

Filed  
FEB 19 2010

Nos. 1, 2, and 3 Original

IN THE

**Supreme Court of the United States**

STATES OF WISCONSIN, MINNESOTA, OHIO, AND  
PENNSYLVANIA,  
*Complainants,*

v.

STATE OF ILLINOIS AND THE METROPOLITAN  
SANITARY DISTRICT OF GREATER CHICAGO,  
*Defendants,*

UNITED STATES OF AMERICA,  
*Intervenor.*

STATE OF MICHIGAN,  
*Complainant,*

v.

STATE OF ILLINOIS AND THE METROPOLITAN  
SANITARY DISTRICT OF GREATER CHICAGO,  
*Defendants,*

UNITED STATES OF AMERICA,  
*Intervenor.*

STATE OF NEW YORK,  
*Complainant,*

v.

STATE OF ILLINOIS AND THE METROPOLITAN  
SANITARY DISTRICT OF GREATER CHICAGO,  
*Defendants,*

UNITED STATES OF AMERICA,  
*Intervenor.*

**BRIEF OF THE STATE OF INDIANA AS AMICUS  
CURIAE IN SUPPORT OF THE MOTION TO REOPEN  
AND FOR A SUPPLEMENTAL DECREE**

Office of the Indiana  
Attorney General  
IGC South, Fifth Floor  
302 W. Washington Street  
Indianapolis, IN 46204  
(317) 232-6255  
Tom.Fisher@atg.in.gov  
*\*Counsel of Record*

GREGORY F. ZOELLER  
Attorney General  
THOMAS M. FISHER\*  
Solicitor General  
HEATHER L. HAGAN  
ASHLEY E. TATMAN  
DENISE A. WALKER  
Deputy Attorneys General

*Counsel for Amicus Curiae the State of Indiana*

**TABLE OF CONTENTS**

Table of Authorities ..... ii

Interest of the *Amicus Curiae* ..... 1

Argument..... 5

I. Reopening this Original Action is Justified..... 5

II. The Right Solution is Not Obvious, so the Court Should Appoint a Special Master With Instructions to Hear Evidence Quickly But Methodically ..... 9

    A. Simply closing the locks may not stop the carp from entering Lake Michigan ..... 11

    B. Deferring to the federal government will not stop the carp..... 15

    C. The Court should appoint a Special Master to hear evidence and make a recommendation as to the proper remedy to abate the nuisance..... 18

Conclusion ..... 20

## TABLE OF AUTHORITIES

### CASES

<i>City of Chicago v. Beretta U.S.A. Corp.</i> , 821 N.E.2d 1099 (Ill. 2004).....	8
<i>Connecticut v. Cahill</i> , 217 F.3d 93 (2d Cir. 2000).....	9
<i>Fednav, Ltd. v. Chester</i> , 547 F.3d 607 (6th Cir. 2008).....	17
<i>Illinois v. City of Milwaukee</i> , 406 U.S. 91 (1972).....	9
<i>Illinois Cent. R. Co. v. Illinois</i> , 146 U.S. 387 (1892).....	8
<i>Kansas v. Colorado</i> , 543 U.S. 86 (2004).....	19
<i>Mississippi v. Louisiana</i> , 346 U.S. 862 (1953).....	18
<i>Missouri v. Illinois</i> , 180 U.S. 208 (1901).....	9
<i>Nebraska v. Iowa</i> , 379 U.S. 996 (1965).....	18
<i>Wisconsin v. Illinois</i> , 278 U.S. 367 (1929).....	5, 6, 8, 18

**CASES [CONT'D]**

<i>Wisconsin v. Illinois</i> , 281 U.S. 696 (1930).....	18
<i>Wisconsin v. Illinois</i> , 289 U.S. 395 (1933).....	6, 8, 9
<i>Wisconsin v. Illinois</i> , 352 U.S. 945 (1956).....	7
<i>Wisconsin v. Illinois</i> , 388 U.S. 426 (1967).....	7
<i>Wisconsin v. Illinois</i> , 449 U.S. 48 (1980).....	7

