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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

STATE OF SOUTH DAKOTA,

Plaintiff,

v.

STATE OF NEBRASKA, STATE OF IOWA AND
STATE OF MISSOURI,

Defendants.

**MOTION FOR LEAVE TO FILE COMPLAINT,
COMPLAINT AND BRIEF IN
SUPPORT OF MOTION FOR LEAVE TO
FILE COMPLAINT**

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STATE OF SOUTH DAKOTA,

Plaintiff,

v.

STATE OF NEBRASKA, STATE OF IOWA AND STATE OF MISSOURI,
Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of South Dakota, appearing herein through the Honorable William Janklow, its Governor, and the Honorable Mark V. Meierhenry, its Attorney General, acting pursuant to the authority and powers vested in them by statute, South Dakota Codified Laws, Section 1-11-1(2) (1980), respectfully states that:

1. The Missouri River is a navigable, interstate stream flowing through the States of South Dakota, Nebraska, Iowa and Missouri. Six dams are located on the mainstem of the Missouri River, four of them within the State of South Dakota. The six dams have a multi-purpose storage capacity of approximately 39.5 million acre-feet of water, of which approximately 15.2 million acre-feet are stored behind the four dams within South Dakota, the largest reservoir in the State being Lake Oahe.

2. A dispute exists between the State of South Dakota and the States of Nebraska, Iowa and Missouri over the right, power and authority of the State of South Dakota to make use

of, issue permits regarding and otherwise exercise sovereign authority over its congressionally apportioned share of the waters of the Missouri River stored for reclamation and irrigation purposes behind mainstem dams located within the territorial boundaries of the State of South Dakota. This dispute can properly be resolved only by this Court under Article III, Section 2, Clause 2 of the United States Constitution.

3. Resolution of this dispute requires judicial construction of the following Federal Statutes, including their legislative history:

a. The Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (codified at 16 U.S.C. §§ 460d, 825s; 33 U.S.C. §§ 701-1, 701a-1, 701b-2, 701c note, 708, 709; 43 U.S.C. § 390) ("Flood Control Act");

b. The Reclamation Project Act of 1939, § 9, Pub. L. No. 76-260, 53 Stat. 1187 (codified at 43 U.S.C. § 485h); and

c. The Reclamation Law of 1902, § 8, Pub. L. No. 57-161, 32 Stat. 388, 390 (codified at 43 U.S.C. § 383).

4. The States of Missouri, Iowa and Nebraska, in August 1982, brought an action captioned *Missouri, et al. v. Andrews, et al.*, in the United States District Court for the District of Nebraska, No. CV82-L-442, naming as defendants therein the Secretary of the Army and several officers of the United States Army Corps of Engineers, the Department of the Interior, the Secretary of the Interior and several officers of both the Department of the Interior and the Bureau of Reclamation. In that action, the Plaintiff States sought to declare invalid: (1) the execution of a Water Service Contract by the Secretary of the Interior for the use of water from Lake Oahe pursuant to a permit to appropriate water issued by the State of South Dakota and (2) the issuance by the United States Army Corps of Engineers of permits to construct diversion facilities that would allow performance of the Water Service Contract and

exercise of the South Dakota permit to appropriate water. The States of Missouri, Iowa and Nebraska alleged that those actions had caused and were then causing immediate and irreparable harm to the Plaintiff States and that future diversions from the Missouri River would threaten further harm. The complaint in *Missouri v. Andrews* sought a declaration that the Water Service Contract entered into by the Department of the Interior and the related intake facility permits issued by the Corps of Engineers were in violation of relevant federal statutes.

5. In said litigation the Plaintiff States deliberately chose not to join the State of South Dakota as a party and further chose not to challenge directly the validity of either the underlying permit to appropriate water or the Assignment Contract entered into between South Dakota and a third-party user, both of which preceded and formed the predicate for the Water Service Contract. Nevertheless, the core issues in that suit concerned the right and power of the State of South Dakota to issue permits to use the waters of the Missouri River stored behind dams located within its territorial boundaries, said permits to be issued pursuant to South Dakota law and the congressional apportionment scheme established by the Flood Control Act and related legislation. Such issues can be determined only in the original jurisdiction of this Court.

6. Although the Plaintiff States in *Missouri v. Andrews* purport to challenge only the actions of the Federal Defendants therein, the specific allegations of the complaint and subsequent statements made in filings in that action reveal that the Plaintiff States are challenging the right, power and authority of the State of South Dakota to allocate, regulate, provide for the use of and otherwise control its allocated share of waters of the Missouri River stored for reclamation and irrigation purposes behind dams located within its territorial boundaries. That challenge is based on a misconstruction of the relevant federal

legislation, under which misconstruction those Plaintiff States would wholly deny the right, power and authority of the State of South Dakota over said waters and would further deny the use by South Dakota and its citizens of said waters. See Appendix A which sets forth in full the complaint in *Missouri v. Andrews* and Appendix B which sets forth relevant extracts from that complaint and makes brief comment thereon.

7. In seeking to invoke the original jurisdiction of this Court, the State of South Dakota does not contend that the United States cannot exercise authority over the waters, stored or otherwise, of the Missouri River. Rather, South Dakota contends that Congress, in enacting the Flood Control Act and related legislation, chose to limit the exercise of federal authority over these waters in such a fashion as to honor and affirmatively to declare the traditional rights of the upper basin States to allocate waters within their boundaries. The Plaintiff States in *Missouri v. Andrews* contend otherwise, asserting that South Dakota lacks right, power and authority over said waters and further assert that the Bureau of Reclamation has no authority to enter into water supply contracts pursuant to permits from South Dakota. These claims are in contravention of the Flood Control Act and would upset the balance of authority established by the Act and related legislation.

8. The use and allocation of Missouri River waters is of vital concern to South Dakota. Four of the six mainstem Missouri River dams are located in the State of South Dakota. Approximately 530,000 acres of South Dakota land are inundated by those reservoirs. In late 1981, South Dakota issued a permit to 50,000 acre-feet per year from Lake Oahe storage to effectuate a long term contract providing for the payment to the State of millions of dollars over the life of the contract.

9. The State of South Dakota sought to intervene in *Missouri v. Andrews* but the District Court denied the motion on the ground, among others, that intervention by the State of

South Dakota in that action would deprive the District Court of jurisdiction. South Dakota respectfully submits that in view of the controversies placed in issue by *Missouri v. Andrews*, the only appropriate forum for their resolution is this Court. For a Federal District court in any one State within a river basin to consider and decide controversies among several States in that basin without the presence of a State whose interests are vitally affected by the outcome, namely South Dakota, is a circumvention of fundamental principles of constitutional federalism.

