 (1931)).

suffer a grave injury to the public rights in and uses of the Great Lakes and connecting waters.

C. Michigan's requested supplemental relief directly relates to the subject matter in controversy – Defendants' diversion project – and is needed to prevent substantial injury to its rights caused by that project.

As provided in paragraph 7 of the 1967 Decree, the supplemental relief sought by Michigan is "proper in relation to the subject matter in controversy."⁴⁴ (App. 6a.) These cases arose because Michigan and the other Complainant States alleged that Illinois and the District's diversion of water from Lake Michigan into the Chicago Sanitary and Ship Canal was unlawful and harmful to public rights in the Great Lakes.⁴⁵ That diversion of water through artificial waterway was at the heart of and absolutely essential to the Defendants' diversion project. Defendants' primary goal was to reverse the flow of the Chicago River and thereby flush Chicago's wastes downstream into the Illinois River basin.⁴⁶ The secondary purpose was to expand navigation inland away from the Lake.⁴⁷ Neither purpose of the diversion at issue in this case could have been accomplished without the Canal.

⁴⁴ *Wisconsin v. Illinois*, 388 U.S. at 430.

⁴⁵ *Wisconsin v. Illinois*, 278 U.S. at 408.

⁴⁶ *Wisconsin v. Illinois*, 278 U.S. at 415-416.

⁴⁷ *Wisconsin v. Illinois*, 278 U.S. at 415-416.

And, but for the artificial connections between Lake Michigan and the Illinois River basin established and maintained through the diversion project, the present threat of Asian carp migration into Lake Michigan would not exist. (App. 80a.) Both Illinois and the Corps have acknowledged that the Chicago Sanitary and Ship Canal creates a pathway for those invasive species to move from Illinois and Des Plaines River into the Great Lakes. (App. 27a, 46a.) Indeed, the Corps has specifically identified five separate locations where the infrastructure of the diversion project connects the inland waters to Lake Michigan. (App. 72a.)

The design of the diversion project infrastructure and the way it is currently maintained and operated by Defendants and the Intervenor presents an imminent threat that bighead and silver carp will enter Lake Michigan. The southern end of the Chicago Sanitary and Ship Canal is connected to the Des Plaines River, and thereby the Illinois River. (App. 72a-73a, 77a-80a, 85a, 111a, 118a-123a.) Asian carp have already rapidly established themselves in the Illinois River. (App. 51a.) They have also been directly observed in the Des Plaines River at locations progressively closer to the southern terminals of the Canal, near Lockport. (App. 45a.)

Movement of water between the Canal and the Des Plaines River is primarily controlled by the Lockport Dam and Lock. (App. 85a, 96a-98a.) The Lockport Dam is owned and operated by the District and the Lock is operated by the Corps. (App. 97a.) Because the Lockport Lock is frequently opened to

accommodate commercial and recreational navigation, fish can and do pass through the Lock into the Canal and the remainder of the artificial waterways connected to Lake Michigan. (App. 78.)

Because of the widely recognized likelihood that Asian carp would move into the Canal, and ultimately Lake Michigan, the Corps, in cooperation with other federal and state agencies, has undertaken well-intended, but insufficient, measures to prevent that occurrence. The Corps has primarily relied upon an electrical "Dispersal Barrier System" comprised of underwater steel cables charged with electricity that is intended to deter the passage of invasive species. (App. 27a-29a.) The Dispersal Barrier System, which is located north of the Lockport Lock and Dam, has been constructed in two stages between 2002 and 2006. A third element has been planned, but has not yet been completed. (App. 30a-33a.)

Information available to the Defendants and the Corps demonstrates that even when completed, the Dispersal Barrier System cannot prevent the migration of bighead and silver carp through the Canal into Lake Michigan. Among other things:

- (a) The System is experimental and some fish may be able to pass through the Barrier.
- (b) The Corps has acknowledged that the Barrier can be by-passed through the movement of water from carp-infested waters of the immediately adjacent

Des Plaines River and Illinois and Michigan Canal, by means of flooding or cross-connections. While the Corps is currently evaluating measures to reduce those risks, none have yet been implemented. (App. 51a-52a, 54a-56a.)