**STATUTES**

16 U.S.C. § 4701 et seq. ....	15
-------------------------------	----

**OTHER AUTHORITIES**

Asian Carp Control Strategy Framework, <i>available at</i> <a href="http://www.asiancarp.org/RegionalCoordination/documents/AsianCarpControlStrategyFramework.pdf">http://www.asiancarp.org/RegionalCoordination/documents/AsianCarpControlStrategyFramework.pdf</a> . ....	2, 12, 15, 16
Dan Egan, <i>Prey Fish Dwindling in Lake Michigan</i> , Milwaukee Journal Sentinel, Jan. 13, 2008, <i>available at</i> <a href="http://www.jsonline.com/features/food/29465749.html">http://www.jsonline.com/features/food/29465749.html</a> .....	2

**OTHER AUTHORITIES [CONT'D]**

- Dan Egan, *Ship Ballast Law Posts Victory*, Milwaukee Journal Sentinel, Aug. 17, 2007, available at <http://www.jsonline.com/news/wisconsin/29336019.html>..... 11
- Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007)..... 10
- Great Lakes Recreational Boating's Economic Punch, available at <http://www.glc.org/reboat/pdf/rec-boating-final-small.pdf>..... 3
- Importance of Chicago Locks to the Port of Indiana, Jan. 27, 2010, available at <http://www.portsofindiana.com/chicagolocks/>..... 4
- John Flesher, *Feds Pass on Surest Solution to Asian Carp Advance*, Wash. Post, Feb. 11, 2010, available at <http://www.washingtonpost.com/wpdyn/content/article/2010/02/11/AR2010021100863.html>..... 16
- Lake Michigan 2008 Creel Survey Report, available at [http://www.in.gov/dnr/fishwild/files/fw-Creel\\_Report.pdf](http://www.in.gov/dnr/fishwild/files/fw-Creel_Report.pdf)..... 2
- Lake Michigan Fishing, available at <http://www.in.gov/dnr/fishwild/3625.htm> ..... 1

**OTHER AUTHORITIES [CONT'D]**

Legacy Act Grand Calumet River Cleanup  
Gets Underway, *available at* [http://epa.gov/  
glnpo/sediment/legacy/grandcal/grdcalFact  
sht2.pdf](http://epa.gov/glnpo/sediment/legacy/grandcal/grdcalFact<br/>sht2.pdf)..... 13

Letter from Governor Mitch Daniels to the  
White House Council on Environmental  
Quality, dated Feb. 11, 2010 ..... 4, 5

Port of Indiana-Burns Harbor, Executive  
Summary, *available at* [http://www.portsofi  
ndiana.com/poi/burns\\_harbor/executive\\_su  
mmary.cfm](http://www.portsofi<br/>ndiana.com/poi/burns_harbor/executive_su<br/>mmmary.cfm) ..... 14

## INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>

Indiana possesses more than forty miles of Lake Michigan shoreline and, therefore, shares the alarm of all Great Lakes States faced with the looming invasion of Asian carp. Indiana is a member of numerous regional, national and international efforts to protect the Great Lakes, such as the recently ratified Great Lakes-St. Lawrence River Basin Water Resources Compact, an agreement among the eight Great Lakes States and two provinces of Canada that seeks to ensure the sustainability of the Great Lakes. Indiana also operates the Indiana Lake Michigan Coastal Program, the purpose of which is to manage natural and cultural resources in the coastal region.

