No. 103 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.

APPENDICES A, B, C AND D TO MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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APPENDIX A

Complaint for Declaratory Injunctive Relief filed by the State of Missouri, the State of Iowa and the State of Nebraska on August 18, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

THE STATE OF MISSOURI
THE STATE OF IOWA
THE STATE OF NEBRASKA,

Plaintiffs,

CV82-L-442

vs.

COLONEL WILLIAM R. ANDREWS, JR., District Engineer, Omaha District, United States Army Corps of Engineers,
BRIGADIER GENERAL MARK J. SISINYAK, Division Engineer, Missouri River Division, United States Army Corps of Engineers,
LIEUTENANT GENERAL J. K. BRATTON, Chief of Engineers, United States Army Corps of Engineers,
JOHN O. MARSH, JR., Secretary of the Army,
JOSEPH B. MARCOTTE, JR., Regional Director, Upper Missouri Region, Bureau of Reclamation,
ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation,
GARREY E. CARRUTHERS, Assistant Secretary of the Interior for Land and Water Resources,
JAMES G. WATT, Secretary of the Interior,
THE DEPARTMENT OF THE INTERIOR,

Defendants.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. This is a civil action for injunctive and declaratory relief required to redress the violation of various federal statutes by defendants, the Regional Director of the Upper Missouri Region of the Bureau of Reclamation, the Commissioner of Reclamation, the Assistant Secretary of the Interior for Land and Water Resources, the Secretary of the Interior and the Department of Interior (hereafter collectively the "Interior defendants") with respect to their approval and execution on behalf of the United States, of a water service contract with ETSI Pipeline Project (hereafter "ETSI Water Service Contract" or "the Contract") and by defendants the District Engineer for the Omaha District of the Army Corps of Engineers, the Division Engineer for the Missouri River Division of the Corps, the Chief of Engineers and the Secretary of the Army (hereafter "Corps of Engineers defendants") with respect to their approval and issuance on a related permit to ETSI Pipeline Project for the construction of a water intake facility in Lake Oahe.

The ETSI Water Service Contract and the related Corps permit would allow ETSI Pipeline Project (hereafter "EPP") to withdraw water from Lake Oahe, a reservoir on the main stem of the Missouri River. The water withdrawn would be piped to a point near Gillette, Wyoming, in an aqueduct called the "West River Aqueduct" approximately 300 miles long, and then used solely to transport coal, and perhaps other "energy minerals" in one or more slurry pipelines to destinations including Arkansas and Louisiana, where the water would be discharged as waste material.

This action arises as a result of the Interior defendants' unlawful approval of a depletion of Missouri River water and the Corps defendants' unlawful issuance of a permit for construction of a water intake facility that will help to make the depletion possible.

APPLICABLE STATUTES

2. This action arises under the following statutes:

(a) The Flood Control Act of 1944, 33 U.S.C. §701 *et se*[*q*].;

(b) The National Environmental Policy Act of 1969, 42 U.S.C. §§3121 *et se*[*q*].;

(c) The Fish and Wildlife Coordination Act, 16 U.S.C. §§661 *et se*[*q*].;

(d) The Endangered Species Act of 1973, 16 U.S.C. §1531 *et se*[*q*].;

(e) The Reclamation Project Act of 1939, 43 U.S.C. §485(h);

(f) The Water Supply Act of 1958, 43 U.S.C. §390b;

(g) The Administrative Procedure Act, 5 U.S.C. §§706 *et se*[*q*].

JURISDICTION, VENUE AND THE NEED FOR A DECLARATORY JUDGMENT

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331(a).

4. Venue is proper in this Judicial District pursuant to 28 U.S.C. §1391(e).

5. There exists between the parties an actual and present controversy requiring a declaration of rights by the Court.

Plaintiffs therefore seek a judgment, pursuant to 28 U.S.C. § 2201, declaring that the Interior defendants' approval and execution of the ETSI Water Service Contract, and the Corps of Engineers defendants' approval and issuance of the water intake permit, are unlawful and invalid for the reasons stated in the counts that follow.

Plaintiffs further seek a judgment enjoining the defendants from performing under the Contract or the permit, taking any action pursuant to their terms, or otherwise acting as though the Contract or the permit were effective or binding upon defendants, until the violations of law declared by the Court have been remedied. Plaintiffs further seek a judgment holding unlawful and setting aside these actions pursuant to 5 U.S.C. §706.

DESCRIPTION OF THE PARTIES AND THEIR INTERESTS

6. Plaintiffs, the State of Missouri, the State of Iowa and the State of Nebraska, bodies politic and sovereign entities, bring this action on behalf of themselves and as *parens patriae* on behalf of all their respective residents and citizens. The Interior defendants' approval and execution of the ETSI Water Service Contract and the Corps of Engineers defendants' approval and issuance of the related permit have caused and are causing immediate and irreparable harm to plaintiffs. The contemplated performance of the Contract by the defendants and the policy and procedures for future diversions that defendants' actions initiate threaten further such harm. Specifically, the Interior defendants' long-term provision of water by the Contract on the basis of an inadequate and obsolete projection that there will be a surplus of water in the Missouri River until the year 2035, without having completed a comprehensive and up-to-date forecast of all reasonably possible demands upon Missouri River water during that period has caused, causes and

threatens such harm to plaintiffs by creating the substantial risk that plaintiffs and their residents and citizens will be denied their right, secured by statute, to obtain Missouri River water in the future for beneficial uses free of the prior allocation of that water to the transportation use that EPP contemplates for the water provided to it under the Contract. The major communities of plaintiff states that line the Missouri River depend upon its water. That water is used to irrigate farmers' fields and thus increase agricultural production. Ground water levels and associated wells are recharged by the Missouri's flows. The river provides barge transportation to move heavy commodities. It generates electricity in hydroelectric dams. It supports fish and wildlife habitats, provides for maintenance of the natural riverine system and provides extensive recreation.

7. The interests of plaintiff states and their citizens are additionally threatened by the federal government's failure to observe the limitations on water marketing created by Congress and by their failure to provide the environmental analyses, public information, and opportunity to comment on federal actions causing significant impact to the environment. The interests of the plaintiff states and their citizens in the appropriation and use of waters in interstate rivers are directly threatened by the actions of the defendants which purport to grant an out-of-basin user a federal right to withdraw water from the Missouri River. Other specific ways in which each of the plaintiffs is threatened with injury by approval and execution of the Contract and related permits and performance of the Contract by the defendants are set forth in the paragraphs below.

8. The State of Missouri and its citizens are specifically subjected to numerous injuries and threats by defendants' actions. The full extent of such injuries cannot be determined in light of the failure of defendants to gather and provide information regarding its actions and to consult properly with the State before taking the actions complained of. However,

preliminary assessments indicate that drinking water supplies can suffer due to increased taste and odor problems. The safe discharge of treated waste water from large municipalities and industries that line the Missouri River in the state requires certain minimum levels of flow in the river. It is predicted that such flows may already not be available during portions of a winter season. Fish and wildlife habitats and the natural riverine system will suffer due to decreased amounts of water during crucial low-flow periods. Upstream diversions of water result in the navigation season being shortened. It is already projected that major droughts could make the season so short that barge lines would be unable to operate at all. Decreased flows may preclude cities, power plants and industries from being able to obtain water during low-flow periods due to mechanical limitations of intake structures.

9. The State of Iowa is threatened with multiple injuries from defendants' actions. These include a loss in dependable, inexpensive and environmentally preferable hydroelectric power from the mainstream reservoirs. Recreation, wildlife, industry, agriculture, domestic, municipal and other uses would be hampered both by a lower water table and the reduced availability of river water. A truncated navigation season will force Iowans to turn to more expensive means of transportation with adverse effects on Iowa agriculture and industry. Fish and wildlife habitats would also be threatened during low flow periods. The Missouri River Navigation and Stabilization Project has already reduced the surface water area of the Missouri River on the Iowa border by 66 percent. Degradation caused by the project has resulted in a significant drop in the level of the river. This has destroyed many oxbow lakes and others are seriously threatened by any further degradation or reduction of river stage caused by diversions.