More important, both direct physical observations and indirect surveillance through sampling genetic material found in the water samples show that bighead and silver carp have already moved north, i.e., *beyond the Lockport Lock and Dam and the Dispersal Barrier System*, into the Canal and connecting waterways between the "Barrier" and Lake Michigan. On December 3, 2009, at least one bighead carp was found approximately 500 feet north of the Lockport Lock and Dam. (App. 61a.) It was killed during a "Rapid Response Workgroup" operation conducted by the Illinois DNR and other cooperating agencies. (App. 61a-62a.) Fish poison was applied to a 5.7-mile segment of the Canal near the Dispersal Barrier System to reduce the risk that Asian carp would pass through the area while the Barrier was temporarily turned off for maintenance. (App. 61a-62a.) Although only one Asian carp was retrieved, the Illinois DNR noted that "biologists with the workgroup believe there is a high probability that additional Asian carp were killed during the toxicant application, but may not be found" because they sank to the bottom of the Canal. (App. 64a-65a.)

A series of environmental surveillance tests commissioned by the Corps before the temporary shutdown of the Barrier System in early December,

2009 strongly indicate that bighead and silver carp have already migrated into the connected Calumet-Sag Channel. In these surveillance tests – referred to as "environmental DNA" (eDNA) – samples of water are collected, filtered, and analyzed for the presence of specific genetic material characteristic of the bighead and silver carp, secreted or released into the water column. (App. 35a-37a.) The most recent eDNA test data publicly reported indicated that Asian carp were present at multiple locations in the Calumet-Sag Channel, including an area in close proximity to the O'Brien Lock and Dam and within approximately eight miles from Lake Michigan. (App. 40a, 73a.)

As noted above, there are five different points where water in the artificial waterway established in the diversion project connects to Lake Michigan. (App. 72a, 78a.) At two of those locations, the O'Brien Dam and Lock on the Grand Calumet River and the Chicago Controlling Works and Lock in downtown Chicago, locks are regularly opened by the Corps. (App. 78a.) When opened, these locks provide a direct conduit through which fish present in the waterways, including Asian carp, can pass into Lake Michigan. (App. 78.) In addition, there are other connections to the Lake, including, for example, the Little Calumet River where no barrier of any kind exists to prevent the passage of Asian carp. (App. 78a-79a.)

Finally, sluice gates (water level control devices), located in the O'Brien Dam, the Chicago Controlling Works, and the Wilmette Pumping Station, may, under certain conditions, allow the

passage of water and fish from the artificial waterway system into Lake Michigan. (App. 77a, 79a, 94a-97a, 107a.) Those facilities are controlled by the State of Illinois through the District. (App. 77a-78a.)

In sum, the imminent threat of introducing bighead and silver carp to Lake Michigan is inextricably related to the diversion project that is the subject of this case. Whether and where these harmful invasive species enter the Lake now depends on the actions taken, or not taken, by parties to this case: the State of Illinois, the District, and the United States, through the Corps of Engineers.

The supplemental relief Michigan seeks is needed to prevent substantial harm to its public trust interests in the aquatic resources of Lake Michigan and other connected waters in the Great Lakes basin. The diversion project infrastructure created, maintained, and operated by Defendants and the Corps will, unless modified, allow the introduction of bighead and silver carp into Lake Michigan. (App. 78a, 80a, 120a-123a.) Because of those species' adaptability, fecundity, and rapid expansion, they are likely to establish populations in portions of the lakes and connected rivers. (App. 111a-115a.)

Once established, these invasive species will disrupt the existing ecosystem, impair resident fish populations, and damage the existing recreational and commercial fishing industry of the Great Lakes. (App. 116a-118a.) Moreover, since there is no demonstrated means of eliminating established populations of bighead and silver carp, the damage to

the resources of the Great Lakes would be irreversible. (App. 111a, 118a.)

Both the United States, through the Corps and the United States Fish and Wildlife Service, and Illinois, through its Department of Natural Resources, have admitted that the potential migration of bighead and silver carp, through the Canal and connecting waters into Lake Michigan, presents a threat of grave environmental and economic harm.

