

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 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 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 METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, <i>Defendants,</i> UNITED STATES OF AMERICA, <i>Intervenor.</i>	No. 3 Original

**RESPONSE OF STATE OF ILLINOIS
 TO MOTION FOR PRELIMINARY INJUNCTION**

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TABLE OF CONTENTS

	Page(s)
INTRODUCTION	1
STATEMENT OF FACTS	4
ARGUMENT	16
I. This Dispute Does Not Fall Within The Scope Of The 1967 Decree	17
II. This Case Does Not Otherwise Fall Within This Court's Exclusive, Original Jurisdiction	24
A. Michigan Does Not Seek Any Specific Relief From Illinois, Much Less Accuse Illinois Of Serious Misconduct	26
B. Michigan May Obtain The Relief It Seeks In Other Forums	31
III. Michigan Cannot Satisfy The Criteria For A Preliminary Injunction	35
A. Michigan Has Not Shown A Likelihood Of Success On The Merits .	37
B. The Remaining Preliminary Injunction Factors Favor Defendants And Intervenor	42
CONCLUSION	51

TABLE OF AUTHORITIES

	Page(s)
<i>Acierno v. New Castle County</i> , 40 F.3d 645 (3d Cir. 1994)	36
<i>Alabama v. United States Army Corps of Eng's</i> , 424 F.3d 1117 (11th Cir. 2005) .	30
<i>Arizona v. California</i> , 460 U.S. 605 (1983)	22, 23
<i>Arizona v. New Mexico</i> , 425 U.S. 794 (1976)	26
<i>Att'y Gen. of Oklahoma v. Tyson Foods, Inc.</i> , 565 F.3d 769 (10th Cir. 2009)	36
<i>California v. Nevada</i> , 447 U.S. 125 (1980)	32
<i>City of Chicago v. Beretta U.S.A. Corp.</i> , 821 N.E.2d 1099 (Ill. 2004) ..	37, 38, 39, 40
<i>Connecticut v. Am. Elec. Power Co. Inc.</i> , 582 F.3d 309 (2d Cir. 2009)	38
<i>D.D. ex rel. V.D. v. New York City Bd. of Educ.</i> , 465 F.3d 503 (2d Cir. 2006)	36
<i>Doninger v. Niehoff</i> , 527 F.3d 41 (2d Cir. 2008)	36
<i>Georgia v. Tennessee Copper Co.</i> , 206 U.S. 230 (1907)	39, 40
<i>Hess v. Port Auth. Trans-Hudson Corp.</i> , 513 U.S. 30 (1994)	31, 34
<i>Hood v. City of Memphis</i> , 570 F.3d 625 (5th Cir. 2009)	30
<i>Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Assoc.</i> , 389 U.S. 64 (1967)	30
<i>Keyes v. Eureka Consol. Min. Co.</i> , 158 U.S. 150 (1895)	44
<i>Louisiana v. Texas</i> , 176 U.S. 1 (1900)	25
<i>Lydo Enters., Inc. v. City of Las Vegas</i> , 745 F.2d 1211 (9th Cir. 1984)	44, 45
<i>Massachusetts v. Environmental Protection Agency</i> , 549 U.S. 497 (2007)	40
<i>Mississippi v. Louisiana</i> , 506 U.S. 73 (1992)	25, 26, 30, 31