10. The State of Nebraska and its citizens are specifically subjected to numerous injuries and threats thereof. Defend-

ants' actions threaten the well-being of agriculture, which is the backbone of the Nebraska economy. Today much of Nebraska's agriculture is sustained by underground water, but it is projected that in less than forty years underground water will no longer be available in substantial parts of the State. If present forms of farming are to continue in these parts of Nebraska, the diversion of greater amounts of Missouri River water will be necessary to replace exhausted aquifers. Moreover, it is probable that the irrigation of additional Nebraska land with Missouri River water will be desired during the term of the Contract. Nebraska also relies on the Missouri River to provide barge transportation to move heavy commodities, to generate pollution-free and inexpensive electricity in the mainstem dams, and to provide municipal and industrial water to the towns and cities in the eastern part of the State. The long-term provision of water by the Contract and the related permit and other such provisions intended to be made by the defendants without analysis of the long-term demands upon water in the Missouri River threaten to foreclose the use of Missouri River water to meet Nebraska's future agricultural, navigation, energy, municipal and industrial needs, and will harm the habitat of vital fish and wildlife resources.

11. The plaintiffs have made written submissions to the defendants in opposition to the Contract and permit and to the announced intention of the defendants to execute the Contract and permits without adequate prior environmental review.

12. Defendant Lieutenant General J. K. Bratton is Chief of Engineers, United States Army Corps of Engineers within the Department of the Army. Lieutenant General Bratton is charged with the ultimate responsibility for, and control over, the activities of the United States Army Corps of Engineers, its officers, employees and agents. Defendant Brigadier General Mark J. Sisinyak is Division Engineer, Missouri Division, of the United States Army Corps of Engineers and is responsible for activities of the Army Corps of Engineers within the Missouri

River basin. Defendant Colonel William R. Andrews, Jr., as District Engineer, Omaha District, United States Army Corps of Engineers, is responsible for Corps of Engineers activities in areas that include Lake Oahe and portions of the States of Missouri, Iowa and Nebraska, and issued the water intake facility permit challenged herein. The Army Corps of Engineers is charged with management of the Missouri River so as to provide flood control, navigation, water supply, hydroelectric power, recreation, water quality and sustenance of fish and wildlife habitat. General Bratton, General Sisinyak and Colonel Andrews are specifically bound by certain requirements of the statutes set out in Paragraph 2 of this Complaint. They have the ultimate responsibility to ensure that the Corps complies with all applicable laws when considering a permit for an intake facility in Lake Oahe or a contract for the provision of water service from Lake Oahe.

13. Defendant John O. Marsh is Secretary of the Army of the United States. Secretary Marsh is charged with the ultimate responsibility for, and control over, the activities of the United States Army Corps of Engineers, its officers, employees and agents. He is specifically bound by certain requirements of the statutes set out in Paragraph 2 of this Complaint. He is also charged with the ultimate responsibility to ensure that the Department complies with all applicable laws when considering permits that implement federal programs to market Missouri River water—including the permit issued to EPP—and when executing water service contracts for surplus water from the mainstem Missouri River reservoirs. He is further charged with responsibility and control over the Oahe and other mainstem Missouri River reservoirs, and with ultimate responsibility to ensure that the Army complies with all applicable laws.

14. Defendant Robert N. Broadbent is Commissioner of Reclamation. Defendant John B. Marcotte is Regional Director, Upper Missouri Region, for the Bureau of Reclamation.

The Bureau of Reclamation, an agency of the Department of Interior, is responsible for the investigation, planning and execution of certain actions for the regulation, conservation and utilization of water and related resources in reservoirs other than those on the mainstem of the Missouri River constructed pursuant to the Pick-Sloan Missouri Basin Program. Commissioner Broadbent has ultimate responsibility for, and control over, the activities of the Bureau of Reclamation, its officers, agents and employees. Mr. Marcotte is responsible for the implementation and Bureau's responsibilities in an area that encompasses portions of Wyoming, Montana, North Dakota, South Dakota and Minnesota. Both Mr. Broadbent and Mr. Marcotte are bound by certain requirements of the statutes set out in Paragraph 2 of this Complaint. They are both charged with the ultimate responsibility of ensuring that the Bureau of Reclamation acts only within the scope of the authority granted to that Bureau. They are also charged with the ultimate responsibility of ensuring that the Bureau complies with all applicable laws.

15. Defendant James G. Watt is Secretary of the Interior. Secretary Watt has ultimate responsibility for, and control over, the activities of the Department, its officers, agents, and employees, including specifically the officers, employees, and agents of the Bureau of Land Management. Secretary Watt is bound by certain requirements of the statutes set out in Paragraph 2 of this Complaint. He is charged with the ultimate responsibility to ensure that the officers and employees of the Department of the Interior act only within the scope of the authority granted to the Department. He is also charged with ultimate responsibility to ensure that the Department complies with all applicable laws.

DESCRIPTION OF THE ETSI WATER SERVICE CONTRACT AND ITS SIGNIFICANCE

16. The ETSI Water Service Contract purports to provide water from the Missouri River to EPP, a partnership comprised of five major national corporations or their affiliates for the purpose of building one or more pipelines to transport coal or other "energy minerals." The source of the water is Lake Oahe, a reservoir on the mainstem of the Missouri River situated in the States of North Dakota and South Dakota. The Corps' permit authorizes an intake structure within Lake Oahe located near Pierre, South Dakota. EPP would pump the water along the "West River Aqueduct" from Lake Oahe to a point in Crook County, Wyoming, near the town of Gillette, a distance of approximately 300 miles. In Crook County, Wyoming, the water would be mixed with pulverized coal and pumped through a slurry pipeline to points in Arkansas and Louisiana, where the water would be separated from the coal and discharged as waste material before the coal was to be burned.

17. Lake Oahe was constructed by the United States Army Corps of Engineers and is operated and managed by the Corps of Engineers defendants as a unit of the Pick-Sloan Missouri Basin Program adopted by Congress in the Flood Control Act of 1944.

18. The Pick-Sloan Missouri Basin Plan is a comprehensive plan for the management and use of the water in the rivers of the Missouri River Basin. Pursuant to the terms of the Plan, the Bureau of Reclamation constructed and operates and manages numerous reservoirs on the tributaries of the Missouri River. Pursuant to the terms of that Plan, the Corps of Engineers constructed and operates and manages six reservoirs on the mainstem of the Missouri River.

19. The use of water that EPP proposes is a transportation use, not an industrial use.

20. The water that would be provided to EPP pursuant to the Contract would be used exclusively by EPP, its affiliates or assigns for commercial transportation purposes. The water would not be used by any municipalities or individuals residing in South Dakota or any other state.

21. The ETSI Water Service Contract incorporates by attachment the South Dakota Water Management Board's "Water Right Application Approval" dated February 5, 1982, which in turn incorporates by reference the Board's "Findings of Fact, Conclusions of Law and Final Decision in the Matter of Application for Permit No. 1791-2 by the South Dakota Conservancy District," dated February 4, 1982, and the "Agreement for South Dakota Conservancy District to Assign a Water Right to Energy Industry Use to ETSI Pipeline Project," dated December 23, 1981.

22. The stated term of the ETSI Water Service Contract is forty years, and it is subject to renewal. The Contract incorporates by reference a South Dakota Water Management Board permit to the South Dakota Conservancy District that is perpetual, provided that the specified use continues. That permit has been assigned to EPP for a period ending 50 years after EPP's completion of its water intake facility and the West River Aqueduct, which, pursuant to the permit, may be as late as 1992. The contract of assignment expressly provides for renewal. The ETSI Water Service Contract therefore contemplates the allocation of water to EPP until at least the year 2042, with an appropriation priority date of 1982, subject only to any inconsistent Indian claim that may be finally established by judicial order.