Indiana's shoreline is the first portion of the Great Lakes to warm in the spring, which makes it a popular spawning location for trout, yellow perch, and salmon. See *Lake Michigan Fishing*, available at <http://www.in.gov/dnr/fishwild/3625.htm>. These species return year after year to spawn, but could easily be decimated by an invasion of Asian carp, which feed voraciously on plankton, a critical component of the base of the food chain. Plankton levels in the Great Lakes have already decreased with the introductions of zebra and quagga mussels (which are filter feeders like Asian carp), and there has been a consequent negative impact on highly

---

<sup>1</sup> Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of Indiana's intention to file this brief more than 10 days prior to the due date of this brief.

valued sport-fish species. See Dan Egan, *Prey Fish Dwindling in Lake Michigan*, Milwaukee Journal Sentinel, Jan. 13, 2008, available at <http://www.jsonline.com/features/food/29465749.html>. In addition, the Great Lakes are home to nearly 80 federally listed threatened or endangered organisms. See Asian Carp Control Strategy Framework at 5 [hereinafter *Framework*], available at <http://www.asiancarp.org/RegionalCoordination/documents/AsianCarpControlStrategyFramework.pdf>.

Furthermore, as with Michigan and other Great Lakes States, sport fishing and recreational boating are important industries for Indiana. The Indiana Department of Natural Resources (“IDNR”) spends nearly \$1 million annually to stock trout and salmon in the southern end of Lake Michigan and conduct ongoing fish management and research programs. Anglers spent approximately 315,000 hours fishing Indiana’s portion of Lake Michigan in 2008, resulting in an economic impact of \$4,890,789, primarily benefiting northwest Indiana. See *Lake Michigan 2008 Creel Survey Report*, available at [http://www.in.gov/dnr/fishwild/files/fw-Creel\\_Report.pdf](http://www.in.gov/dnr/fishwild/files/fw-Creel_Report.pdf).

In 2009, IDNR issued 44 Charterboat Fishing Licenses for Lake Michigan and its tributary streams. These operators take clients fishing for hire, principally targeting trout and salmon. This specialized sport-fishing industry is dependent upon healthy and abundant fish stocks for its survival.



In addition, the well-documented jumping behavior of silver carp poses significant risks to boaters. There are approximately 4.3 million boats registered in the eight Great Lakes States, which is approximately one-third of all the registered boats in the United States. Great Lakes Recreational Boating's Economic Punch at 3, *available at* <http://www.glc.org/recboat/pdf/rec-boating-final-small.pdf>. A 2003 study showed that spending on boats and boating activities in the Great Lakes States totaled nearly \$16 billion, directly supporting 107,000 jobs. *Id.* at 6. These industries would be devastated if Asian carp were to invade Lake Michigan, destroy other aquatic life and imperil boaters and skiers.

Indiana thus has a compelling interest in the continued protection of Lake Michigan and its ecosystem. Even so, perhaps more than any other Great Lakes state, Indiana's ecological and economic well-being stand in tension when it comes to resolving the Asian carp issue.

Indiana has a vested interest in maintaining shipping channels connecting the Great Lakes with the Mississippi, including the Chicago Sanitary and Ship Canal that Michigan urges this Court to shutter in this matter. Indiana industries use the Great Lakes and connected canal systems to ship hundreds of thousands of tons of cargo every year. An average of 439 barges transit the O'Brien Lock to and from the Port of Indiana-Burns Harbor each year, which translates into more than 700,000 tons

of cargo, 3,000 jobs, \$350 million in business revenue, \$84 million in personal income and \$7.9 million in state and local tax revenue. *See Importance of Chicago Locks to the Port of Indiana, Jan. 27, 2010, available at <http://www.portsofindiana.com/chicagolocks/>.* These numbers do not include the impact of barge shipping on large Indiana businesses located on Lake Michigan that use their own shipping slips, such as ArcelorMittal, U.S. Steel and BP Whiting. *Id.* The locks and canals leading to the Mississippi across Illinois are vital to the operations of the steel mills of northwest Indiana, which is among the largest steel-producing regions in the United States. In addition, the operations of the locks and canals are vital to petroleum refining, petroleum re-refining, agricultural and building construction manufacturing businesses. Closing the O'Brien Lock would terminate all shipping of raw and finished products from Lake Michigan to the Mississippi River because the only economically viable shipping route requires passage through the lock.