<i>Missouri v. Illinois</i> , 180 U.S. 208 (1901)	39
<i>Missouri v. Illinois</i> , 200 U.S. 496 (1906)	39
<i>Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle</i> , 429 U.S. 274 (1977)	33-34
<i>Nebraska v. Wyoming</i> , 507 U.S. 584 (1993)	23
<i>New Jersey v. Delaware</i> , 128 S. Ct. 1410 (2008)	24
<i>New Jersey v. Delaware</i> , 295 U.S. 694 (1935)	23, 24
<i>New Jersey v. Delaware</i> , 546 U.S. 1028 (2005)	23
<i>New Jersey v. Delaware</i> , No. 134, 2005 WL 6140912 (Oct. 27, 2005)	24
<i>Nken v. Holder</i> , 129 S. Ct. 1749 (2009)	35
<i>Pennsylvania v. New Jersey</i> , 426 U.S. 660 (1976)	25
<i>Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel</i> , 872 F.2d 75 (4th Cir. 1989)	44
<i>RoDa Drilling Co. v. Siegal</i> , 552 F.3d 1203 (10th Cir. 2009)	44
<i>South Dakota v. Ubbelohde</i> , 330 F.3d 1014 (8th Cir. 2003)	30, 31
<i>Supreme Court of Virginia v. Consumers Union</i> , 446 U.S. 719 (1980)	35
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983)	25
<i>Tough Traveler, Ltd. v. Outbound Prods.</i> , 60 F.3d 964 (2d Cir. 1995)	44, 45
<i>United States v. Apex Oil Co., Inc.</i> , 579 F.3d 734 (7th Cir. 2009)	30
<i>United States v. Nevada</i> , 412 U.S. 534 (1973)	31
<i>Westar Energy, Inc. v. Lake</i> , 552 F.3d 1215 (10th Cir. 2009)	36
<i>Williams v. Med. Ctr. Comm'n</i> , 328 N.E.2d 1 (Ill. 1975)	31

Winter v. Natural Res. Def. Council, 129 S. Ct. 365 (2008) 35

Wisconsin v. Illinois, 278 U.S. 367 (1929) 18, 19

Wisconsin v. Illinois, 281 U.S. 696 (1930) 19

Wisconsin v. Illinois, 289 U.S. 395 (1933) 20, 32, 33

Wisconsin v. Illinois, 352 U.S. 945 (1956) 20

Wisconsin v. Illinois, 388 U.S. 426 (1967) 17, 20, 22

Wisconsin v. Illinois, 449 U.S. 48 (1980) 21

STATUTES AND RULE

5 U.S.C. § 702 32

5 U.S.C. § 704 32

28 U.S.C. § 1251(a) 25, 30

33 U.S.C. § 403 28

15 ILCS 205/4 (2008) 34

55 ILCS 5/1 – 5/7 (2008) 33

65 ILCS 5/1 – 5/11 (2008) 33

70 ILCS 2605/3 (2008) 34

70 ILCS 2605/3.2 (2008) 34

70 ILCS 2605/5.3 (2008) 34

70 ILCS 2605/9 – 2605/9.8 (2008) 34

70 ILCS 2605/12 – 2605/15 (2008) 34

70 ILCS 2605/19 (2008) 34

70 ILCS 2605/23 – 2605/24 (2008) 34

70 ILCS 2605/50 (2008)	34
805 ILCS 5/2.05 – 5/2.35 (2008)	33
FED. R. CIV. P. 65(d)	30

MISCELLANEOUS

Libby Hill, <i>The Chicago River: A Natural & Unnatural History</i> (Lake Claremont Press 2000)	4, 5
W. Page Keeton <i>et al.</i> , <i>Prosser & Keeton on the Law of Torts</i> , (5th ed. 1984)	40
Restatement (Second) of Torts (1979)	37, 40
<i>Lake Michigan Diversion Accounting: Water Year 2005 Report</i> , available at http://155.79.114.198/divacct/05%20Reports/wy05_Diversion.pdf	47

Introduction

The motion for preliminary injunction should be denied. As an initial matter, this case does not fall within the scope of the decades' old Consent Decree on which Michigan and the joining States (hereinafter "Michigan") chiefly rely as a source for this Court's jurisdiction. The Decree reconciles States' competing claims to water from Lake Michigan, and it would stretch the Decree's scope well past the breaking point to argue that it resolves any dispute related in any way to Illinois canals, particularly where, as here, Michigan disclaims any interest in reducing the amount of Lake Michigan water that Illinois may divert. But without the Decree, Michigan has little on which to proceed, especially against the State of Illinois, which operates neither the locks nor the sluice gates that Michigan wants closed or regulated. In fact, Michigan does not—and cannot—specify a single action within Illinois' legal authority that it has not undertaken already to ensure that the Asian carp do not reach the Great Lakes.