23. The Contract purports to provide to EPP 20,000 acre-feet of water a year at present and recites that EPP intends to enlarge its Contract to 50,000 acre-feet a year "as plans are developed," prehaps for a second coal slurry pipeline. EPP's water permit from South Dakota allocates 50,000 acre-feet of

water from Lake Oahe a year, pursuant to EPP's formal declaration of its intent to put all 50,000 acre-feet of the water to use by 1992. Absent intervention by this Court, when EPP makes a formal request for a water service contract for the additional 30,000 acre-feet of water, the Interior defendants will perfunctorily find the absence of any environmental impact and execute the requested contract.

24. Whether the Contract is considered to involve 20,000 acre-feet or 50,000 acre-feet of water, the Contract is a major federal action significantly affecting the human environment.

25. The basis claimed by the Interior defendants for the ETSI Water Service Contract is the Bureau of Reclamation's obsolete and inaccurate prediction that there will exist, at least until the year 2035, a surplus of water in the amount of at least one million acre-feet a year in the mainstem reservoirs on the Missouri River. This prediction was made in 1974 on the basis of studies published in 1969 and 1971. The Interior defendants have refused plaintiffs' request that they update their obsolete prediction to take account of demands for major quantities of Missouri River water that have appeared since 1974 and that may, as a matter of reasonable probability, result in the depletion of Missouri River water during the period of the ETSI Water Service Contract. The Interior defendants have declared their intention to issue water service contracts up to the total amount of one million acre-feet a year for transportation and energy purposes, without updating their inadequate and obsolete prediction, unless there is a significant change in the precipitation pattern in the Missouri Basin. Therefore, the execution of the ETSI Water Service Contract represents the implementation of an unlawful policy of the Interior defendants to permit the depletion of one million acre-feet a year of Missouri River water without adequate analysis of foreseeable competing demands for that water or without adequate provisions for protecting other uses.

26. Material incorporated by reference into the ETSI Water Service Contract recites that the State of South Dakota has the authority to determine who may have the right to use the Missouri River water stored in Lake Oahe, and that currently there are future use permits either granted or pending before the South Dakota Water Management Board for approximately 5.6 million acre-feet of water from the Missouri River in South Dakota. South Dakota's state officers have declared their intent to sell water from the mainstem reservoirs within South Dakota to the highest bidder, to compensate for the State's poverty and to redress what South Dakota falsely claims to be the failure of defendants to provide South Dakota with its fair share of the benefits of the Pick-Sloan Missouri Basin Program. The Interior defendants have justified the ETSI Water Service Contract on the ground that it facilitates South Dakota's right to allocate its water resources. Therefore, the execution of the ETSI Water Service Contract represents the implementation of an unlawful policy of the Interior defendants of abdicating duties of water management imposed on federal officers by Congress, in favor of control over the water impounded, in the mainstream reservoirs by the states in which the reservoirs are located.

27. Heretofore, water impounded in the mainstem reservoirs on the Missouri River has been used exclusively for agriculture and for environmental, domestic, municipal and industrial requirements within the states situated in the Missouri River Basin from which the water is drawn, for navigation upon the Missouri River, and for the generation of hydroelectric power at the mainstem dams. By contrast, the ETSI Water Service Contract permits, for the first time, the sale of water as a cash commodity for export outside the state in which it is impounded outside the Missouri River Basin. The ETSI Water Service Contract also permits, for the first time, the depletion of the Missouri River for transportation use—*i.e.*, the private contract carriage of coal. Therefore, the execution of the ETSI

Water Service Contract represents the implementation and initiation of a policy of the Interior defendants to permit the depletion of Missouri River water for transportation use, even though, as a result, preexisting uses of the water for navigation and hydroelectric generation will be impaired and customers that presently purchase hydroelectric power produced at the Oahe Dam will have to pay more for such power or replacement power in the future.

HISTORY OF ETSI'S AND EPP'S APPLICATIONS TO DEFENDANTS AND DEFENDANTS' RESPONSES TO THOSE APPLICATIONS

28. In 1974, EPP's affiliate and alter ego, Energy Transportation Systems, Inc. ("ETSI"), formally applied to the Department of the Interior for a right-of-way over federal land for its proposed coal/water slurry pipeline. ETSI had previously secured legislation and permits from the State of Wyoming allowing it to use ground water from the Madison Aquifer in its pipeline. ETSI stated that it intended to use Wyoming ground water in its pipeline. The Department of the Interior took no action on this initial application.

29. On April 28, 1978, ETSI filed a revised application for a right-of-way for its pipeline across federal land. This application identified the Wyoming ground water from the Madison Aquifer as the water that would be used in the pipeline. In response to this application, the Secretary of the Interior designated the Bureau of Land Management, an agency of the Department of the Interior, to prepare an environmental impact statement ("EIS") on the coal/water slurry pipeline that ETSI proposed to build across federal land.

30. The Bureau of Land Management filed a draft EIS on ETSI's proposed coal/water slurry pipeline ("Pipeline EIS") on October 31, 1980. The final Pipeline EIS was filed on July 17, 1981. Both the draft and final versions of the ETSI EIS

identified the "proposed action" as a pipeline using Wyoming ground water from the Madison Aquifer. Indeed, the stated purpose of the Pipeline EIS, in both draft and final versions, was to assess the environmental consequences of the construction, operation, and maintenance of a proposed coal slurry pipeline from Wyoming to Louisiana with Wyoming ground water as its water source. All federal notices of the availability of the draft Pipeline EIS and the final Pipeline EIS repeated this description of the proposed action.

31. In the draft and final versions of the Pipeline EIS, several alternatives to the proposed action were mentioned, including two alternative water sources. One of these was the so called "Oahe Alternative," according to which the water sources for the pipeline would be Lake Oahe rather than Wyoming ground water. This "Oahe Alternative" was discussed in less than 20 pages (including responses to comments) and several maps and tables scattered through the two volumes of the final Pipeline EIS. The absence of any serious attention to the "Oahe Alternative" in the draft and final Pipeline EIS is evident from the fact that, of the four hundred ninety-three comments identified and responded to in the final Pipeline EIS, only nine cursory comments concerned the "Oahe Alternative."

32. In the draft Pipeline EIS, the only reference to the "Oahe Alternative's" effects upon the supply of water from the mainstem reservoirs and the allocation of such water in the face of competing uses (other than hydropower generation) is contained in three sentences found at page 4-104. These sentences are based entirely on one page of handwritten notes from a single telephone conversation with an employee, title undisclosed, of the Corps of Engineers.

33. While the final Pipeline EIS contained an elaborate forecast, until the year 2035, of possible competing uses of the underground Wyoming water to be used in the proposed action, it omitted any forecast of possible competing uses of

water in the mainstem Missouri River reservoirs. For satisfaction of this part of its environmental review duty, the final Pipeline EIS relied entirely on the three sentences described in Paragraph 32, above, a single-sentence reference (page 1-63) to a final environmental impact statement, entitled "Water for Energy; Missouri River Reservoirs", published by the Bureau of Reclamation on December 1, 1977 (hereafter "1977 Bureau of Reclamation EIS"), and a statement that:

> "Increased movement of coal by pipeline could result in a trend to move large volumes of water from areas where water is scarce, to where water is more abundant. This would have significant *undetermined impacts* on water in scarce areas." (Page 5-29, emphasis added).

Thus, the Pipeline EIS does not even purport to satisfy the defendants' obligation under NEPA to assess the effects of water depletions during the period of those depletions. The inadequacies of the 1977 Bureau of Reclamation EIS for satisfaction of the defendants' duty of environmental review prior to execution of the ETSI Water Service Contract are set forth in Paragraph 64 of this Complaint.

34. More than one month prior to the publication of the final Pipeline EIS, the Interior defendants and the Bureau of Land Management, which was responsible for preparing the Pipeline EIS, were advised by ETSI that it had fundamentally changed its proposed action by substituting Missouri River water from Lake Oahe, for the Wyoming ground water as the water that would be used in its proposed coal/water slurry pipeline. At that time ETSI was engaged in secret negotiations with the State of South Dakota and had reached a general agreement with South Dakota to obtain Missouri River water. The Bureau of Land Management, however, viewed the Pipeline EIS as primarily an assessment of the environmental impacts caused by construction and operation of the Wyoming-Arkansas coal/water slurry pipeline itself and gave short shrift

to the effects of any use of water other than Madison Formation underground water. Accordingly, the Bureau of Land Management did not revise its final EIS to disclose or take account of the new water use proposal.