Not only would closing the locks harm Indiana's shipping, steel, and other industries, but it could lead to other environmental crises in northwest Indiana's Calumet region. In the last two years, severe flooding in the region has caused approximately \$127 million in damage and even some fatalities. *See Letter from Governor Mitch Daniels to the White House Council on Environmental Quality, dated Feb. 11, 2010.* Indiana and the Army Corps of Engineers have been

building levees to control water flows, but closing the locks would cause back flow and render the new levees inadequate.

Accordingly, while Indiana sides with Michigan in urging the Court to exercise its original jurisdiction over this matter, it believes the Court should use a Special Master to hear evidence concerning solutions that best balance direct costs, public safety, ecological efficacy, and indirect consequences. As Governor Mitch Daniels recently explained to the White House Council on Environmental Quality, “[t]here is no single simple solution and we must utilize a variety of science and engineering-based approaches.” *Id.* In order to find the proper solution, the Court’s intervention is needed to ensure that both Illinois and the Corps—who jointly bear responsibility for this budding ecological disaster—maintain proper focus and devote sufficient time, talent and resources to reach a workable solution. The Court should act quickly but circumspectly in order to avoid the ecological disaster that has followed the Asian carp at each step along their trip toward the Great Lakes.

## ARGUMENT

### I. Reopening this Original Action is Justified

For decades, Illinois has diverted water from Lake Michigan to hydraulically sanitize water for the City of Chicago. *Wisconsin v. Illinois*, 278 U.S. 367, 415 (1929). It has accomplished this by digging

and installing various canals, locks and channels between Lake Michigan and the more highly elevated Des Plaines River. *Id.* at 402. It went so far as to reverse the flow of the Chicago River so that the city's wastewater traveled away from the lake and into the Mississippi River. *Id.* at 403.

Illinois diverted so much water from Lake Michigan that the water levels in the entire Great Lakes system lowered several inches. *Id.* at 407. This prompted other Great Lakes States to ask the Court for an injunction against Illinois. This Court found, in 1929, that Illinois' withdrawal of lake water for sanitation purposes was illegal. *Id.* at 418, 420. Although the Court allowed the diversion to continue at that time for health reasons, it ordered Illinois to "devise proper methods for providing sufficient money and to construct and put in operation with all reasonable expedition adequate plants for the disposition of the sewage through other means than the lake diversion." *Id.* at 420-21.

Instead of complying with the Court's order to construct sewage treatment plants, Illinois continued to withdraw water from Lake Michigan for its local sewage needs. In 1933, the Special Master determined that the state could not construct sewage treatment plants, as it had been ordered to do, because of limited financial resources. *Wisconsin v. Illinois*, 289 U.S. 395, 399, 412 (1933).

The Court, however, retained jurisdiction over the matter and, when asked to do so, occasionally

modified the Decree to alter the amount of water that could be diverted. See *Wisconsin v. Illinois*, 352 U.S. 945, 947 (1956); *Wisconsin v. Illinois*, 388 U.S. 426, 427-29 (1967); *Wisconsin v. Illinois*, 449 U.S. 48, 48-50 (1980). For example, in 1967, the Court reopened the case and entered a Decree enjoining Illinois from diverting water from Lake Michigan in excess of 3,200 cubic feet per second. *Wisconsin v. Illinois*, 388 U.S. at 427.

Now the invasive Asian carp use the artificial waterways created by Illinois to approach Lake Michigan. The carp were first introduced into the southern United States in the early 1970s to remove algae from farmed catfish ponds. Flooding allowed the carp to escape and enter the Mississippi River. The carp have moved upstream and are now well established in both the Mississippi and Illinois Rivers. In fact, the Corps has estimated that the Illinois River has the world's largest population of bighead and silver carp. Mich. App. at 51a. The Illinois River is connected to Lake Michigan by the Chicago Sanitary and Ship Canal.