Illinois is intensely concerned about, and invested in, the ecology and health of the Great Lakes. Its own environmental and commercial stake in the Lakes' well-being is unsurpassed, and Illinois is as much a victim of the release of Asian carp into the Mississippi years ago by fish farmers in the South as any of the complainants. Indeed, the State is doing everything within its legal authority over a federal, navigable waterway to combat the carps' progress. The Illinois Department of Natural Resources ("IDNR") spent millions of dollars in 2009 alone in a massive effort to kill all aquatic life over a six-mile stretch of water—hand in

hand with officials from Michigan and other Great Lakes States, who participated in the effort—notwithstanding this measure’s devastating effect on water life. And this is only a small fraction of the work the State has done, within its limited authority in this area, to stop the progress of Asian carp. Alongside officials from each of the Great Lakes States and Canada, Illinois has been an active participant for years in efforts to keep the carp and other invasive species from entering the Lakes, contributed \$1.8 million toward the construction by the Army Corps of Engineers (“Corps”) of an electric barrier to prevent Asian carp from passing into Lake Michigan, and sponsored commercial and “electrofishing” efforts to detect the presence of Asian carp. Having participated in these efforts, Michigan makes no specific demand of Illinois, and accordingly this case does not fall within this Court’s exclusive, original jurisdiction. At best, it is a thinly veiled end-run around the Administrative Procedure Act, under which Michigan would need to sue the Corps in federal district court to close the locks.

But Michigan has another problem, beyond the fact that it has sued in the wrong court and demands nothing specific from Illinois. The harm that it identifies is speculative. Illinois has deployed a battery of tests to detect the presence of Asian carp above the protective barrier that the Corps built to keep the fish from Lake Michigan, without finding a single fish. The “fish kill” that devastated all aquatic life over a six-mile stretch revealed one Asian carp, and even that was *south* of the barrier. In the end, plaintiffs rely on “eDNA” evidence suggesting that some fish matter north of the barrier tested positive for the presence of Asian carp DNA.

But putting aside the fact that eDNA testing is a nascent, unpublished practice, every effort to find even a single actual Asian carp above the barrier has come up empty. And against this speculation, Michigan understates the massive health, safety, and economic effects of even a temporary shut-down of the lock system.

Finally, there is yet another, independently fatal defect in Michigan's extraordinary request for preliminary injunctive relief from this Court: it cannot show any likelihood of success on the underlying merits of its claim. Without the argument that the 1967 decree somehow resolves this dispute, Michigan must contend that Illinois has violated the common law of nuisance. But this is absurd on its face. That Asian carp would be introduced into Mississippi by third parties and make their way toward the Great Lakes was wholly unforeseeable at the time the Chicago waterway system was constructed, and Illinois lacks control over the locks and sluice gates on which Michigan premises its claim for relief. And where Illinois does have control, it has worked cooperatively with other States in ensuring that the carp do not enter the Great Lakes, and has used what legal authority it has, and substantial resources, to fulfill this mission.

For each of these several, independent reasons, Michigan's motion for preliminary injunction should be denied.

Statement of Facts

Introduction of Asian Carp to American Waterways

In the 1970s, fish farmers in Arkansas and other southern States first brought silver and bighead varieties of Asian carp, which are native to eastern Siberia and China, to the United States to keep the farmers' aquaculture and waste retention ponds clean. After flooding in the 1990s allowed the fish to escape into the Mississippi River, the fish migrated into the Missouri and Illinois Rivers. Ill. App. 4a; Pl. App. 18a, 44a, 49a. To date, no silver or bighead carp have been found beyond the electric dispersal barriers built and operated by the Corps to prevent Asian carp from migrating from the Mississippi River watershed into the Great Lakes. Ill. App. 77a.