10. The District Court in *Missouri v. Andrews* rendered judgment on Motions for Summary Judgment in favor of the Plaintiff States and the Federal Defendants have appealed to the United States Court of Appeals for the Eighth Circuit, No. 84-1674-NE, 84-1675-NE, 84-1719-NE, 84-1720-NE, 84-1721-NE, and 85-1593-NE. Pending before the Eighth Circuit is a Motion, made by the Federal Defendants, to dismiss the appeal and to vacate the judgment below for want of jurisdiction. South Dakota respectfully submits that this Court should assume original jurisdiction over the controversy among the States herein and give effect to the jurisdictional mandate set forth in Article III, Section 2, Clause 2 of the Constitution of the United States and Paragraph (a), Section 1251, Title 28, United States Code.

11. The actions of the Defendant States herein, their misconstruction of relevant federal legislation, and the ruling of the District Court in excess of its jurisdiction have immediately and irreparably damaged South Dakota. South Dakota has suffered the immediate loss of both the significant monetary and environmental benefits of its contract with a third party user. Further, the ability of South Dakota to grant permits for use of Missouri River waters is at least clouded if not negated. The ability of South Dakota to protect major aquifers within the State is now threatened and the ability of South Dakota to protect its own interests and the interests of its citizens in the water resources of the State is jeopardized.

WHEREFORE, the State of South Dakota prays:

(1) That this Honorable Court take original jurisdiction and grant plaintiff leave to file its Complaint in this Court; and

(2) That this Court grant the relief prayed for in the attached Complaint and issue such Orders as the Court may deem appropriate in respect to the Complaint in aid of its original, exclusive jurisdiction and agreeable to the usages and principles of law.

Respectfully submitted,

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August 15, 1985

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OCTOBER TERM, 1985

STATE OF SOUTH DAKOTA,

Plaintiff,

v.

STATE OF NEBRASKA, STATE OF IOWA and STATE OF MISSOURI,
Defendants.

COMPLAINT IN THE NATURE OF A PETITION
TO QUIET TITLE AND FOR INJUNCTIVE RELIEF

The State of South Dakota, appearing herein through the Honorable William Janklow, its Governor, and the Honorable Mark V. Meierhenry, its Attorney General, acting pursuant to the authority and powers vested in them by statute, South Dakota Codified Laws Section 1-11-1(2) (1980), respectfully states that:

JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and Paragraph (a), Section 1251, Title 28, United States Code.

INTRODUCTION

2. This is a civil action brought within the original jurisdiction of this Court by the State of South Dakota to quiet title regarding its right, power and authority to administer the waters of South Dakota under its laws, rules and regulations. Such waters include South Dakota's congressional apportionment to the waters of the Missouri River that are stored for reclamation and irrigation purposes behind the mainstem Missouri River dams located within its territorial boundaries. The State of South Dakota further seeks injunctive relief against the States of Nebraska, Iowa and Missouri to prevent their further interference with the exercise by South Dakota of said right, power and authority.

3. The State of South Dakota has enacted statutes, and under such statutes has issued permits for use of stored waters in the past and intends to do so in the future. More particularly, such permits have pertained to waters subject to its jurisdiction and control in accordance with an act of Congress that apportions waters of the Missouri River to it. The Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (codified at 16 U.S.C. §§ 460d, 825s; 33 U.S.C. §§ 701-1, 701a-1, 701b-1, 701c note, 708, 709; 43 U.S.C. § 390) ("the Flood Control Act"), constituted an apportionment scheme under which the State of South Dakota has authority to administer Missouri River water stored for reclamation and irrigation purposes behind mainstem dams located within the State. Under the provisions of the Act, the United States Army Corps of Engineers (the "Corps") and the Bureau of Reclamation (the "Bureau"), as applicable, also exercise certain authority with respect to such water.

4. By the Flood Control Act Congress apportioned the waters of the Missouri River in a continuing attempt to deal with the gravity of the water problems in the Western United States and the competing claims by several states to the use of that water. Among the uses recognized by that Act are those of reclamation, navigation and flood control. The Act in its

preamble specifically declares it to be the policy of Congress "to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; . . . " 58 Stat. at 888.

5. South Dakota brings this action to protect its sovereign right, power and authority to use and to allocate waters of the Missouri River stored for reclamation and irrigation purposes behind the mainstem dams within its territorial boundaries. The States of Nebraska, Iowa and Missouri have directly challenged that right, which is intrinsic to the stability and operation of the Missouri Basin apportionment scheme enacted by Congress.

6. Exercising its authority under Article I, Section 8, Clause 3 of the Constitution of the United States (the Commerce clause) Congress has apportioned to the State of South Dakota the waters of the Missouri River stored for reclamation and irrigation purposes behind dams located within the territorial boundaries of the State by enacting the Flood Control Act and by authorizing and appropriating funds for the construction of said dams. Section 9(c) of said Act directs that all reclamation features and developments under the Act are subject to the Federal Reclamation Laws, 58 Stat. at 891, thereby incorporating the authority contained in Section 9(c) of the Reclamation Project Act of 1939, Pub. L. No. 76-760, 53 Stat. 1187, 1194-95 (codified at 43 U.S.C. § 485h(c)) and Section 8 of the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388, 390 (codified at 43 U.S.C. § 383) (the "1902 Law"). Section 8 of the 1902 Law specifically requires the Secretary to conduct reclamation operations in conformity with state law. It is the exercise by South Dakota of its congressionally recognized right, power and authority over such water that forms the predicate for this litigation.

7. There exists between the parties an actual and present controversy requiring a declaration of rights by this Court. Plaintiff therefore seeks a declaration that South Dakota has the right, power and authority to issue permits for the use of Missouri River water stored for reclamation and irrigation purposes behind dams located within South Dakota and that no use of said water can legally be made without issuance of such permits. Plaintiff requests that the Court find that under current federal statutes no diversion out of the mainstem reservoirs located within the State's territorial boundaries can lawfully be made without a permit from South Dakota and, further, that in the operation for reclamation and irrigation purposes of dams and reservoirs within the State's boundaries, the Corps and the Bureau provide water storage only; they do not provide water or grant water rights. These rights are South Dakota's to grant.