Illinois argues that this Court does not have jurisdiction because the underlying lawsuit “resolved solely a dispute over the amount of water that the District may withdraw from Lake Michigan for sanitation and navigation purposes[,]” and is thus not relevant here. Ill. Resp. to Mot. for Prelim. Inj. at 17. While that may have been the narrow focus of latter stages of the original lawsuit, the broader issue has always been about the conditions under

which Illinois may divert water from Lake Michigan into the artificial waterway system that Illinois created for local sanitation purposes. That issue was the basis of the 1929 case, *Wisconsin v. Illinois*, 278 U.S. 367 (1929), and is now the basis for the nuisance claim brought by Michigan here.

Illinois also points out that only the Army Corps of Engineers controls the locks (and only the Metropolitan Sanitary District of Greater Chicago controls the sluice gates) that Michigan wishes to close. Ill. Resp. to Mot. for Prelim. Inj. at 27. That does not defeat the need for this Court to exercise original jurisdiction over Michigan's claim. "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." Mich. Mot. to Reopen at 22 (citing *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1111 (Ill. 2004)). The general public has rights to the Great Lakes that include fishing, boating, commerce and recreation. *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). At the very least, a condition exists with respect to Illinois' rivers that enables a public nuisance impacting the Great Lakes. That is enough to make Illinois a defendant and to invoke the Court's original jurisdiction. See *Wisconsin v. Illinois*, 289 U.S. at 400 (finding that Illinois "is the primary defendant" even though "the sanitary district is the immediate instrumentality of the wrong" because the District "was created and has continuously been maintained

by the state of Illinois.”); *Missouri v. Illinois*, 180 U.S. 208, 242 (1901).

Michigan has the option to choose to name Illinois as a defendant and invoke original jurisdiction rather than name another proper party and proceed in district court. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972); *Connecticut v. Cahill*, 217 F.3d 93, 98 (2d Cir. 2000) (citing *Missouri v. Illinois*, 180 U.S. 208 (1901)); *but see id.* at 105 (Sotomayor, J., dissenting) (stressing that “Section 1251(a) makes clear that the Supreme Court’s jurisdiction is ‘exclusive’ for ‘all’ controversies between States.”). Michigan has opted to bring suit in this Court, which waded into the contentious issues involving the diversion of Lake Michigan water decades ago and has retained jurisdiction over the matter. Now that this diversion has led us to the brink of an Asian carp invasion of the Great Lakes, the Court should accept a role in resolving the dispute over the proper solution to this nationally significant problem.

## **II. The Right Solution is Not Obvious, so the Court Should Appoint a Special Master With Instructions to Hear Evidence Quickly But Methodically**

The conditions for permissibly diverting the waters of Lake Michigan and related issues of ecological protection are all legal matters properly before the Court. The complexity of the Asian carp issue, however, requires more than briefing on

points of law. As discussed in more detail below, permanently closing the locks is neither a simple nor likely effective solution, though temporary closures may play a part in a more comprehensive series of steps to prevent the carp from infesting the Great Lakes.

The parties need an opportunity to present and contest evidence demonstrating the costs and benefits of various proposed solutions so that the Court may arrive at a workable, but complete, solution. The prospect of developing an evidentiary record, however, should not deter the Court from exercising jurisdiction. By appointing a Special Master, the Court should acquire sufficient capacity to collect and weigh evidence. *See Eugene Gressman et al., Supreme Court Practice, 642-43 (9th ed. 2007).*

The Court should proceed in this manner rather than force the parties to go to district court because time is of the essence. No one denies the fact that the carp are getting closer and closer to the Great Lakes. Sending the case through multiple layers of the federal judiciary, with untold motions, appeals, and remands, will only thwart the efficacy of any remedy the courts might eventually order because by then the Asian carp will have invaded.

Taking this case and appointing a Special Master with instructions to hear evidence and recommend a judgment and remedy within a specified (and reasonably short) time period is the best way to achieve efficient, yet circumspect, adjudication.