The Chicago Area Waterway System

Lake Michigan is the sole source of Chicago's municipal drinking water supply. Ill. App. 17a. In the late nineteenth century, a plan was developed to reverse the flow of the Chicago River, which became polluted, so that, instead of flowing into Lake Michigan, it flowed towards the Mississippi River and ultimately emptied into the Gulf of Mexico. Libby Hill, *The Chicago River: A Natural & Unnatural History* 119, 122 (Lake Claremont Press 2000). Reversing the river in this manner would dilute and flush away pollution in the river, *id.* at 115, and the waterway created by the project would be deep enough to permit commercial navigation, *id.* at 119-120.

To these ends, the Chicago Sanitary and Ship Canal ("Canal"), the North

Shore Channel, and the Calumet-Sag Channel (collectively, the “waterway”) were built to link the Mississippi River with the Chicago, Calumet, Grand Calumet and Little Calumet Rivers, respectively, thereby reversing the flow of those rivers away from the lake. Ill. App. 1a, 31a, 50a-51a, 91a; Hill, *supra*, at xiii-xv. In addition, Lake Michigan water was diverted into the waterway to decrease pollution and improve sanitation. Hill, *supra*, at 118.

Three locks were built on the Canal to allow for navigation: the Lockport Powerhouse and Lock (located in downstate Illinois), the O’Brien Lock and Dam (located just south of Chicago), and the lock at the Chicago River Controlling Works (“Controlling Works”) (located in Chicago). Ill. App. 1a, 31a. The Corps operates these locks, and Illinois has no authority or ability to direct the Corps to close them. Ill. App. 11a, 31a, 106a-107a; Mich. App. 77a, 91a-92a.

The Controlling Works, which lies at the mouth of the Chicago River and connects the river to Lake Michigan, Ill. App. 31a-32a, serves as the gateway to one of the nation’s busiest commercial and recreational waterways. Every year more than 50,000 vessels and 900,000 passengers pass through this lock. Ill. App. 72a. Indeed, more than \$16 billion worth of goods are transported annually in and out of Illinois via barge, Ill. App. 51a, and in 2008, over 19.3 million tons moved through the three locks combined, Ill. App. 31a-32a. Commodities that travel by barge through the waterway include petroleum products, agricultural products, coal, road salt, steel, cement, home heating oil, and aircraft-deicing fluid. Ill. App. 32a, 52a-55a, 57a-58a. At any given time, hundreds of towing vessels are operating or

fleeted lakeward of the O'Brien Lock, Ill. App. 36a, and it would take between 30 and 60 days to reposition the barges lakeward of the O'Brien and Chicago locks to avoid stranding those barges if the locks closed. Ill. App. 37a. Additionally, the waterway is the receiving stream from some of the biggest commercial dischargers in the nation, including the District, Midwest Generation's coal-fired power plants, and many chemical manufacturing plants. Ill. App. 14a. Over 70% of the annual flow in the waterway is discharge of treated municipal wastewater effluent. Ill. App. 94a.

In addition to the three locks, moreover, the Chicago waterway system also includes sluice gates, which are large plates that slide into grooves in the sides of a channel to control water level and flow rates, at the O'Brien Lock and Dam, the Controlling Works, and the Wilmette Pumping Station. Ill. App. 11a, 31a. The Metropolitan Water Reclamation District of Greater Chicago ("District") controls and operates the sluice gates, as well as pumps located at the Controlling Works and the Pumping Station. Ill. App. 12a, 106a-107a; Mich. App. 77a, 91a-92a.