8. In rendering its judgment, the Court must consider and construe the legislative history, purpose and terms of the Flood Control Act, the Reclamation Project Act of 1939 and the Reclamation Law of 1902. As shown by the provisions and legislative history of these several enactments, both the Corps and the Bureau in the exercise of their respective authority are specifically subjected to state law. South Dakota does not take the position that Congress cannot exercise authority over the waters, stored or otherwise, of the Missouri River. Rather, South Dakota contends that Congress, in enacting the Flood Control Act and related legislation, chose to limit the exercise of its authority over those waters in such a fashion as to honor and affirmatively to declare the rights of the upper basin States to allocate waters within their boundaries.

9. The right, power and authority of the State of South Dakota to allocate Missouri River water stored behind dams

located within its territorial boundaries have been put into issue by litigation brought by the Defendant States of Missouri, Iowa and Nebraska in the United States District Court for the District of Nebraska, under the caption, *Missouri, et al. v. Andrews, et al.*, No. CV82-L-442. In that suit, now on appeal to the United States Court of Appeals for the Eighth Circuit under Docket Nos. 84-1674-NE, 84-1675-NE, 84-1719-NE, 84-1720-NE, 84-1721-NE and 85-1593-NE, those three States contend that South Dakota's authority over the waters of the Missouri River within its territorial boundaries has been totally displaced by the federal authorities, which, they allege, have exclusive authority to allocate said waters. As referenced in greater detail below, South Dakota was not named as a party defendant in that action and unsuccessfully sought to intervene. South Dakota's motion to intervene was denied on the ground, among others, that to allow intervention by South Dakota would be to divest the District Court of jurisdiction, because a suit between States lies within the exclusive, original jurisdiction of the United States Supreme Court.

10. It is the contention of South Dakota that although the complaint in *Missouri v. Andrews* did not name South Dakota as a party it nevertheless sought by its specific allegations to attack and negate the power of South Dakota to allocate its share of the waters of the Missouri River within its territorial boundaries. The complaint in *Missouri v. Andrews* is attached hereto as Appendix A and excerpts therefrom revealing the character of the allegations denying South Dakota's right to allocate waters of the Missouri River are attached hereto as Appendix B. The allegations may be fairly summarized as stating that *any* use of stored water from the Missouri River in the State of South Dakota pursuant to permits from that State is prohibited by law.

DESCRIPTION OF THE PARTIES AND THEIR INTERESTS

11. Plaintiff, the State of South Dakota, a body politic and a sovereign entity, brings this action on behalf of itself as an entity capable of granting water rights and permitting their transfer through contractual agreements. South Dakota also sues as *parens patriae* on behalf of all its residents and citizens who are directly affected by any negation of the State's ability to grant such rights and by any negation of its separate but related ability to protect the water resources of the state. The action initiated by the States of Missouri, Iowa and Nebraska in *Missouri v. Andrews* improperly sought, in the Federal District Court in Nebraska, an adjudication of the sovereign rights of those three states in the waters of the Missouri River as against the sovereign rights of the State of South Dakota. The injunction granted by the District Court and declaration of law embodied in the Court's Memorandum of Summary Judgment, see Appendix C, are contrary to the language, purpose and intent of the applicable federal statutes and have been issued by a court in excess of jurisdiction in direct contravention of the sovereign rights and powers of the State of South Dakota.

12. The States of Nebraska, Iowa and Missouri are each a body politic and a sovereign entity and have sought adjudication in an improper forum of issues of the right, power and authority of sovereign States in and to the waters of an interstate stream, which issues can properly be adjudicated by this Court only. The State of South Dakota has been impeded and damaged by the claim of those three States denying the right, power and authority of the State of South Dakota over the stored waters of the Missouri River within its territorial boundaries and by the further claim that *any* attempt by South Dakota to administer any portion of those waters is prohibited by federal law.

THE HISTORY OF THIS CONTROVERSY

13. The Missouri River is a navigable interstate stream that traverses the State of South Dakota, entering the State from the north and flowing in a generally southerly and southeasterly direction across the state to a point where it forms the border of the State of South Dakota and the State of Nebraska; it then flows in an easterly direction until it reaches Sioux City, Iowa, where it forms the border of Iowa and Nebraska; it then flows in a generally southerly direction to a point where it becomes the border of the states of Nebraska and Missouri. It then flows south to Kansas City, Missouri, forming the border of the states of Missouri and Kansas; and it then flows through the state of Missouri to St. Louis, Missouri, where it joins the Mississippi River.

14. South Dakota has sovereign power and authority over the waters of the Missouri River stored for reclamation and irrigation purposes within its territorial boundaries and, in accord with applicable federal legislation, is entitled to use and allocate such waters. South Dakota has exercised its power and authority by enacting S.D. Codified Laws Ann. Title 46, which generally provides for the issuance of permits by the State to its citizens and others for the use of the waters of the State, and by enacting S.D. Codified Laws Ann. Title 46A, which contains provisions for state planning and development of water resources projects beneficial to the citizens of the state.

15. This controversy between the several states named in this action arises out of a 1974 grant by the State of Wyoming of a groundwater right to a coal slurry consortium for wells located immediately adjacent to South Dakota's western border. The wells were to pump water out of the Madison Formation aquifer under South Dakota, thus affecting the productivity of that aquifer. South Dakota, in the exercise of its sovereign powers, persuaded the consortium to apply instead for the right to use reclamation and irrigation water stored in Lake Oahe, thus avoiding the drawdown of the aquifer.

16. In late 1981 South Dakota entered into a long-term contract with Energy Transportation Systems, Inc. ("ETSI") providing for the payment to South Dakota of millions of dollars for the right to divert 50,000 acre-feet of water per year from Lake Oahe, which is principally located in South Dakota on the mainstem of the Missouri River. That money was to have been placed in a special fund to foster water development in South Dakota, S.D. Codified Laws Ann. § 46A-1-63 (1983 & Supp. 1985). In addition to its coal slurry use, ETSI agreed to make transportation capacity of between 4,000 and 7,000 acre-feet of water available for domestic use to communities and rural users in South Dakota, thereby assuring a previously unavailable reliable supply of high quality water.

17. With the South Dakota water-right permit in hand, ETSI then approached the Department of the Interior to obtain federal approval to exercise its state-granted water permit by contracting for 20,000 acre-feet of reclamation storage in Lake Oahe. The Department of the Interior, through the Bureau of Reclamation, entered into a Water Service Contract with ETSI on July 2, 1982. Although the Corps did not sign said contract, on July 6, 1982 it issued ETSI a permit under 33 U.S.C. §§ 403 and 1344 allowing ETSI to construct a pumping station in Lake Oahe for diversion of the water and also gave ETSI a right of way to cross federal land with a pipeline.