**A. Simply closing the locks may not stop the carp from entering Lake Michigan**

Michigan argues for immediate closure of the O'Brien and Chicago Controlling Works Locks as the solution to preventing Asian carp from entering the Great Lakes. Mich. Mot. for Prelim. Inj. at 5, 28. Indiana understands Michigan's concern and its frustration with the apparent lack of effective barriers to Asian carp and other invasive species. As Wisconsin State Senator Robert Cowles once explained, "[w]e have to keep the pressure on. It's been over 40 years (since the St. Lawrence Seaway opened), and it's done incredible damage. Who knows what the next rotten species will be?" Dan Egan, *Ship Ballast Law Posts Victory*, Milwaukee Journal Sentinel, Aug. 17, 2007, available at <http://www.jsonline.com/news/wisconsin/29336019.html>. When federal solutions do not protect a state's interests, the states as sovereigns must take or propose measures to protect themselves.

Closing the locks alone, however, may not stop the Asian carp—but such action would be certain to have a significant negative impact on the ecological, public safety and economic interests of Indiana and other Great Lakes States. Accordingly, the Court should be aware of the pitfalls of closing the gates.

1. In its briefing before the Court, the Corps argues that the locks are not watertight. U.S. Resp. to Mot. for Prelim. Inj. at 49. It is possible that small fish or eggs could swim through or otherwise

penetrate a closed lock. *Id.* The Corps also contends that shutting the locks will permanently impair their function as flood control and navigational devices. *Id.* Apparently, the locks are so old that “[e]specially in cold weather, they require frequent—sometimes constant—cycling in order to remain operational.” *Id.* Thus, shutting the locks, even temporarily, might “degrade[e] the locks to the point that the shutdown will necessarily become a permanent one[.]” *Id.*

The White House Council on Environmental Quality agrees. In its recent report titled “Asian Carp Control Strategy Framework,” released February 9, 2010, in coordination with various state and federal agencies, the Council evaluated the effectiveness of lock closure and concluded that “it is possible for fish to swim through the lock into the lake even when the locks are ‘closed.’” Framework at 7. Further, even if the locks were closed and water-tight, the fish might access the lake through “leaking sluice gates at both federal and non-federal facilities, release of live adult fish into the Great Lakes, the transfer of juveniles in bait buckets, or the replenishment of ballast water in marine vessels.” *Id.* Presumably, the carp also have unrestricted access to the Great Lakes through various other rivers and streams in Illinois, Wisconsin and Indiana that have no existing control structures.<sup>2</sup> *See id.*

---

<sup>2</sup> For example, in Indiana, the Grand Calumet and Little Calumet Rivers are located close to, but not obstructed

2. Closing the locks could cause negative ecological consequences for Illinois and northwest Indiana. Illinois argues that closing the locks “would critically undermine the City of Chicago’s ability to respond to, mitigate, and recover from a large-scale incident (including a terrorism-related incident) along the area’s inland waterways or within Chicago’s central business district[.]” Ill. Resp. to Mot. for Prelim. Inj. at 46. Further, in order to prevent dangerous flooding, the District claims that it must be able to release water through the sluice gates and the locks, and it has no means to prevent the carp from entering the lake when releasing flood water. MWRD Resp. to Mot. for Prelim. Inj. at 16.

Moreover, as described in detail by Illinois, the impacts of closing the locks on business and recreation are significant. Ill. Resp. to Mot. for Prelim. Inj. at 12-15. Indiana shares Illinois’ general concerns regarding the impact of closing the locks and has specific concerns related to the economic impact of lock closure to Indiana.

The Port of Indiana-Burns Harbor is ideally situated as an access point for domestic and international markets and handles more ocean-going

---

by, the O’Brien Lock. For the next two to three years, the Grand Calumet River is being dredged and, thus, is not navigable even by fish. *See* Legacy Act Grand Calumet River Cleanup Gets Underway, *available at* <http://epa.gov/glnpo/sediment/legacy/grandcal/grdcalFactsht2.pdf>. The Little Calumet River, however, is still accessible.