35. Also prior to the publication of the final Pipeline EIS, ETSI requested from the Bureau of Reclamation a firm water service contract for twenty thousand acre-feet of water, and a firm option contract for thirty thousand acre-feet of water, from the Oahe Reservoir for its coal/water slurry pipeline. In response, the Bureau of Reclamation advised ETSI that its policy required prompt publication of a *Federal Register* notice and news release announcing ETSI's request. ETSI responded in turn by requesting that no public notice of its plans to use Missouri River water be given until after the comment period on the final Pipeline EIS had ended. The Bureau of Reclamation acceded to this request.

36. Subsequently, the final Pipeline EIS was published on July 17, 1981, with no indication that ETSI proposed to use Missouri River water from Lake Oahe. There was no notice of any kind that the proposed action had been changed with respect to its water source.

37. The period for public comment on the final Pipeline EIS closed September 16, 1981. On that same day, September 16, 1981, ETSI's president disclosed ETSI's previously secret negotiations with South Dakota and announced ETSI's intent to buy water from the Oahe Reservoir for use in its coal/water slurry pipeline. This was the first public notice of the fact that ETSI proposed to use water from the Missouri River rather than underground Wyoming water for its pipeline. On September 17, 1981, the Governor of South Dakota outlined the terms of an agreement with ETSI in a televised address. At an emergency meeting on September 21, 1981, the South Dakota Water and Natural Resources Board approved the proposed sale. The South Dakota legislature convened in emergency

session on September 23, 1981, and on September 24 enacted elaborate and extensive legislation to effect the sale.

38. By letter mailed from San Francisco on September 14, 1981, ETSI informed the Bureau of Reclamation that it could proceed to disclose ETSI's request for a water service contract. On October 23, 1981, the Assistant Secretary of the Interior for Land and Water Resources gave notice, in 46 *Federal Register* 52040, that the Bureau of Reclamation had prepared, and proposed to execute as a routine matter, a water service contract with ETSI to give effect to the arrangements between ETSI and the State of South Dakota. The Assistant Secretary acknowledged that the water service contract was a major federal action significantly affecting the human environment, for which an Environmental Impact Statement must be prepared. The notice stated, however, that the Interior defendants considered the final Pipeline EIS a sufficient description of the environmental impacts of, and the alternatives to, ETSI's new proposal to use Missouri River water in its coal/water slurry pipeline.

39. Subsequent to October 23, 1981, the Interior defendants have passed over the following opportunities to consider the environmental effects of using Missouri River water in the coal slurry pipeline:

a. ETSI filed with the Interior defendants a revised project description for its coal/water slurry pipeline proposal. This filing announced ETSI's substitution of Missouri River water for Wyoming ground water and a major relocation of the right-of-way proposed for the coal/water slurry pipeline. In anticipation of this filing, the Bureau of Land Management prepared a "Supplemental Environmental Assessment" ("SEA"), dated December, 1981. The SEA did not mention, much less consider the impacts of, ETSI's proposal to use Missouri River water.

b. On January 4, 1982, within two working days after ETSI mailed its revised project description to the Bureau of

Land Management, the Bureau signed a "Finding Of No Significant Impact" ("FONSI") with respect to the proposed new pipeline route. The FONSI did not discuss ETSI's proposal to use Missouri River water.

40. On January 14, 1982, the Bureau of Reclamation approved ETSI's request for permits for construction of its Wyoming-Arkansas coal/water slurry pipeline across federal land. Written public comments on ETSI's new proposal to use Missouri River water in the pipeline were not due to be submitted to the Bureau of Reclamation until January 10, 1982, and the Bureau held the comment period open until January 27, 1982.

41. On June 22, 1982, the Commissioner of Reclamation recommended that the Secretary of the Interior approve the ETSI Water Service Contract, without undertaking any further analysis of the environmental impacts of the Contract. On June 29, 1982, the Secretary gave his approval. On July 2, 1982, the Bureau of Reclamation executed the Contract. By its terms, the Contract now purports to be in full force and effect.

42. On July 6, 1982, the Corps of Engineers defendants granted a permit to EPP pursuant to Section 404 of the Clean Water Act, 33 U.S.C. §1344, and Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403, allowing EPP to construct a water intake structure in Lake Oahe for the depletion of the water subject to the ETSI Water Service Contract. By its terms, this permit purports presently to be in full force and effect. The grant of this permit followed EPP's application in March 1982 and a period of public comment on the application that expired in May 1982.

43. In June 1982 the Corps of Engineers defendants completed an Environmental Assessment that incorporated by reference the Pipeline EIS and the 1977 Bureau of Reclamation EIS and concluded that it was unnecessary for the Corps to prepare a separate environmental impact statement with respect to EPP's application for a water permit.

44. The Corps' Environmental Assessment implicitly recognizes that the Interior defendants erred in refusing to update their estimates of future competing uses of Missouri River water. While the Corps attempted such an update, its effort is a cursory post-hoc rationalization of the Interior defendants' decision to authorize the ETSI project and to execute the ETSI Water Service Contract as part of that project. For this purpose, the Corps' Environmental Assessment relies primarily on a document available to, but not mentioned by, the Interior defendants in the Pipeline EIS. The Environmental Assessment rejected arbitrarily and in conclusory fashion numerous major proposed withdrawals of Missouri River water identified in February 1982 by the Missouri Basin States Association. The Environmental Assessment was not made available to the public for comment or circulated to agencies of the federal government.

45. Unless enjoined therefrom by this Court, defendants will perform the Contract, allow EPP to take the actions purportedly permitted by the permit issued by the Corps of Engineers defendants and continue to follow the water marketing policies described in Paragraphs 25-27 of this Complaint, all to the great and immediate harm of plaintiffs as detailed above, and in violation of applicable law, as detailed below.

Count One: The Bureau of Reclamation and the Other Interior Defendants Lack Authority to Enter Into the Water Service Contract.

46. The foregoing paragraphs of this Complaint are incorporated herein by reference.

47. The Army Corps of Engineers constructed the Oahe Dam and operates and manages it and Lake Oahe pursuant to the Flood Control Act of 1944 and the Pick-Sloan Plan approved therein.

48. The defendants characterize the use by EPP of the water to be provided by the Contract as an "industrial use" of water.

49. Congress' sole grant of authority to contract, for delivery of the water impounded in Lake Oahe for industrial purposes, is contained in Section 6 of the Flood Control Act of 1944, 33 U.S.C. §708. Section 6 authorizes the delivery of such water for such purposes only by the Secretary of the Army and only upon his making the findings required therein and only under the conditions contained therein.

50. The Secretary of the Interior and the other Interior defendants have no statutory authority to enter into and execute the ETSI Water Service Contract.

51. None of the Corps of Engineers defendants is a party to the ETSI Water Service Contract. Moreover, the Corps of Engineers defendants have not made the findings required by Section 6 before they may execute their own Water Service Contract.

52. The ETSI Water Service Contract is void because the party that executed the Contract on behalf of the United States lacked statutory authority to do so.

53. On February 24, 1975, the Secretary of the Interior and the Secretary of the Army signed a Memorandum of Understanding regarding the marketing of water for industrial use from the six mainstem reservoirs on the Missouri River including Lake Oahe. Its stated purpose was "to expedite the use of water for energy development in the Missouri River basin," and purported to authorize the Secretary of the Interior to market water from the Missouri River mainstream reservoirs. The Memorandum of Understanding was by its terms a temporary measure effective for two years. It was extended until December 31, 1978, and expanded to include the Secretary of Energy, who had acquired jurisdiction over the

hydroelectric power generated at the dams built pursuant to the Pick-Sloan Missouri Basin Program. Thereafter, the Memorandum of Understanding was not further extended. It is not now in effect.