18. Four of the six mainstem dams on the Missouri River are located within the territorial boundaries of South Dakota. Some 530,000 acres of land within the State of South Dakota are inundated by the reservoirs so created. South Dakota has a comprehensive system of water use regulation and management over all waters within its boundaries and a long-standing policy of using Missouri River water for the benefit of its citizens.

19. In August, 1982 the States of Missouri, Iowa and Nebraska brought an action captioned *Missouri, et al v. Andrews, et al.* in the United States District Court for the District of Nebraska, No. CV82-L-442, against, among others,

the Secretary of the Army and officials of the Corps of Engineers and against the Secretary of the Interior and officials of the Bureau of Reclamation, alleging as void: (1) the execution of the ETSI Water Service Contract by the Secretary of the Interior pursuant to a permit to appropriate water issued by the State of South Dakota, and (2) the issuance by the Corps of Engineers of permits enabling the construction of diversion facilities on Lake Oahe. The Plaintiff States in *Missouri v. Andrews* further alleged that the challenged actions caused immediate and irreparable harm to the Plaintiff States and that future diversions of Missouri River water in South Dakota threatened further harm. Appendix A sets forth the complaint in full. Appendix B sets forth extracts from the complaint in which each of the Plaintiff States directly and indirectly challenges South Dakota's right to divert water from Lake Oahe, and in which each of the Plaintiff States alleges that South Dakota's allocation to ETSI of 20,000 acre-feet of water stored in Lake Oahe is injurious to such States and is unlawful.

20. *Missouri v. Andrews*, while framed as a suit against federal officials, is in reality a suit against the State of South Dakota. Such a suit involves competing claims by sovereign states to the stored waters of the Missouri River.

21. By its Memorandum Decision of May 3, 1984 on Motions to Dismiss and on Cross-Motions for Partial Summary Judgment, *see* Appendix C, the Federal District Court in *Missouri v. Andrews* has, without jurisdiction, determined several issues that affect the rights of South Dakota as a sovereign state in and to the waters of the Missouri River stored for reclamation and irrigation purposes behind dams within its territorial boundaries. In so doing, the court has exceeded its jurisdiction, for only this Court has authority to adjudicate controversies between States over the waters of interstate streams.

22. By their pleadings, arguments and opposition to intervention by South Dakota adduced in *Missouri v. Andrews*, the States of Missouri, Iowa and Nebraska have plainly invited

adjudication by this Court. For example, those States assert that South Dakota has no right to authorize use of Missouri River waters stored in South Dakota (Appendix A, paragraph 26; Appendix B-1, Allegations 49, 55 and 75) and that *any* use by South Dakota injures drinking water supplies, power generation capacities, wildlife habitats and the like of the downstream States (Appendix A, paragraphs 6, 7 and 8). The issues raised in *Missouri v. Andrews* have therefore not been limited merely to the adjustment of authority between two federal agencies. Rather, the issues posed have unavoidably crossed over into the adjudication of the right, power and authority of several States in the waters of an interstate stream. The injuries claimed by the States of Missouri, Iowa and Nebraska are alleged to flow from water diversion in South Dakota, which has been accomplished not by the Corps or Bureau but rather by the State of South Dakota operating under its sovereign power and in accordance with the authority set forth in legislation providing for congressional apportionment of a portion of the waters of the Missouri River to the State of South Dakota.

23. The State of South Dakota has been irreparably injured by the actions of the Defendant States in *Missouri v. Andrews* and by the holdings of the Federal District Court therein, for which there is no adequate remedy at law. South Dakota cannot enjoy the monetary and environmental benefits of its contract with ETSI. Similarly, the ability of South Dakota to grant permits for use of Missouri River waters is at least clouded if not negated. The ability of South Dakota to protect its major aquifers, including the Madison Formation, is now threatened and the ability of South Dakota to protect its own interests and the interests of its citizens in the water resources of the State is jeopardized. Pecuniary damages will not provide adequate remedy for those wrongs and, indeed, it would be extremely difficult even to ascertain the amount of compensation that would afford adequate relief if such were

otherwise possible. Unless restrained, the Defendant States, by their contentions discussed herein, will provoke a multiplicity of judicial proceedings.

24. South Dakota therefore requests that this Court address and remedy, in the exercise of its original jurisdiction, the injury effected by the claims made by the downstream States, the injury effected by the injunction against performance by ETSI of its contract with the United States and the injury effected by the District Court below in declaring rights, powers and remedies in excess of its jurisdictional authority and in contravention of relevant federal legislation. South Dakota therefore respectfully requests that the right, power and authority of South Dakota to allocate waters of the Missouri River stored for reclamation and irrigation purposes within its territorial boundaries and its entitlement to said waters under the congressional apportionment be quieted by a declaration that confirms and defines such right, power, authority and entitlement.

25. The State of South Dakota seeks only to establish its right, power and authority over those waters stored for reclamation and irrigation purposes behind the mainstem dams on the Missouri River in South Dakota, as apportioned by Congress to it in the Flood Control Act and to secure those rights against the claims of Defendant States of Nebraska, Iowa and Missouri. The State of South Dakota does not seek an adjudication regarding all of the stored waters of the Missouri River System nor does it seek an adjudication of the natural or base flow of the Missouri River. It does not seek a determination of the rights of Indian tribes, Indian reservations, or Federal establishments in the State of South Dakota. The sole relief it seeks is a determination that under the Flood Control Act, the Reclamation Project Act of 1939 and the Reclamation Act of 1902 (and especially Section 8 thereof), the State of South Dakota has the right, power and authority to control, manage

and provide for the use of certain water stored for reclamation and irrigation purposes behind mainstem dams in South Dakota, subject to the appropriate power and authority of the Bureau and the Corps.

WHEREFORE, the State of South Dakota respectfully prays:

1. That process issue herein to all parties as required by law.

2. That, on final hearing hereof, this Court adjudicate and declare, in the nature of a quiet title action, the right, power and authority of South Dakota to use or allocate for reclamation purposes the waters of the Missouri River stored for reclamation and irrigation purposes behind mainstem dams within its territorial boundaries, such right, power and authority to be exercised in accord with the provisions, intent and history of the controlling federal legislation which includes the Flood Control Act of 1944, the Reclamation Project Act of 1939 and the Reclamation Act of 1902.

3. That the States of Nebraska, Iowa and Missouri be enjoined from further interference with the exercise of the right, power and authority of the State of South Dakota over its share of said Missouri River water.

And for such other and further relief, general or special, as may be proper.