For example, the Corps recently acknowledged:

Asian carp have the potential to damage the Great Lakes and confluent large riverine ecosystems by disrupting the complex food web of the system and causing damage to the sport fishing industry. Two species of Asian carp, bighead carp (*Hypophthalmichthys nobilis*) and silver carp (*H. molitrix*), have become well established in the Mississippi and Illinois River systems exhibiting exponential population growth in recent years. Certain life history traits have enabled bighead and silver carp to achieve massive population numbers soon after establishing. Currently, the Illinois River is estimated to have the largest population of bighead and silver carp in the world. The prevention of an inter-basin transfer of bighead and silver carp from the Illinois River to Lake

Michigan *is paramount in avoiding ecological and economic disaster.* (App. 51a, emphasis added.)

A 2004 United States Fish and Wildlife publication similarly stated:

Bighead and silver carp are in the Illinois River, which is connected to the Great Lakes via the Chicago Sanitary and Ship Canal. *Asian carp pose the greatest immediate threat to the Great Lakes ecosystem. . . .* Bighead and silver carp could colonize all of the Great Lakes and sustain high-density populations. High densities would likely result in declines in abundance of many native fishes.

* * *

Great Lakes sport and commercial fisheries are valued at \$4.5 billion dollars annually, without including the indirect economic impact of those industries. Degradation of those fisheries would have severe economic impacts on Great Lakes communities that benefit from the fisheries. Waterfowl production areas are also at risk from Asian carp. Hunters spend more than \$2.6 billion annually on their sport in the Great Lakes, so reduction of waterfowl populations there would decrease the economic value to

communities that benefit from hunting.
(App. 15a, emphasis added.)

The Illinois Department of Natural Resources recently stated:

Asian carp could have a devastating effect on the Great Lakes ecosystem and a significant economic impact on the \$7 billion fishery. Once in Lake Michigan, this invasive species could access many new tributaries connected to the Great Lakes. These fish aggressively compete with native commercial and sport fish for food. *They are well suited to the water temperature, food supply, and lack of predators of the Great Lakes and could quickly become the dominant species.* Once in the lake, it would be very difficult to control them. (App. 45a, emphasis added.)

The Asian Carp Rapid Response Team, which is lead by the Illinois Department of Natural Resources, with the cooperation of among other agencies, the District, the Corps, and the United States Fish and Wildlife Service, summarized the enormous threat to the Great Lakes posed by Asian Carp as follows:

The presence of Asian carps in the Great Lakes could cause catastrophic declines in abundances of native fish species, cause economic impacts to sport

and commercial fisheries, and result in injuries to boaters. (App. 57a-60a.)

As noted above, the present risk that bighead and silver carp will migrate into Lake Michigan exists precisely because Defendants created and implemented the diversion project that is the subject of this action and because the Defendants and the Corps are maintaining and operating the infrastructure of that project in a manner that allows those fish to migrate from the Illinois River into the Lake. Moreover, the harm to public rights that will result if these species enter the Great Lakes is both severe and foreseeable.

At common law, including the common law of Illinois, a condition, action, or failure to act that unreasonably interferes with a right common to the general public is a public nuisance.⁴⁸ The attorney general may bring an action for injunctive relief to prevent or abate such a public nuisance.⁴⁹

The waters and aquatic resources of Lake Michigan and the other Great Lakes are held in trust for the benefit of the public by Michigan and other Great Lakes states, within their respective jurisdictions.⁵⁰ The public rights in those waters and

⁴⁸ *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 366 (Ill. Sup. Ct. 2004).

⁴⁹ *Missouri v. Illinois*, 180 U.S. 208, 244 (1901).

⁵⁰ *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 455-458 (1892).

resources include, but are not limited to, fishing, boating, commerce, and recreation.⁵¹

As Illinois and as the United States, through the Corps and the United States Fish and Wildlife Service, have properly acknowledged, the migration of bighead and silver carp from the Canal into Lake Michigan, and thereby other Great Lakes and connected rivers and waterbodies, will cause enormous and irreversible harm to the public rights in those waters. (App. 15a, 19a-23a, 45a, 57a-59a.)