54. Notwithstanding the refusal of the Secretary of the Army to extend the Memorandum of Understanding, the Interior defendants determined in 1980 to proceed, with respect to requests for Missouri River depletions including the one presently at issue, as though the Memorandum of Understanding were still in effect.

55. The Memorandum of Understanding was an unlawful delegation of water marketing authority by the Secretary of the Army to the Secretary of the Interior. The Interior defendants' unilateral assertion of authority to market water from mainstem reservoirs for industrial purposes after the expiration of the Memorandum of Understanding is an unlawful arrogation of such authority.

Count Two: The Defendants' Failure to Prepare, Circulate and File an Adequate Environmental Impact Statement on the ETSI Water Service Contract and Related Water Intake Permit Violates the National Environmental Policy Act and Other Environmental Statutes.

56. The foregoing paragraphs of this Complaint are incorporated herein by reference.

57. Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. §4332(2)(C), requires, *inter alia,* that all federal agencies include in every recommendation or report on a major federal action significantly affecting the quality of the human environment a detailed statement by the responsible official regarding the environmental impact, resource commitments and other aspects of the proposed action and the alternatives to the proposed action.

58. Section 102(2)(E) of NEPA, 42 U.S.C. §4332(2)(E), requires that all federal agencies study, develop and describe appropriate alternatives to any proposal that involves unresolved conflicts concerning alternative uses of available resources.

59. The execution of the ETSI Water Service Contract and the grant of a permit for the construction of a water intake facility are major federal actions that significantly affect the quality of the human environment and involve unresolved conflicts concerning alternative uses of available resources. The significant effects of these actions include the irrevocable commitment of water, at least for the period (described in Paragraph 22, *supra*) of the ETSI Water Service Contract and the South Dakota water permit that the Contract incorporates by attachment, and of future similar contracts for the sale and export of water that will be executed pursuant to the policies of the Interior defendants (described in Paragraphs 25-27, *supra*) that the ETSI Water Service Contract discloses and implements, and the major environmental disruption involved in the construction of the West River Aqueduct on an unlocated right of way approximately 300 miles long. The relevant unresolved conflicts concerning alternative uses of available resources involve competing future uses of the limited supplies of water in the mainstem reservoirs on the Missouri River.

60. Under Sections 102(2)(C) and (E) of NEPA, defendants were required to prepare a detailed environmental impact statement including a description of possible alternative uses of Missouri River water during the period of the Contract and subsequent renewals of the South Dakota water permit that the Contract incorporates by attachment, to circulate the statement to relevant federal agencies, and to invite public comment on the statement before the Contract was approved and executed.

61. The Draft Pipelines EIS and the Final Pipeline EIS were prepared to report on the environmental consequences of the major federal action of granting a right of way in Wyoming for the ETSI pipeline. The pipeline proposal did not include the use of Missouri River water. Defendants nevertheless relied solely on the Draft and Final Pipeline EIS for satisfaction of the requirements of NEPA and other environmental statutes with respect to the ETSI Water Service Contract.

62. For the purposes upon which reliance is now made, the Draft and Final Pipeline EIS do not satisfy the requirements of Sections 102(2)(C) and (E) of NEPA, the Council of Environmental Quality's Guidelines on the Preparation of Environmental Impact Statements, 40 C.F.R. §§1501 *et seq.*, or the relevant rules of the Department of the Interior implementing NEPA, Departmental Manual, Part 516, Appendix 9, §9.3.A(3), 45 Fed. Reg. 47,945 (1980) and 46 Fed. Reg. 18,026 (1981).

63. As a matter of law, the Draft and Final Pipeline EIS and the procedures by which they were prepared and exposed for comment are insufficient and defective for the purpose for which defendants now rely on them. Specifically, the defects in the EIS include the following:

64. Neither the Draft Pipeline EIS nor the Final Pipeline EIS includes any inventory, much less a comprehensive and up-to-date inventory, of reasonably foreseeable competing uses of Missouri River water during the period of the ETSI Water Service Contract and the South Dakota Water permit that the Contract incorporates by attachment, including but not limited to uses for energy development and High Plains irrigation. Consequently, neither the Draft Pipeline EIS nor the Final Pipeline EIS contains an adequate explanation or discussion of the possible cumulative effects of the Contract and of the defendants' water marketing policies, described in Paragraphs 25-27 above, upon the water resources of the Missouri River

and the resources and activities that depend upon those water resources. The 1977 Bureau of Reclamation EIS, on which the Interior defendants rely for this purpose, is insufficient and defective for the following reasons:

(a) The 1977 Bureau of Reclamation EIS addressed the environmental effects only on the upper Missouri River Basin, which the Bureau defined to exclude most of the State of Nebraska and all of the States of Iowa and Missouri. The focus of this EIS was the energy related industrial development which might take place if water were made available for such development and not the environmental effects of the water depletion itself.

(b) The Bureau of Reclamation EIS is not a water availability study. It merely assumed without analysis or explanation the validity of the 1974 projection, based on studies concluded in 1969 and 1971, that there existed a long term surplus of one million acre-feet per year of water in the six Missouri River mainstem reservoirs. The assumption underlying the 1974 projection was that the one million acre-feet of water would not be used for irrigation before the year 2035. The assumption did not take account of all irrigation uses that are presently foreseeable. The assumption did not take account of major non-irrigation uses that are presently foreseeable. The 1974 projection recognized that the studies on which it was based required updating to permit more specific and accurate determinations of water uses and requirements.

(c) The Bureau of Reclamation EIS did not describe the water needs of areas downstream from the proposed "marketing area," including parts of Montana, North Dakota, South Dakota and Wyoming, on which the EIS focused. Nor did the Bureau of Reclamation EIS consider projected future water uses downstream. Downstream states outside the proposed "marketing area," including

Nebraska, Missouri and Iowa, were not even asked to comment on the Bureau of Reclamation EIS. Thus, the Bureau of Reclamation declared that there was surplus water in the interstate flows of the Missouri River without focusing on downstream water uses.

(d) The Bureau of Reclamation EIS does not address the effects of diversions during periods of limited water availability. A diversion for transportation uses, such as that which EPP contemplates, is continuous and ongoing, without variation. A critical flow analysis for periods of limited water availability would be necessary to determine the effect of such diversions on water needs downstream, but is absent from the Bureau of Reclamation EIS.

(e) The estimated water requirements for coal development as discussed in the Bureau of Reclamation EIS do not go beyond the year 2000.

(f) The Bureau of Reclamation EIS includes this express disclaimer:

> "This evaluation is not intended to fulfill the requirement of NEPA for any specific development. Site specific environmental impact statements will be prepared prior to decisions on water deliveries to industrial sites and water use locations." (Page 1-4)

65. The defendants did not adequately study and develop all reasonable alternatives pursuant to the National Environmental Policy Act, 42 U.S.C. §4332(2)(E). The Draft and Final Pipeline EIS do not include any discussion of the most likely and reasonable alternatives to defendants' approval and execution of the ETSI Water Service Contract in its present form. Such alternatives would include reduction of the period of the Contract and provisions in the Contract that the use of the water supplied pursuant to the Contract shall be subordinate to all presently existing and future agricultural, energy, municipal, industrial and navigational uses of Missouri River

water within the Missouri River Basin. Nor does the Draft Pipeline EIS or the Final Pipeline EIS describe or consider any alternatives to the generalized corridor proposed for the West River Aqueduct, even though the Fish and Wildlife Service advised that a route different from the route that ETSI proposes to follow would be less environmentally sensitive.