cargo than any other U.S. port on the Great Lakes. See Port of Indiana-Burns Harbor, Executive Summary, available at [http://www.portsofindiana.com/poi/burns\\_harbor/executive\\_summary.cfm](http://www.portsofindiana.com/poi/burns_harbor/executive_summary.cfm). The port provides ship and barge connections to the world through the Great Lakes and St. Lawrence Seaway, including year-round access to the Inland Waterway System through the O'Brien Lock, which connects the Midwest to the Gulf of Mexico via the Illinois and Mississippi Rivers. *Id.* The Inland Waterway System handles more than 630 million tons of cargo per year and stretches for 12,000 miles across the United States, providing direct waterway connections to 38 states and the opportunity for transfers to ocean-going vessels at the Gulf of Mexico. *Id.*

The steel industry, which uses the waterway system both to receive raw materials and to ship finished products, is but one example of an industry that would be seriously impacted by closure of the O'Brien Lock. Nestled between ArcelorMittal and U.S. Steel, Port of Indiana-Burns Harbor handles 15 percent of all U.S. steel trade with Europe, with more than 10 steel processors onsite. *See id.*

Balancing environmental and industrial interests is always difficult, but common sense dictates that if closing the locks will not shield Lake Michigan from carp, but *will* impact commerce negatively, the closure cannot be justified. The Court should appoint a Special Master to hear evidence concerning the costs and benefits of proposed remedies.

**B. Deferring to the federal government will not stop the carp**

In the scheme of Lake Michigan water diversion, the Corps has allowed its areas of responsibility to deteriorate into a public nuisance. It should not now be left alone to deal with the mess.

1. In opposing Michigan's claims and demands for injunctive relief, the federal government has in essence stated that the solution is to let *it* handle the problem. U.S. Resp. to Mot. for Prelim. Inj. at 16-17; Framework at ES-4. While Indiana has no doubt that the federal agencies involved are taking the problem seriously and working diligently, the Corps has been aware of the Asian carp threat for many years, U.S. Resp. to Mot. for Prelim. Inj. at 5, and has not yet found a way to stop it.

In 1996, Congress authorized the Corps to construct a Demonstration Dispersal Barrier in the Chicago Sanitary and Ship Canal. U.S. App. at 47a; 16 U.S.C. § 4701 et seq. This barrier became operational in April 2002; however, it was designed and built with materials that were not intended for long-term use. U.S. App. at 48a, 49a. Further research showed that smaller juvenile carp might not be repelled by the voltages in use at Barrier I, so the Corps began researching and constructing a second barrier. *Id.* at 50a. "Although Barrier IIA was operational in March 2006, full time operation of Barrier IIA did not occur until 2009 because the Corps and the Coast Guard were involved in an

extensive safety testing program.” *Id.* at 51a. These delays allowed the carp to reach the doorstep of the Great Lakes.

Current federal proposals to address the Asian carp situation attack the threat from many aspects, but may not go far enough. The proposals include funding a study to look at the potential impact of permanent lock closing, the effectiveness of lock operations and alternative methods of keeping carp out of Lake Michigan such as electric, light and bio-acoustic barriers. Framework at ES-3. While useful information may come from these studies, concrete action must be taken now. As University of Notre Dame biologist David Lodge has noted, “[w]hile we’re all talking, the fish are swimming.” John Flesher, *Feds Pass on Surest Solution to Asian Carp Advance*, Wash. Post, Feb. 11, 2010, available at <http://www.washingtonpost.com/wpdyn/content/article/2010/02/11/AR2010021100863.html>.

In the short term, the federal proposal focuses on confirming the carp population (through increased environmental DNA testing) and attempting to reduce that population (through poisoning and netting). Incrementally, the Corps would alter the locks, dams, sluice gates and pumping stations so as to impede the migration of the carp. Framework at ES-2. Chicago’s navigational locks may also be closed several days a week. Unfortunately, because of funding and infrastructure delays, the Corps appears to be unable to implement these solutions quickly enough to stop the carp. *Id.* at ES-3.

2. While many of the government's plans are expensive to implement, controlling invasive species once they are established is even more costly.