Under these circumstances, the Defendants' and Intervenors' maintenance and operation of the diversion project in the manner allowed by the existing Decree is no longer equitable. Indeed, it is a continuing public nuisance that substantially infringes upon Michigan's rights. Supplemental relief is therefore warranted.

In sum, the diversion project is now an open door to enormous harm to the Great Lakes and the public use of those resources. When this case first came before the Court some eighty years ago, the Defendants' same diversion project had already caused substantial harm to the public trust resources of the Great Lakes:

The Master finds that the damage due to the diversion at Chicago relates to navigation and commercial interests, to structures, to the convenience of

⁵¹ *Illinois Central R.R. Co. v. Illinois*, 146 U.S. at 452; *Glass v. Goeckel*, 473 Mich. 667, 678-679 (Mich. 2005).

summer resorts, *to fishing and hunting grounds*, to public parks and other enterprises, and to riparian property generally. . . ." ⁵²

Just as the Court properly exercised its equitable power to abate those injuries in its 1930 Decree and subsequent orders, the Court should now reopen this case and exercise its continuing jurisdiction to afford Michigan supplemental relief to prevent and abate a somewhat different, but potentially even more serious, harm to the Great Lakes now threatened by the diversion project.

II. The claims now asserted by Michigan regarding the diversion project are, in any event, within this Court's original jurisdiction and warrant consideration by the Court.

Even if this Court had not specifically retained jurisdiction to consider Michigan's present request for a Supplemental Decree, the nature and significance of Michigan's claims for equitable relief set forth in the Petition are both within the Court's jurisdiction and merit its consideration.

In *Mississippi v. Louisiana*,⁵³ the Court identified two factors to be considered in determining whether to exercise its original jurisdiction.⁵⁴ First,

⁵² *Wisconsin v. Illinois*, 278 U.S. 367, 408 (1929) (emphasis added).

⁵³ *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

⁵⁴ *Mississippi v. Louisiana*, 506 U.S. at 77.

the Court considers the interests of the complaining state, focusing on the "seriousness and dignity" of the claim.⁵⁵ Second, the Court considers whether there is an alternative forum in which the issues presented can be fully resolved.⁵⁶ Applying those factors here, Michigan's claims for supplemental relief warrant the Court's exercise of original jurisdiction.

First, the matter now in controversy presented is grave and important. In previously exercising its original jurisdiction in these consolidated cases, the Court recognized that the Complainant States, including Michigan, have a vital interest in protecting the waters, fisheries, and other natural resources and the public use of those resources.⁵⁷ The Court further held that Illinois' challenges to the Court's jurisdiction and the legal sufficiency of the Complainants' pleadings were without merit, based upon several previous decisions of the Court, including *Missouri v. Illinois*.⁵⁸ There the Court held that Missouri's allegations that Illinois' diversion project had polluted downstream water supplies stated a claim of common law public nuisance cognizable by the Court.⁵⁹

The present controversy arises because the diversion project now provides a conduit for the

⁵⁵ *Mississippi v. Louisiana*, 506 U.S. at 77 (internal quotation marks omitted).

⁵⁶ *Mississippi v. Louisiana*, 506 U.S. at 77.

⁵⁷ *Wisconsin v. Illinois*, 281 U.S. at 408.

⁵⁸ *Missouri v. Illinois*, 180 U.S. 208 (1901).

⁵⁹ *Missouri v. Illinois*, 180 U.S. at 241-248.

introduction of extremely damaging invasive species to the Great Lakes. As the Corps has stated, "[t]he prevention of an outer-basin transfer of bighead and silver carp from the Illinois River to Lake Michigan is paramount in avoiding ecological and economic disaster." (App. 51a.) Illinois has similarly acknowledged that "Asian carp could have a devastating effect on the Great Lakes ecosystem and a significant economic impact on the \$7 billion fishery." (App. 45a.) Thus, the imminent threat of harm to public rights on Lake Michigan and connecting waters and public rights in those waters is plainly a matter of such substantial importance and gravity as to warrant the Court's exercise of its original jurisdiction in this dispute between Michigan and Illinois, the District, and the Corps.