Respectfully submitted,

WILLIAM JANKLOW,
Governor

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**BRIEF IN
SUPPORT OF MOTION FOR LEAVE TO
FILE COMPLAINT**

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No. Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

STATE OF SOUTH DAKOTA,

Plaintiff,

v.

STATE OF NEBRASKA, STATE OF IOWA AND STATE OF MISSOURI,
Defendants.

**BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO FILE COMPLAINT**

I.

INTRODUCTION

This controversy concerns the sovereign right, power and authority of the State of South Dakota to administer its congressionally apportioned share of the waters of the Missouri River that are stored for reclamation and irrigation purposes behind the mainstem dams located within South Dakota's territorial boundaries.

The Missouri River is a navigable, interstate stream flowing through the States of South Dakota, Nebraska, Iowa and Missouri. The law of the Missouri River is not set forth in an interstate compact, but rather is found in legislation enacted by Congress, namely, the Flood Control Act of 1944 (the "Flood Control Act"), Pub. L. No. 78-534, 58 Stat. 887. It was the Flood Control Act which authorized construction of the four mainstem dams on the Missouri River in South Dakota, and it is the Flood Control Act and the law of South Dakota which govern the storage, administration and distribution of the reclamation and irrigation water stored behind those dams.

By this original proceeding the State of South Dakota now seeks relief from the attempts by the named Defendants herein to prevent it from exercising its sovereign right, power and authority over the reclamation and irrigation waters of the Missouri River stored behind the mainstem dams located within its boundaries, the largest reservoir being Lake Oahe.

The predicate for this action is found in the pleadings, arguments and contentions by the Defendant States, as Plaintiffs, in *Missouri v. Andrews* now on appeal to the Eighth Circuit. However, as stated in South Dakota's Complaint herein, the claims of the Defendant States in the *Missouri v. Andrews* litigation reach beyond the specific waters of Lake Oahe to the central issue of South Dakota's sovereign right, power and authority, as an upper basin state under the congressional apportionment, to allocate waters within its boundaries.

The controversy in *Missouri v. Andrews* arose out of the 1974 grant by the State of Wyoming of a groundwater right to a coal slurry consortium for wells located in Wyoming but immediately adjacent to South Dakota's western border. The wells were to pump water out of the Madison Formation aquifer, which underlies Wyoming and South Dakota, and would have affected the aquifer, including the portion under South Dakota. South Dakota, relying upon its sovereign powers to allocate and control its water resources, including surface and subsurface resources, persuaded the consortium to apply for the right to use waters out of Lake Oahe rather than out of the Madison Formation aquifer. Thus, on February 5, 1982, the South Dakota Water Management Board, a political subdivision of South Dakota, issued a Water Rights Application Approval which incorporates by reference a certain "Agreement for the South Dakota Conservancy District to Assign a Water Right to Energy Industry use to ETSI Pipeline Project," dated December 23, 1981 (the "Agreement"). Under the terms of the Agreement, Energy Transportation Systems, Inc. ("ETSI") was entitled to divert and consumptively to use 50,000 acre-feet of water per year (20,000 acre-feet initially)

upon payment of nine million dollars per year to South Dakota with an inflation adjustment after construction had begun. The money was to have been placed in a special fund to foster water development in South Dakota. See S.D. Codified Laws Ann. § 46A-1-63 (1983 & Supp. 1985).

In addition, ETSI agreed to build its facilities with capacity to transport between 4,000 and 7,000 acre-feet of water per year for domestic use to communities and rural users in South Dakota who would secure permits for such uses. A reliable supply of high quality water was important because some of these communities are now dependent upon very low quality water and others suffer a chronic water supply problem.

Having obtained the South Dakota Agreement and Permit, ETSI then executed a Water Service Contract with the Department of Interior on July 2, 1982, under the terms of which the Secretary consented to ETSI's plans; and on July 6, 1982, the United States Army Corps of Engineers issued ETSI a permit under 33 U.S.C. §§ 403 and 1344 allowing ETSI to construct a pumping station for removal of the water and also gave ETSI a right of way to cross federal land with a pipeline to gain access.

In August, 1982, litigation was initiated in the United States District Court for the District of Nebraska by the States of Missouri, Iowa and Nebraska and by Kansas City Southern Railway, the Sierra Club and three chapters of the Farmers Union challenging the actions of the Departments of the Army and the Interior. In the case filed by the States, *Missouri, et al. v. Andrews, et al.*, No. CV82-L-442, the plaintiffs sued the Secretary of the Army and several officers of the United States Army Corps of Engineers, the Department of Interior, the Secretary of the Interior, and several officers of both the Department of the Interior and the Bureau of Reclamation. They alleged as void: (1) the execution of the ETSI Water Service Contract by the Secretary of the Interior pursuant to permits issued by the State of South Dakota, and (2) the issuance by the Corps of Engineers of permits enabling the construction of diversion facilities on Lake Oahe. The Plaintiff States in *Missouri v. Andrews* further contended that the

challenged actions threatened immediate and irreparable harm to the plaintiffs by the future diversion of Missouri River water. See Appendices A, B-1 and B-2.

The State of South Dakota is not a party to *Missouri v. Andrews*, the plaintiffs having framed their allegations in such a way as to challenge the powers of the two Secretaries, ostensibly refraining from challenging South Dakota's issuance of a water permit. South Dakota's Motion to Intervene in the case was denied by the Court, which determined that if South Dakota were to become a party, the controversy would then be one between sovereign States over which only this Court, not the Nebraska District Court, could take jurisdiction. See Appendix C, Memorandum and Order at 12 (Jan. 12, 1983).

By Memorandum Decision on May 3, 1984, on Motion to Dismiss and Cross Motion for Summary Judgment, the District Court enjoined performance of the ETSI contracts. See Appendix C. That decision is currently on appeal to the Eighth Circuit Court of Appeals under Docket Nos. 84-1674-NE, along with the companion cases, 84-1675-NE, 84-1719-NE, 84-1720-NE, 84-1721-NE and 85-1593-NE.

Thereafter, ETSI exercised its option to terminate the Agreement of December 23, 1981, in order to avoid making payments due thereunder. The Eighth Circuit, when faced with the question of mootness of the controversy due to ETSI's action, remanded to the District Court which found that the issues presented were not tied exclusively to the ETSI contract, but rather pertained to use and distribution of all the waters of Lake Oahe. See Appendix D.