Take the invasions of the sea lamprey and zebra and quagga mussels, for example. Scientists are not certain how the sea lamprey reached the Great Lakes, but zebra and quagga mussels entered through ballast discharge. When Congress refused to regulate ballast practices, Michigan passed a law requiring ships to obtain state permits and, if intending discharge ballast water, to use specified technologies to prevent the introduction of invasive species into the Great Lakes. *Fednav, Ltd. v. Chester*, 547 F.3d 607, 613 (6th Cir. 2008). The shipping industry sued, alleging Commerce Clause violations. *Id.* The Sixth Circuit held that Michigan had a "legitimate state interest in protecting its waters from further introductions of [invasive species] from ballast-water discharges by oceangoing vessels" and upheld the law. *Id.* at 625.

Alas, the zebra mussels spread ahead of Michigan's law. Great Lakes States now spend several billion dollars each year to control them, and the Great Lakes Fishery Commission has reported that assessing, researching and controlling sea lampreys cost \$13.5 million in 2001. Failing to block Asian carp is similarly likely to require exponentially more costly eradication solutions.

**C. The Court should appoint a Special Master to hear evidence and make a recommendation as to the proper remedy to abate the nuisance**

As it did in the other iterations of this matter, *see Wisconsin v. Illinois*, 278 U.S. at 399; *Wisconsin v. Illinois*, 281 U.S. 696, 696 (1930), the Court should appoint a Special Master to assist with necessary fact-finding. The Master could then “fix the time and conditions for the filing of additional pleadings and . . . direct subsequent proceedings” as well as “summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for.” *Nebraska v. Iowa*, 379 U.S. 996, 996 (1965). A Special Master is often asked “to find the facts specially and state separately his conclusions of law thereon, and to submit the same to this Court with all convenient speed, together with a draft of the decree recommended by him.” *Mississippi v. Louisiana*, 346 U.S. 862, 862 (1953). It is in the interest of all Great Lakes States for the Court to arrive at a judgment and remedy that allows for the States to maintain commerce channels while protecting Lake Michigan and the other Great Lakes from the invasive Asian carp.

Ultimately, if the Court enters a judgment requiring further action by one or more defendants, it might be useful also to appoint a River Master. Although rare, the appointment of a River Master to oversee a decree is used in circumstances where the Court is convinced such appointment would



significantly aid in resolving future disputes. See *Kansas v. Colorado*, 543 U.S. 86, 92 (2004). This is particularly important in a case such as this where there is neither a concrete plan in place nor a clear timetable for taking specific action, but instead a considerable amount of political posturing. Here, a River Master would not make policy oriented decisions, but would instead monitor the implementation of the technical aspects of court orders or agreements resulting from this case. *Id.* at 92-93.

A River Master may also be able to accelerate the judicial system in circumstances, such as this, where time is an enemy. Here we have a race between the carp's migration to the Great Lakes and the implementation of an effective deterrent. A River Master dedicated to monitoring the progress of the fish towards Lake Michigan would have the ability to make immediate determinations relating to the effectiveness of programs and make subsequent recommendations to the Court.

\* \* \* \*

The situation here is exceedingly complex and important, not only to the Great Lakes States but to the Nation. If Asian carp invade the Great Lakes, the damage will be catastrophic and perhaps irreparable—or at the very least reparable only at a cost hundreds of times greater than effective prevention. The Court should accept jurisdiction over the matter and force action, before it is too late.

**CONCLUSION**

The Court should grant the Motion to Reopen and for a Supplemental Decree.

Respectfully submitted,

Office of the Indiana  
Attorney General  
IGC South, Fifth Floor  
302 W. Washington Street  
Indianapolis, IN 46204  
(317) 232-6255

*\*Counsel of Record*

GREGORY F. ZOELLER  
Attorney General  
THOMAS M. FISHER\*  
Solicitor General  
HEATHER L. HAGAN  
ASHLEY E. TATMAN  
DENISE A. WALKER  
Deputy Attorneys General

*Counsel for Amicus Curiae  
the State of Indiana*

Dated: February 19, 2010