The District uses the gates to regulate the diversion of Lake Michigan water into the Chicago waterway system, Ill. App. 12a, and to direct diversion from Lake Michigan to improve and maintain inland water quality, lockage, and navigation, Ill. App. 95a; Mich. App. 89a. The State of Illinois, through IDNR, establishes a maximum quantity of water that the District may divert from the lake annually pursuant to the Lake Michigan Water Allocation program, but so long as the District diverts the water for allocated purposes and does not exceed the allocated

amount in any year, IDNR has no authority over the District's operation of the sluice gates for diversion. Ill. App. 12a. And just as the Corps uses the locks to lower water levels during significant rainfalls to prevent flooding, Ill. App. 26a; Mich. App. 94a-95a, the District may use the sluice gates to allow water back into Lake Michigan to avoid flooding during heavy rains, as it has done on six occasions since August 2007, Mich. App. 107a. Again, Illinois has no authority to direct or control the District's operation of the gates for this purpose. Ill. App. 12a, 108a.

Efforts to Prevent the Migration of Asian Carp

Illinois, the Corps, and other stakeholders have gone to—and continue to go to—substantial efforts to prevent the Asian carp from entering the Great Lakes. The Corps built, operates, and controls an Electrical Disbursal Barrier System—located in the Canal approximately 37 miles south of the Calumet River entrance to Lake Michigan—that was designed to prevent invasive species, such as Asian carp, from entering the lake. Ill. App. 11a, 73a-76a. The Corps has completed construction on Barriers I and IIA, which operate continuously, and is in the process of constructing Barrier IIB. Ill. App. 74a-75; Mich. App. 30a. Together with other States, IDNR supplied a significant amount of the funding toward the construction of the barrier, Ill. App. 5a; Mich. App. 33a, but Illinois has no authority to direct the Corps' operation of that system, Ill. App. 5a, 11a; Mich. App. 30a-33a. In addition, the Corps is working to control flooding along the Des Plaines River, the Illinois and Michigan Canal, and the Calumet rivers. Mich. App. 69a.

The Corps also contracted with the University of Notre Dame to take environmental DNA (“eDNA”) samples to determine whether Asian carp eDNA was present in the waterway south of the electric barrier. Ill. App. 6a. Samples taken in Spring 2009 were positive for the presence of Asian carp eDNA, and in response IDNR intensified monitoring, consulted with the Corps about increasing the voltage of the barrier, and coordinated with other agencies to address the Corps’ need to shut down the barrier for maintenance. *Ibid.* In November 2009, the Corps and University of Notre Dame reported positive eDNA results for samples collected in September above the electric barrier, but below the O’Brien Lock and Dam. Ill. App. 7a.

Illinois responded by contracting with commercial fishermen experienced in fishing for Asian carp to use electrofishing and thousands of yards of fishing nets in the areas of the Channel where the earlier eDNA results were collected. Ill. App. 8a. From December 1 to 7, 2009, more than 1,000 fish were caught and identified, without finding a single Asian carp. Ill. App. 8a, 77a-78a; Mich. App. 65a-66a, 68a. Also in December, as part of a 350-person operation by the Asian Carp Rapid Response Workgroup (“Workgroup”), IDNR applied the fish poison Rotenone to a 5.7-mile stretch of the Canal south of the electric barrier.¹ Rotenone affects all

¹ IDNR is the lead responding agency member of the Workgroup, whose other members are the United States Coast Guard, the District, the Corps, the United States Environmental Protection Agency, and the United States Fish and Wildlife Service. Ill. App. 81a-83a. Additional operational support for the group is provided by the Great Lakes Fishery Commission, the City of Chicago, the International Joint Commission, Midwest Generation, and local law enforcement and emergency services. Ill. App. 83a-84a. And

fishes and invertebrates, not just the target carp. Ill. App. 6a-7a; Mich. App. 25a, 61a-63a. Michigan, Indiana, Wisconsin, and Canada provided personnel and equipment to aid the operation, and Minnesota, New York, Ohio, and Pennsylvania, made other contributions. Ill. App. 7a.

Before this operation, Illinois could not confirm the eDNA results using any established fishing techniques, and no Asian carp had been found in the Canal. *Ibid.* And even the Rotenone operation, though it killed tens of thousands of fish, revealed just one bighead carp, and that fish was found south of the electric barrier. *Ibid.*; Mich. App. 25a, 61a-63a.