By their pleadings and arguments in *Missouri v. Andrews*, the Defendant States have raised questions of South Dakota's rights that can be determined by this Court only. For example, those States assert that South Dakota has no right to authorize use of Missouri River waters stored in South Dakota (Appendix A, paragraph 26; Appendix B-1, Allegations 49, 55 and 75) and that any such use authorized by South Dakota damages drinking water supplies, power generation capacities, and wildlife habitats of the downstream States (Appendix A, para-

graphs 6, 7 and 8). The injuries claimed by the Defendant States are alleged to flow from water diversion in South Dakota. That diversion was accomplished not by the Army Corps of Engineers, or by the Bureau of Reclamation but rather by the State of South Dakota acting pursuant to its sovereign right, power and authority under its own legislation and congressional legislation providing for apportionment to South Dakota of the reclamation and irrigation waters of the Missouri River stored behind the mainstem dams located within the State.

This issue of South Dakota's right, power and authority over such waters is of vital concern to both the State itself and its citizens. Mainstem reservoirs on the Missouri River located in the State of South Dakota inundate 530,000 acres of land. Of the approximately 39.5 million acre-feet of water stored behind the six mainstem dams on the Missouri River, some 15.2 million acre-feet are stored behind the four dams within South Dakota.

The reclamation and irrigation waters of the Missouri River stored behind the mainstem reservoirs in South Dakota are of immense importance to the State and its residents. The State's future growth and prosperity depend upon the management and use of these waters for irrigation, domestic and other beneficial purposes. The Defendant States have challenged South Dakota's sovereign right, power and authority to manage and grant use permits for these waters, thus interfering with the orderly development of the resource pursuant to South Dakota law and the congressional apportionment of a portion of the waters of the Missouri River.

II.

JURISDICTION

The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and Paragraph (a), Section 1251, Title 28, United States Code.

As the Court stated in *Arizona v. California*, 373 U.S. 546, 564 (1963): “[T]his Court does have a serious responsibility to adjudicate cases where there are actual, existing controversies over how interstate streams should be apportioned among States. . . . Resolution of this dispute requires a determination of what apportionment, if any, is made by the . . . Act and what powers are conferred by the Act upon the Secretary of the Interior. Unless many of the issues presented here are adjudicated, the conflicting claims of the parties will continue, as they do now, to raise serious doubts as to the extent of each State’s right to appropriate water from the . . . River . . . for existing or new uses. In this situation we should and do exercise our jurisdiction.”

III.

ARGUMENT

A. CONGRESS HAS EXERCISED ITS AUTHORITY UNDER ARTICLE I, SECTION 8, CLAUSE 3 OF THE UNITED STATES CONSTITUTION TO APPORTION THE WATERS OF THE MISSOURI RIVER BY ENACTMENT OF THE FLOOD CONTROL ACT OF 1944.

In enacting the Flood Control Act, Congress apportioned certain waters of the Missouri River. The State of South Dakota here petitions this Court to interpret and enforce such apportionment as to the reclamation and irrigation waters of the Missouri River that are stored behind dams located within its territorial boundaries.

1. Legal Precedent: Arizona v. California

The theory of congressional apportionment was first endorsed by this Court in *Arizona v. California*, 373 U.S. 546 (1963), when the Court found the Boulder Canyon Project Act, 45 Stat. 1057 (1928), to be a congressional apportionment of

the Colorado River over which “courts have no power to substitute their own notions of an ‘equitable apportionment’ for the apportionment chosen by Congress.” 373 U.S. at 565-66. In reaching the conclusion that the waters had been apportioned by Act of Congress, the Court relied upon three sources: the language of the Act, the legislative history of the Act and the scheme established by the Act for the storage and delivery of water. 373 U.S. at 575.

The Boulder Canyon Project Act authorized the Secretary of Interior to construct, operate, and maintain a dam and other works in order to control floods, improve navigation, regulate the River’s flow, store and distribute waters for reclamation and other beneficial uses, and generate electrical power. *See* 45 Stat. at 1057-66.

In discussing the legislative history of the Boulder Canyon Project Act, the Court focused on congressional comprehension of the gravity of the water problems in the Southwestern United States, the inability of individual States or local groups to deal with those problems, the continued failure of the States to agree on how to conserve and divide the waters, and the action by Congress at the request of the States to create a federal system of dams and public works built, operated and controlled for the purpose of conserving and distributing the water. 373 U.S. at 552. The legislative record further revealed that earlier versions of the Act, considered by Congress and ultimately rejected, contained no method by which the waters would be apportioned between competing users. 373 U.S. at 575-78. The Act as passed, in the view of the Court, did contain a method of apportionment, and the Court found that fact determinative. *See* 373 U.S. at 578-80, 588-90. Since Congress had intended to divide up the waters among competing users, and had devised a system for doing so, the Court enforced the congressional mandate.

The method that Congress devised under that Act vests the Secretary of the Interior with authority by means of “such general regulations as he may prescribe, to contract for the

storage of water in said reservoir and for the delivery thereof at such points on the river . . . as may be agreed upon, for irrigation and domestic uses”¹ To emphasize the Secretary’s power, the Act further states, “No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.”²

Thus, the standards for determining the existence or nonexistence of congressional apportionment of an interstate stream have been established. Those standards involve consideration of the language of the relevant statute, its legislative history, and the scheme for allocation of water established by Congress. An analysis of the Flood Control Act in accordance with those standards leads inescapably to the conclusion that the waters of the Missouri River, like the waters of the Colorado, have been congressionally apportioned.

2. Flood Control Act: Language of the Act

The Flood Control Act apportions the waters of the Missouri River by means of a statutory scheme that allocates to the Secretary of the Army, acting through the Corps of Engineers, responsibility for flood control on the River, and to the Secretary of Interior, acting through the Bureau of Reclamation, authority over the waters held in the mainstem reservoirs for reclamation purposes, subject to the interests and rights of the States in which the water is located.

The preamble to the Act reads as follows:

In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States

¹ 45 Stat. at 1060.

² *Id.*

in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.³

This language of the Flood Control Act is quite similar to that of the Boulder Canyon Project Act, *supra*. It achieves a specific allocation of responsibilities as did the Boulder Canyon Project Act. Congress clearly intended to enact a plan which would, from that point forward, control the regulation, development, use and allocation of a portion of the waters of the Missouri River.

a) *Authority of the Corps of Engineers*

The Act gives the Corps of Engineers the responsibility for operation of the dams for flood control and navigation purposes.⁴ It also gives the Corps authority to promulgate regulations for the use of storage allocated to flood control or navigation, and to contract for surplus water, provided that there is no adverse impact on then existing lawful uses of the water.⁵ The Corps, by regulation, defines surplus water as that water which is not otherwise "utilized to fill an authorized project purpose."⁶

³ 58 Stat. at 887-88.