66. Construction of the West River Aqueduct, which the Corps of Engineers' actions would permit, would involve major environmental disruption along a right of way approximately 300 miles long that has not been specifically located. The Draft and Final Pipeline EIS fail to include detailed, meaningful analysis of the environmental impact of the construction of the West River Aqueduct. In responding to these documents, the Fish and Wildlife Service stated that the information concerning site-specific locations, design and measures to minimize harm provided to it was insufficient for a full understanding of the project's effects on fish and wildlife resources. Accordingly, the Interior defendants' reliance on the Pipeline EIS to satisfy their obligation of environmental review of the effect of approval of the ETSI Water Service Contract violates both NEPA and the Fish and Wildlife Coordination Act, 16 U.S.C. §661 *et seq.*

67. The West River Aqueduct would traverse the habitat of endangered species, including the black-footed ferret, the bald eagle, the peregrine falcon and the whooping crane. Neither the Draft nor the Final Pipeline EIS includes an adequate evaluation of the effect of construction of the West River Aqueduct upon endangered species of plants or animals required to be protected pursuant to the Endangered Species Act of 1973, 16 U.S.C. §1531 *et seq.* Therefore, the Interior defendants' reliance on the Pipeline EIS to satisfy their obligation of environmental review of the effect of approval of the ETSI Water Service Contract violates this Act.

68. Neither the Draft nor the Final Pipeline EIS includes an adequate assessment of the economic impacts and effects of the withdrawal of water, or of the defendants' espousal of the unlawful water marketing policies described in Paragraphs 25-27, upon the people, resources, activities and enterprises in the plaintiff states including but not limited to the loss of hydroelectric power generation, shortening of navigation season, decreasing water quality, lowering the intake structures as required by loss of water and other cumulative and secondary affects of the Contract or of the water marketing policies that it implements.

69. Neither the Draft nor the Final Pipeline EIS includes an adequate analysis of the alternatives to this means of transportation such as waterless slurries and other forms of transportation.

70. The procedures for environmental review followed by defendants denied plaintiffs, other members of the public, and relevant federal agencies a meaningful opportunity to learn, understand and comment on the environmental impact of the ETSI Water Service Contract and the water intake facility permit, and to have their comments considered by other interested federal agencies, especially the defendants, before a decision was made by defendants to enter into the Contract.

71. The procedures for environmental review followed by the defendants prevented an independent and objective good faith analysis and weighing of all the alternatives and cumulative impacts produced by the ETSI Water Service Contract and the water intake facility permit before a decision was made with respect to execution of the contract and permit.

72. The Corps of Engineers' Environmental Assessment dated June 1982 cannot, as a matter of law, be considered a supplement to the Pipeline EIS. The Corps of Engineers' determination that an EIS should not be prepared for the water intake facility permit was wrong as a matter of law and is based on inaccurate and inadequate data.

73. The procedural and substantive inadequacies of the environmental impact statements and the environmental assessement preclude the defendants from reliance upon them for a compliance with NEPA, and the actions of the defendants in permitting the water withdrawal are therefore unlawful and void.

Count Three: The ETSI Water Service Contract Is Void Because It Purports to Provide Water for a Purpose that Congress Did Not Authorize.

74. The preceding paragraphs of this Complaint are incorporated herein by reference.

75. ETSI would not use the Missouri River Water for any of the purposes for which Congress authorized construction of the Oahe Dam and Reservoir.

76. ETSI would not use the Missouri River Water provided to it under the Contract for an "industrial" purpose.

77. The provision of water to ETSI pursuant to the Contract is not necessary to make possible the mining or sale of the coal that ETSI proposes to transport. The coal that ETSI proposes to transport in its pipeline would be mined, transported and sold to the same destinations and customers if ETSI's pipeline were not built.

78. The sole use of the Missouri River Water that would be provided to ETSI pursuant to the Contract would be a transportation use. ETSI would use the water to transport coal to destinations in Arkansas or Louisiana, where the water would be discharged as a waste material.

79. In the Flood Control Act of 1944, Congress did not authorize defendants to provide water from Lake Oahe for transportation purposes. Therefore the Contract is in excess of statutory authority and void.

Count Four: The ETSI Water Service Contract Is Void Because It Violates the Scheme for Use of Missouri River Water Established by Statute.

80. The preceding paragraphs of this Complaint are incorporated herein by reference.

81. ETSI's use of the Missouri River water to be made available by this water service contract and the related permits is a transportation use. If authorized at all, this use is subordinate both to navigation and the six (6) beneficial consumptive uses specified in Section 1(b) of the Flood Control Act of 1944, 33 U.S.C. §701-1(b), and to other existing lawful uses of the water as described in Section 6 of the Flood Control Act of 1944, 33 U.S.C. §708.

82. Even if ETSI's use of Missouri River water for transportation were a beneficial consumptive use of water for domestic, municipal, stock water, irrigation, mining or industrial purposes, which it is not, ETSI's use of the water would occur at the points of delivery of coal in Arkansas and Louisiana, which are states that lie wholly east of the 98th meridian.

83. No federal statute gives defendants authority to give ETSI's proposed transportation use of Missouri River water a priority superior to existing uses of Missouri River water including navigation and hydroelectric generation.

84. The defendants cannot lawfully permit a depletion of water in Lake Oahe that may presently or in the future impair the efficiency of the project for irrigation purposes.

85. The action of Interior defendants in executing the Water Service Contract and the action of the Corps of Engineer defendants in issuing the water intake facility permit further violate Section 6 of the Flood Control Act of 1944, 33 U.S.C. §708, in that the water to be provided over the term of the contract and renewal are not surplus waters, and the water

service contract will adversely affect existing lawful uses of the water. The present contract does not assure that it will be subordinate to other existing lawful uses over the life of the contract, nor have the defendants adequately determined what affect this contract and water marketing policy will have on existing lawful uses of Missouri River water.

86. The Water Service Contract is inconsistent with the project purposes authorized by Congress in violation of Section 9(a) of the Flood Control Act of 1944.

87. The Contract therefore violates the statutory scheme for the use of Missouri River Water, is in excess of statutory authority, and is void.

Count Five: Defendants Cannot Execute the Contract or Follow the Water Marketing Policies That It Implements Without the Approval of Congress.

88. The foregoing paragraphs of this Complaint are incorporated herein by reference.

89. The Water Supply Act of 1958 prohibits defendants, in the absence of legislation by Congress, from making major operational changes in the mainstem reservoirs on the Missouri River, or from modifying the use of those reservoirs in a way that would seriously affect the purposes for which they were authorized.

90. The ETSI Water Service Contract, the water marketing policies that it implements and the Corps' related water intake facility permit would modify the Missouri River mainstem reservoir projects and would seriously affect the purposes for which the mainstem reservoir projects were authorized by Congress. The use of water from the reservoirs for transportation purposes was not authorized by Congress. Assuming that such a use were authorized by Congress, the priority that

defendants purport to give to such a use violates priorities established by Congress. Congress did not authorize the Interior defendants to contract for delivery of water from Lake Oahe for industrial or transportation purposes. Congress did not authorize defendants to contract for delivery of any water from Lake Oahe that is not surplus. Moreover, defendants' authorization of the sale of water from Lake Oahe to the highest bidder for export from the state in which it is drawn and from the Missouri River Basin represents a radical modification of established practices according to which the projects have been managed.

91. The ETSI Water Service Contract and the water marketing policies that it implements would cause major operational changes in the Lake Oahe project and other mainstream and tributary reservoirs in the Missouri River basin, including but not limited to diminishing the amount of hydroelectric power generated by the projects, increasing the cost of and demand for hydroelectric power to purchasers of power from the projects, shortening the Missouri River navigation season, and altering the timing and duration of releases.

92. According to the Water Supply Act of 1958, the ETSI Water Service Contract is in excess of statutory authority and void because defendants failed to obtain the approval of Congress before executing the Contract and implementing their water marketing policies.

Count Six: Violation of the Administrative Procedure Act.

93. The foregoing paragraphs of this Complaint are incorporated herein by reference.

94. The findings made and conclusions drawn by defendants, expressly or by implication, in support of their execution of the ETSI Water Service Contract, and their issuance of the

related water intake facility permit including but limited to the findings or conclusions that there exists a long-term surplus of water in the mainstem reservoirs of the Missouri River, that the Contract will not impair the efficiency of Lake Oahe for agricultural purposes, and that the Contract is not a modification of the purposes for which Congress authorized the Lake Oahe project, are arbitrary, capricious, unreasonable, an abuse of discretion, and contrary to law. Accordingly, such findings and the Contract and permit that they purport to support must be set aside pursuant to 5 U.S.C. §706.