Meanwhile, IDNR continues to work with other Workgroup members to evaluate and develop further measures to control Asian carp migration. Ill. App. 8a; Mich. App. 69a. Since the mid-1990s, IDNR has undertaken significant efforts to monitor for bighead and silver carp, and it continues to monitor and survey the waterway. Ill. App. 5a, 8a. Illinois also is a member of the Great Lakes Panel on Aquatic Nuisance Species, along with representatives from Michigan, Indiana, Minnesota, New York, Ohio, Pennsylvania, Wisconsin, Ontario and Quebec. Ill. App. 4a. Many federal agencies, including the Corps, also participate on the

supplemental in-kind support is provided by Michigan, Indiana, Minnesota, New York, Ohio, Pennsylvania, Wisconsin, the Ontario Ministry of Natural Resources, and the province of Quebec, among others. Ill. App. 84a; Mich. App. 67a. The group's mission is to implement procedures and take action to protect the integrity of the Great Lakes ecosystem from Asian carp migration via the Canal. Ill. App. 80a.

Panel, *ibid.*, which provides guidance on nuisance species research, policies, and educational programs. Ill. App. 5a.

Public Health and Safety Effects of Closing Locks and Sluice Gates

Even a temporary closure of the locks will “devastate the local economy” and Illinois’ role in the regional, national, and global economies, endanger public safety, and cause serious environmental harm. Ill. App. 50a. Turning first to health and safety issues, closure of the O’Brien and Controlling Works locks would obstruct the performance of critical duties by the Chicago Police and Fire Departments, and undercut Chicago’s ability to respond to, mitigate, and recover from a large-scale incident (including a terrorism incident) along the Chicago area’s inland waterway or within Chicago’s central business district, which is occupied by more than one million people on an average work day. Ill. App. 23a-24a. The Chicago Police Department’s Marine Operations Officers must use the locks to enforce state and municipal law effectively and assist the United States Coast Guard and the IDNR Conservation Police with protecting established safety zones for special events and high profile, threat-assessed targets. Ill. App. 20a-21a. Homeland security is also a key responsibility within the Marine Operations’ jurisdiction, which extends three miles into Lake Michigan. Ill. App. 21a. Operations officers perform 700 to 800 homeland security checks each month along the lakefront, the Chicago and Calumet Rivers, and the Canal. *Ibid.*

Marine Operations Officers also respond to 300 distress calls per month on Lake Michigan during boating season, and 30 calls per month during the offseason.

Ibid. The response time in these cases would be considerably longer if the locks were closed, for police then would need to deploy their marine resources and personnel by land instead of through the lock. Ill. App. 20a. And if the locks were closed while ice was present, Marine Operations could not respond to a Lake Michigan emergency at all. *Ibid.*

In addition, the Chicago Fire Department's Air Sea Rescue Division docks its emergency response watercraft—which includes Engine 58, a 96-foot fireboat—in Lake Michigan, and these fire vessels could not access the inland waterways to respond to emergencies if the O'Brien and Chicago River Controlling Works locks were closed. Ill. App. 22a. The Air Sea Rescue Division passes through the locks approximately 250 times each year responding to and returning from emergencies in the inland waterways. *Ibid.* In 2009, it responded to 165 incidents along these waterways, ranging from water rescues to fires. *Ibid.* Engine 58 can deliver more than 14,000 gallons of river water per minute to fire engines battling fires near the inland waterway. *Ibid.* And if the main water line in Chicago's central business district fails, Engine 58 is the primary means of water supply to the area because it can pump water directly from the river. *Ibid.*

Permitting the locks to be opened only in case of emergency and then immediately re-closed is incompatible with rescue operations. Ill. App. 24a. The locks and sluice gates need to be operated to control the river level to enable Engine 58 to go under the Chicago River bridges that cannot be raised. *Ibid.* And raising