⁴ 33 U.S.C. § 701a-1.

⁵ 33 U.S.C. §§ 708, 709.

⁶ Corps of Engineers Project Purpose Planning Guidance ER-1105-2-20. There is, however, legislative history that surplus water is flood water. 90 Cong. Rec. 4125 (1944).

The Corps does not have and cannot grant water rights. In *The League of Women Voters of Tulsa, Inc. v. United States Corps of Engineers*, 730 F.2d 579 (10th Cir. 1984), a case involving a challenge to a Corps water supply contract, the Court held:

The Corps of Engineers is not involved with the distribution of water . . . it has no water rights and no authority to allocate water among users as this is a state function, and it has no control over the water rights of others.

Id. at 583.

Thus, the Corps is directed to operate the dams to control flooding and, subject to certain limitations, to facilitate navigation.

b) *Authority of the Secretary of the Interior*

When a dam or reservoir is found to have irrigation purposes, the Secretary of the Interior is authorized by the Act to construct, maintain and operate irrigation works. Congress gave the Bureau of Reclamation the power to regulate the storage reserved for reclamation and irrigation water, including the use of such storage for other purposes when the water is not necessary for irrigation.

The correlative power to contract for such water is found in the reference to the Federal Reclamation Laws in Sections 8 and 9(c) of the Flood Control Act. *See* 58 Stat. at 891. In these sections, Congress made the Bureau's powers subject to the Federal Reclamation Laws, thereby incorporating the authority contained in § 9(c) of the Reclamation Project Act of 1939, Pub. L. No. 76-260, 53 Stat. 1187, 1194-95 (codified at 43 U.S.C. § 485h(c)), and the limitation on authority contained in § 8 of the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388, 390 (codified at 43 U.S.C. § 383). The Reclamation Project Act of 1939 gives general authority to the Bureau of Reclamation, through the Secretary of the Interior, to "enter into contracts to furnish water for municipal water supply or miscellaneous purposes." 43 U.S.C. § 485h(c).

The reference in the Act to the Federal Reclamation Laws also contemplates that, should irrigation development not occur immediately, reclamation water can be made available for other purposes, subject to the regulations of the Bureau.

The authority of the Secretary of the Interior to contract for waters is subject to state water law. *The State in which the reservoir is located has control over the water; the Secretary must conform to state law under Section 8 of the Reclamation Act of 1902*, which provides:

That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws,⁷

In *California v. United States*, 438 U.S. 645 (1978), this Court analyzed the history of federal reclamation legislation in the context of the New Melones Dam litigation. The Court noted that, "The history of the relationship between the Federal Government and the States in the reclamation of arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." 438 U.S. at 653. Such deference was specifically incorporated in the Reclamation Act of 1902, according to the Court, *id.* at 675, 678 n.31, and has been reaffirmed by later legislation such as the Flood Control Act, *see* 438 U.S. at 678. The Court summarized its holding with language taken from the legislative history of the McCarran Amendment, to-wit:

In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use

⁷ 32 Stat. at 390 (emphasis in original).

thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.

438 U.S. at 678.

Thus, the language of the Act achieves a congressional apportionment of the waters of the Missouri River with certain rights and duties delegated to the Secretary of the Army, and with other rights and duties, including the right to contract for storage of the waters, delegated to the Secretary of the Interior, both of whom must conform to applicable State water laws in exercising their functions.

3. *Legislative History*

The legislative history of the Act further supports and amplifies the intent of Congress to apportion the Missouri. The Act was an amalgam of the Pick Plan proposed by the War Department for flood control and navigation and the Sloan Plan proposed by the Bureau of Reclamation for irrigation.

a) *The Pick Plan*

The major thrust of the Pick Plan was flood control, but even the Pick Plan contemplated use of the water to be stored in the federally funded reservoirs "for all purposes."⁸ The reservoirs proposed were clearly identified as multiple use structures as to which the water would be available for any beneficial use. According to the Pick Plan, "the comprehensive plan would . . . provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation."⁹ The Plan proposed coordination between the War Department and the Bureau of Reclamation regarding the amount of water to be made available for specific uses.¹⁰

⁸ H.R. Doc. No. 475, 78th Cong., 2d Sess. 29 (1944).

⁹ *Id.*

¹⁰ *Id.* at 30.

b) *The Sloan Plan*

The Sloan Plan was far more detailed, but its principal thrust was the irrigation of 4,760,400 acres of land not then irrigated, with a supplementary water supply for 547,300 acres of land.¹¹ It recognized the importance of agricultural development in the Missouri River Basin, yet proposed a plan of development which, while emphasizing irrigation, was broadly focused on all beneficial uses of the waters.¹²

c) *Senate Doc. No. 247*

Senate Doc. No. 247, 78th Cong., Second Sess. achieved a compromise between the Pick Plan and the Sloan Plan and made a general allocation of responsibility as follows:

(a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control and navigation.

(b) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.

(c) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water.¹³

The purpose for the construction of the reservoirs was envisioned by Congress as follows:

Development of the Missouri River Basin in accordance with House Document 475 [Pick Plan] . . . and Senate Document 191 [Sloan Plan] . . . as coordinated in the enclosed joint engineering report, if authorized as a unified plan, will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation.¹⁴

¹¹ S. Doc. No. 191, 78th Cong., 2d Sess. 23 (1944).

¹² See, e.g., S. Doc. No. 191, 78th Cong., 2d Sess. 17-18, 25-26, 142-43 (1944).

¹³ S. Doc. No. 247, 78th Cong., 2d Sess. 1 (1944).

¹⁴ *Id.* at 5.

d) *Congressional Debate*

One of the questions before Congress was the division of authority over the Missouri River between the Corps of Engineers and the Bureau of Reclamation. In order to resolve this controversy proposals were made to create either a Missouri River Commission or a Missouri Valley Authority.¹⁵ One Senator argued that both proposals were excuses to avoid agreement on a "proper program for the regulation of the river as an entire matter."¹⁶ When agreement was reached and the division of authority between the Corps and the Bureau was established, there was no need for a governing body and none was established. The Act was itself an entire plan.

e) *Upper Basin Protection: The O'Mahoney—Millikin Amendment*

The O'Mahoney-Millikin Amendment, passed as part of the original Flood Control Act, further demonstrates congressional insistence on the primacy of state law. The Amendment or "preference provision" provides as follows:

The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.¹⁷

The Amendment was, in part, a response to the provisions of the Rivers and Harbors Bill, H.R. 3961,¹⁸ which provided for a nine-foot deep navigation channel below Sioux City and

¹⁵ 90 Cong. Rec. 8420-22 (1944).