95. The actions of Interior defendants in executing the Water Service Contract and the Corps of Engineers defendants in granting the water intake facility permit are in excess of statutory authority, contrary to law, and must be set aside pursuant to 5 U.S.C. §706.

Relief Sought

WHEREFORE, plaintiffs pray for judgment:

(a) declaring that the defendants' approval and execution of the ETSI Water Service Contract and related intake facility permit violate the statutes described in this Complaint for the reasons detailed above,

(b) setting aside the contract and the related intake permit for the reasons stated above,

(c) enjoining defendants, preliminarily and permanently, from acting to perform the Contract and from taking any other action as though the Contract and permit were effective or binding upon defendants, until the violations of law declared by the court are corrected,

(d) granting plaintiffs' costs and disbursements, and

(e) granting such other and further relief to the plaintiffs as the Court may consider just and proper.

Dated: August 18, 1982

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The plaintiffs and each of them hereby request that the trial of this case be held at Lincoln, Nebraska, and that the case be calendared accordingly.

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APPENDIX B

Excerpts from and Commentary on the Complaint

APPENDIX B-1

Allegations relating to the issue of water allocation.

ALLEGATION NO. 6

> "The contemplated performance of the Contract by the defendants and the policy and procedures for future diversions that defendants' actions initiate threaten further such harm. Specifically, the Interior defendants' long-term provision of water by the Contract . . . . "
>
> (This allegation implies that the United States makes policy and procedure for diversions from the mainstem reservoirs and that the Bureau of Reclamation is providing water to ETSI rather than the State of South Dakota. In fact, it was South Dakota, acting through its political subdivision, the South Dakota Conservancy District, which, by contract of December 23, 1981, granted a water right to energy industry use to the ETSI Pipeline Project.)

ALLEGATION NO. 7

> "The interests of plaintiff states and their citizens are additionally threatened by the federal government's failure to observe the limitations on water marketing created by Congress . . . . "
>
> (This allegation implies that the United States markets water rather than the individual states.)
>
> "The interests of the plaintiff states and their citizens in the appropriation and use of waters in interstate rivers are directly threatened by the actions of the defendants which purport to grant an out-of-basin user a federal right to withdraw water from the Missouri River."
>
> (This is precisely what South Dakota is concerned about; that plaintiffs are assuming that the federal government is granting the right to withdraw water from the Missouri River rather than South Dakota.)

ALLEGATION NO. 13

"[John O. Marsh] is also charged with the ultimate responsibility to ensure that the Department complies with all applicable laws when considering permits that implement federal programs to market Missouri River water . . . ."

(Only South Dakota has the authority to market water from the Missouri River in South Dakota.)

ALLEGATION NO. 16

"The ETSI Water Service Contract purports to provide water from the Missouri River to EPP . . . ."

(The Water Service Contract does not purport to provide water; the contract between ETSI and the South Dakota Conservancy District is the only document which provides a water permit to ETSI.)

ALLEGATION NO. 19

"The use of water that EPP proposes is a transportation use, not an industrial use."

(Even if the plaintiffs are correct in their claim that the use of water for a coal slurry pipeline is not an industrial use, it does not matter. South Dakota has determined that the use of water for a coal slurry pipeline is a beneficial use of water and it is South Dakota's determination that rules, not a determination by either the plaintiffs or by the federal government.)

ALLEGATION NO. 20

"The water that would be provided to EPP pursuant to the Contract would be used exclusively by EPP, its affiliates or assigns for commercial transportation purposes."

(See Allegation No. 19.)

ALLEGATION NO. 23

"The Contract purports to provide to EPP 20,000 acre-feet of water a year . . . ."

(See Allegation No. 16.)

ALLEGATION NO. 26

"Material incorporated by reference into the ETSI Water Service Contract recites that the State of South Dakota has the authority to determine who may have the right to use the Missouri River water stored in Lake Oahe, and that currently there are future use permits either granted or pending before the South Dakota Water Management Board for approximately 5.6 million acre-feet of water from the Missouri River in South Dakota. South Dakota's state officers have declared their intent to sell water from the mainstream reservoirs within South Dakota to the highest bidder, to compensate for the State's poverty and to redress what South Dakota falsely claims to be the failure of defendants to provide South Dakota with its fair share of the benefits of the Pick-Sloan Missouri Basin Program. The Interior defendants have justified the ETSI Water Service Contract on the ground that it facilitates South Dakota's right to allocate its water resources. Therefore, the execution of the ETSI Water Service Contract represents the implementation of an unlawful policy of the Interior defendants of abdicating duties of water management imposed on federal officers by Congress, in favor of control over the water impounded in the mainstream reservoirs by the states in which the reservoirs are located."

(The allegation implies that South Dakota has no authority to allocate waters out of Lake Oahe.)

ALLEGATION NO. 27

". . . [T]he ETSI Water Service Contract permits, for the first time, the sale of water as a cash commodity for export outside the state in which it is impounded outside the Missouri River Basin. The ETSI Water

Service Contract also permits, for the first time, the depletion of the Missouri River for transportation use—i.e., the private contract carriage of coal. Therefore, the execution of the ETSI Water Service Contract represents the implementation and initiation of a policy of the Interior defendants to permit the depletion of Missouri River water for transportation use . . . ."

(The only policy that is relevant to the permit to appropriate water granted to ETSI is the policy of the State of South Dakota. If South Dakota wishes to sell water for export outside the state it has the authority to do so.)

ALLEGATION NO. 48

"The defendants characterize the use of EPP of the water to be provided by the Contract as an 'industrial use' of water."

(The federal defendants are not providing water to ETSI, South Dakota is.)

ALLEGATION NO. 49

"Congress' sole grant of authority to contract, for delivery of the water impounded in Lake Oahe for industrial purposes, is contained in Section 6 of the Flood Control Act of 1944 . . . ."

(This allegation states that South Dakota has no right to permit ETSI's withdrawals from the Oahe Reservoir.)

ALLEGATION NO. 55

"The Memorandum of Understanding was an unlawful delegation of water marketing authority by the Secretary of the Army to the Secretary of the Interior."

(Neither agency has the authority to market water from the Oahe Reservoir; only South Dakota does.)

ALLEGATION NO. 64

"... defendants' water marketing policies ...."

(See Allegation No. 55.)

ALLEGATION NO. 68

"... the defendants' espousal of the unlawful water marketing policies ...."

(See Allegation No. 55.)

ALLEGATION NO. 75

"ETSI would not use the Missouri River water for any of the purposes for which Congress authorized construction of the Oahe Dam and Reservoir."

(Congress authorized South Dakota to make the determination as to how the water will be used and managed.)

ALLEGATION NO. 79

"In the Flood Control Act of 1944, Congress did not authorize defendants to provide water from Lake Oahe for transportation purposes."

(See Allegation No. 75.)

ALLEGATION NO. 81

"ETSI's use of Missouri River water to be made available by this water service contract and the related permits is a transportation use. If authorized at all, this use is subordinate both to navigation and the six (6) beneficial consumptive uses specified in Section 1(b) of the Flood Control Act of 1944 ... and to other existing lawful uses of the water...."

(South Dakota's position is that navigation is subordinate to all beneficial consumptive uses approved under South Dakota law.)

ALLEGATION NO. 86

"The Water Service Contract is inconsistent with the project purposes authorized by Congress in violation of Section 9(a) of the Flood Control Act of 1944."

(South Dakota's position is that the Water Service Contract is totally consistent with the project purposes authorized by Congress in that the United States is giving deference to the policies and actions of South Dakota regarding the Missouri River.)

ALLEGATION NO. 87

"The Contract therefore violates the statutory scheme for the use of Missouri River water . . . ."

(See Allegation No. 86.)

ALLEGATION NO. 89

"The Water Supply Act of 1958 prohibits defendants, in the absence of legislation by Congress, from making major operational changes in the mainstem reservoirs on the Missouri River, or from modifying the use of those reservoirs in a way that would seriously affect the purposes for which they were authorized."

(This allegation states that South Dakota may make no allocation of water out of Lake Oahe without further Act of Congress.)