Second, no alternative forum exists where Michigan's claims for declaratory and injunctive relief regarding the diversion project can be resolved. The State of Illinois was and remains a party responsible for creating, maintaining, and controlling the diversion project. Indeed, this Court has at least twice rejected Illinois' assertions that the District alone, not the State, is responsible for the project. First, in *Missouri v. Illinois*,⁶⁰ the Court held that the State of Illinois was a proper and indispensable party in Missouri's challenge to the interstate efforts of the Lake Michigan diversion project. In the instant case, the Court again rejected as "untenable" Illinois' contention that the District, not the State of Illinois, was the "active defendant" and emphatically held

⁶⁰ *Missouri v. Illinois*, 180 U.S. at 242.

that Illinois was the primary and responsible defendant with respect to the diversion project:

In this controversy between States, the State of Illinois by virtue of its status and authority as a State is the primary and responsible defendant. While the Sanitary District is the immediate instrumentality of the wrong found to have been committed against the complainant States by the diversion of water from Lake Michigan, that instrumentality was created and has continuously been maintained by the State of Illinois. Every act of the Sanitary District in establishing and continuing the diversion has derived its authority and sanction from the action of the State, and is directly chargeable to the State. The adjudication as to the right of the complainant States to have the diversion reduced as provided in the decree is an adjudication not merely as against the Sanitary District but as against the State as the defendant responsible under the Federal Constitution to its sister States for the acts which its creature and agent, the Sanitary District, has committed under the State's direction.⁶¹

⁶¹ *Wisconsin v. Illinois*, 289 U.S. at 399-400.

The Court then enlarged its original 1930 Decree to impose additional, affirmative obligations upon the State of Illinois to take measures necessary to redress the wrongs suffered by the Complainant States.⁶²

The harms of which Michigan now complains are traceable to the actions of the State of Illinois in creating and maintaining the diversion project. The State of Illinois has continued to exercise statutory authority over the diversion, including the allocation of water diverted from Lake Michigan.⁶³ It has also exercised control over fish present in the Chicago waterway system⁶⁴ and assumed responsibility for measures intended to address the potential migration of bighead and silver carp through that into Lake Michigan. (App. 61a-70a.)

In sum, the State of Illinois was and remains an indispensable party in any proceeding to resolve the present dispute between Michigan and the other parties concerning the existence of a continuing public nuisance and the equitable relief sought by Michigan to prevent and abate it. Accordingly, since by law, this Court has "original and *exclusive* jurisdiction of all controversies between two or more

⁶² *Wisconsin v. Illinois*, 289 U.S. 710 (1933).

⁶³ *See, e.g.*, Illinois Level of Lake Michigan Act, 615 Ill. Comp. Stat. 50/1 *et seq.*

⁶⁴ *See, e.g.*, Illinois Fish and Aquatic Life Code, 515 Ill. Comp. Stat. 5/5-5.

states,"⁶⁵ there is no other forum in which Michigan may obtain the equitable relief it seeks.

Thus, the Court should, in any event, exercise its original jurisdiction with respect to the subject of Michigan's Petition for Supplemental Decree. If the Court were to determine that Michigan should have filed a new Bill of Complaint rather than seeking a Supplemental Decree pursuant to paragraph 7 of the Decree, then Michigan respectfully requests that the Court treat the Petition for Supplemental Decree as Michigan's Bill of Complaint and allow Michigan to proceed on the basis of the papers filed here.

CONCLUSION

Michigan requests that the Court grant its Motion to Reopen Nos. 1, 2, and 3, Original, to seek a Supplemental Decree as set forth in the Petition filed herewith.

⁶⁵ 28 U.S.C. § 1251(a) (emphasis added).

Michigan also requests that the Court expeditiously consider and grant its concurrently filed Motion for Preliminary Injunction.

Respectfully submitted,

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

S. Peter Manning
Division Chief

Robert P. Reichel
Louis B. Reinwasser
Daniel P. Bock
Assistant Attorneys General

Attorneys for Complainant

Dated: December 21, 2009