¹⁶ 90 Cong. Rec. 8422 (1944).

¹⁷ 58 Stat. 887, 889 (1944) (enacting 90 Cong. Rec. 8547 (1944)).

¹⁸ 90 Cong. Rec. 8669 (1944).

which was also before Congress at the time. Such a navigation channel directly threatened the ability of the upstream States to protect their interests in the Missouri River waters within their boundaries. If such a draw on the waters of the Missouri River was granted precedence over the interests of the upstream States, their authority over waters stored within their boundaries would be greatly weakened if not supplanted by the navigation demands of the downstream States. As stated by Governor Ford of Montana during the legislative hearings, "[W]e are not satisfied with just having the dams; we want the right to the use of the waters behind those dams."¹⁹

The purpose of the O'Mahoney-Millikin Amendment was to confirm and protect "the historic and traditional rights of the people of the West to use the waters rising in the West in the manner which has been recognized by law and by court decision for almost 100 years."²⁰ It is this same interest which South Dakota seeks to protect in the instant action.

The focus of the O'Mahoney-Millikin Amendment reflected the overall purpose of the Flood Control Act. Senator Millikin in his testimony in favor of the Amendment cited and explained several Federal Acts which gave special deference to State water law, in particular the Dennison Reservoir Act, which expressly gave priority to State law over impounded water in a Federal facility.²¹

The legislative history of both the Flood Control Act and the O'Mahoney-Millikin Amendment to that Act confirms the proposition that the Act apportioned the Missouri River, with certain functions allocated to the Secretary of the Army and certain others to the Secretary of the Interior, subject always to the sovereign right, power and authority of the State in which the water is stored.

¹⁹ *Flood Control, Hearings on H.R. 4485 before a Subcommittee of the Senate Committee on Commerce*, 78th Cong., 2d Sess. 544 (1944).

²⁰ 90 Cong. Rec. 8420 (1944).

²¹ *Flood Control*, *supra* note 19, at 722-23; see also *id.* at 477, 478, 535, 563, 601, 675, 687.

4. Operation Since Passage of the Act

The administration of the Act since its passage confirms the understanding that Congress apportioned the waters of the Missouri River and provided a scheme for regulation and distribution which involves participation of the Corps, the Bureau and the affected State.

For instance, the Corps formulates an Annual Operating Plan which contemplates that each reservoir is divided into four zones: an exclusive flood control zone, a flood control and multiple use zone, a carry over multiple use zone and an inactive zone.²² The Corps allocates costs,²³ determines depletion, and arrives at flows necessary to maintain existing navigation uses.²⁴ The Bureau coordinates closely with the Corps in implementing the Plan. The mandate of the Act in giving the Corps operational responsibilities for flood control and navigation has thus been put into effect.

A Memorandum of Understanding was entered into by the Secretary of the Army and the Secretary of the Interior on February 24, 1975, which gave the Secretary of the Interior authority to contract for water out of the reservoirs for industrial uses, thus implementing the congressional mandate regarding authority to contract. This Memorandum of Understanding has expired, but the implicit requirement in it that a State water right must be obtained prior to any use of the water, as required by the preference provision and the preamble of the Act, was nonetheless acknowledged and confirmed.

There is also an agreement between South Dakota and the United States for fish, wildlife and recreation development on reservoirs located in South Dakota, pursuant to which South

²² See, e.g., United States Army Corps of Engineers, Missouri River Division, 1982-83, Missouri River Mainstem Reservoirs Annual Operating Plan and Summary of Actual 1981-82 Operations.

²³ See, e.g., United States Army Corps of Engineers, Missouri River Mainstem Reservoir System Allocation of Costs (Dec. 22, 1958).

²⁴ United States Army Engineer Division, Missouri River Corps of Engineers, Omaha, Nebraska (1979), Master Manual, Missouri River Basin.

Dakota and the United States split costs on a fifty-fifty basis. \$4.4 million is allocated to the Oahe Reservoir.²⁵

Similarly, the ETSI contracts themselves evidence a cooperative arrangement between the Corps, the Bureau and the State of South Dakota which, but for the intervention of the Defendant States, would have implemented the intent of Congress.

IV.

RELIEF SOUGHT BY SOUTH DAKOTA

The State of South Dakota seeks only to establish its sovereign right, power and authority over those waters stored for reclamation and irrigation purposes behind the mainstem dams on the Missouri River in South Dakota, as apportioned by Congress to it in the Flood Control Act and to secure those rights against the claims of Defendant States of Nebraska, Iowa and Missouri. The State of South Dakota does not seek an adjudication regarding all of the stored waters of the Missouri River System nor does it seek an adjudication of the natural or base flow of the Missouri River. It does not seek a determination of the rights of Indian tribes, Indian reservations, or Federal establishments in the State of South Dakota. The sole relief it seeks in this action is a determination that under the Flood Control Act, the Reclamation Project Act of 1939 and the Reclamation Act of 1902 (and especially Section 8 thereof), the State of South Dakota has the right, power and authority to control, manage and provide for the use of reclamation and irrigation water stored behind mainstem dams in South Dakota, subject to the appropriate authority of the Bureau and the Corps.

V.

CONCLUSION

The Flood Control Act was intended to be and has been a comprehensive scheme for development, operation and control of certain of the waters of the Missouri River, incident to which was the apportionment of those waters to the States in which the water was stored.

The apportionment scheme devised by Congress was no

²⁵ Agreement between the United States of America and the State of South Dakota for Recreation and Fish and Wildlife Development at Lake Oahe, South Dakota, etc., September 2, 1983.

accident; it was forged out of the controversy generated by divergent interests and needs. For over forty years it has been in place and has worked.

South Dakota, by reason of challenges asserted in other forums, here seeks this Court's ruling that the Act achieved a dispositive apportionment of the waters of the Missouri River stored for reclamation and irrigation purposes behind the mainstem dams located in South Dakota; and, that under such apportionment, the State of South Dakota may exercise its sovereign right, power and authority over such waters located within its boundaries, in concert with operational and regulatory authority of the Corps and the Bureau.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned, counsel of record for the State of South Dakota, and a member of the Bar of the Supreme Court of the United States, hereby certifies that copies of the foregoing Motion of the State of South Dakota for leave to file original action with Complaint and Brief annexed, have been served by depositing same in a United States mailbox with postage prepaid, addressed to:

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Governor
State of Nebraska
State Capitol
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Hon. Robert M. Spier
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This day of August, 1985.

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