ALLEGATION NO. 90

"The ETSI Water Service Contract, the water marketing policies that it implements and the Corps' related water intake facility permit would modify the Missouri River mainstem reservoir projects and would seriously affect the purposes for which the mainstem reservoir projects were authorized by Congress. The use of water from the reservoirs for transportation purposes was not authorized by Congress. Assuming that such a use were authorized by Congress, the priority that defendants purport to give to such a use violates priorities established by Congress. Congress did not

authorize the Interior defendants to contract for delivery of water from Lake Oahe for industrial or transportation purposes. Congress did not authorize defendants to contract for delivery of any water from Lake Oahe that is not surplus. Moreover, defendants' authorization of the sale of water from Lake Oahe to the highest bidder for export from the state in which it is drawn and from the Missouri River Basin represents a radical modification of established practices according to which the projects have been managed."

(This entire allegation sums up the plaintiffs' case and controversy against the State of South Dakota. Though plaintiffs superficially argue that they are challenging only the actions of the federal defendants, in reality they are challenging the authority of the State of South Dakota to allocate waters of the Missouri River pursuant to South Dakota law.)

ALLEGATION NO. 92

"According to the Water Supply Act of 1958, the ETSI Water Service Contract is in excess of statutory authority and void because defendants failed to obtain the approval of Congress before executing the Contract and implementing their water marketing policies."

(See Allegation No. 89.)

APPENDIX B-2

Allegations which imply that the Missouri River is fully appropriated.

ALLEGATION NO. 1

> "This action arises as a result of the Interior defendants' unlawful approval of a depletion of Missouri River Water . . . ."
>
> (The plaintiffs imply, by using the word depletion throughout their complaint, that the withdrawal of twenty thousand acre feet per year is a measurable and significant amount of water which will injure existing users of water in the downstream States. This is simply not the case, but it does point out that the plaintiffs are essentially claiming that no additional diversions can be made from the Missouri River in South Dakota because the Missouri River is now fully appropriated.)

ALLEGATION NO. 6

> ". . . creating the substantial risk that plaintiffs and their residents and citizens will be denied their right, secured by statute, to obtain Missouri River water in the future for beneficial uses free of the prior allocation of that water . . . ."
>
> (The plaintiffs are alleging that South Dakota had appropriated its equitable share of the water and that the plaintiff states' future demands for water are within their equitable shares, leading to the conclusion that South Dakota has no further right to issue permits out of the Missouri River.)
>
> "The major communities of plaintiff states that line the Missouri River depend upon its water. That water is used to irrigate farmers' fields and thus increase agricultural production. Ground water levels and associated wells are recharged by the Missouri's flows. The river provides barge transportation to more heavy commodities. It generates electricity in hydro-

electric dams. It supports fish and wildlife habitats, provides for maintenance of the natural riverine system and provides extensive recreation."

(Here the plaintiffs state that ETSI's proposed use of water will impair existing uses of the Missouri River. Thus, the defendants are again claiming that the Missouri River is fully appropriated.)

ALLEGATION NO. 8

"The safe discharge of treated waste water from large municipalities and industries that line the Missouri River in the state requires certain minimum levels of flow in the river. It is predicted that such flows may already not be available during portions of a winter season. Fish and wildlife habitats and the natural riverine system will suffer due to decreased amounts of water during crucial low-flow periods. Upstream diversions of water result in the navigation season being shortened. It is already projected that major droughts could make the season so short that barge lines would be unable to operate at all. Decreased flows may preclude cities, power plants and industries from being able to obtain water during low-flow periods due to mechanical limitations of intake structures."

(See Allegation No. 6.)

ALLEGATION NO. 9

(See Allegation No. 6.)

ALLEGATION NO. 10

(See Allegation No. 6.)

ALLEGATION NO. 25

"... without adequate analysis of foreseeable competing demands for that water or without adequate provisions for protecting other uses."

(See Allegation No. 6.)

ALLEGATION NO. 27

"... The ETSI Water Service Contract also permits, for the first time, the depletion of the Missouri River for transportation use ...."

(See Allegation No. 1.)

ALLEGATION NO. 33

"... omitted any forecast of possible competing uses of water in the mainstem Missouri River reservoirs."

(See Allegation No. 6.)

ALLEGATION NO. 42

"... allowing EPP to construct a water intake structure in Lake Oahe for the depletion of the water ...."

(See Allegation No. 1.)

ALLEGATION NO. 59

"... involve competing future uses of the limited supplies of water in the mainstem reservoirs on the Missouri River."

(See Allegation No. 6.)

ALLEGATION NO. 68

"Neither the Draft nor the Final Pipeline EIS includes an adequate assessment of the economic impacts and effects of the withdrawal of water ... upon the people, resources, activities and enterprises in the plaintiff states including but not limited to the loss of hydroelectric power generation, shortening of navigation season, decreasing water quality, lowering the intake structures as required by loss of water and other cumulative and secondary affects [sic] of the Contract ...."

(See Allegation No. 6.)

ALLEGATION NO. 84

"The defendants cannot lawfully permit a depletion of water in Lake Oahe that may presently or in the future impair the efficiency of the project for irrigation purposes."

(See Allegation Nos. 1 and 6.)

ALLEGATION NO. 85

"... the water service contract will adversely affect existing lawful uses of the water."

(See Allegation No. 6.)

APPENDIX C

C-1 Memorandum and Order
(on Intervention),
dated January 12, 1983

C-2 Judgment of Permanent Injunction,
dated May 3, 1984

C-3 Memorandum on Motions To Dismiss
And On Cross-Motions
For Partial Summary Judgment,
dated May 3, 1984

C-1-1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

THE STATE OF MISSOURI, et al.,

Plaintiffs,

CV82-L-442

vs.

COLONEL WILLIAM R. ANDREWS, JR., et al.,

MEMORANDUM AND ORDER

Defendants.

Pending before the court is the motion of the State of South Dakota to intervene in this action as a party defendant. The matter has been thoroughly briefed by the parties, and oral argument was held December 20, 1982, before the undersigned. Following oral argument the plaintiff states were permitted to submit a post-argument brief, and the matter is now ready for decision.

This case arises from a project planned by Energy Transportation Systems Inc. (ETSI) to construct a coal slurry pipeline for the transportation of coal from Wyoming to receiving areas in Louisiana and Arkansas. As planned, water from the Oahe Reservoir of the Missouri River would be transported by way of the "West River Aquaduct" from the Reservoir across western South Dakota and eastern Wyoming to the Powder River Basin, where pulverized coal would be added to the water and pumped through the pipeline to the discharge points. As more fully described below, the plaintiff states have instituted this action challenging the actions of the federal defendants in approving the building of a water intake structure at Lake Oahe, and executing on behalf of the United States a

"Water Service Contract" with the ETSI Pipeline Project (EPP) permitting the use of the water from Lake Oahe for the pipeline project. The original defendants are officers of the United States Army or its Corps of Engineers, and the United States Department of the Interior, including its Secretary, Assistant Secretary, and officers with its Bureau of Reclamation. By Memorandum and Order dated November 29, 1982, filing 40, ETSI was permitted to intervene as a defendant pursuant to Rule 24(a)(2), Fed.R.Civ.P.

Count One of the complaint alleges that the execution of the Water Service Contract, on July 2, 1982, by the Bureau of Reclamation was without legal authority. Plaintiffs claim that the only Congressional grant of authority to contract for the delivery of water from Lake Oahe for industrial purposes is found in Section 6 of the Floor Control Act of 1944, 33 U.S.C. §708, and that such authority is granted only to the Secretary of the Army. While plaintiffs acknowledge that a Memorandum of Understanding between the Secretary of the Interior and the Secretary of the Army executed in 1975 "purported to authorize" the Secretary of the Interior to market water from Missouri River mainstream reservoirs, such Memorandum expired December 31, 1978. Thus, plaintiffs allege that the Water Service Contract is void for lack of statutory authority on the part of the Bureau of Reclamation to execute it. With the exceptions of admitting that they characterize the proposed use of water from Lake Oahe as "industrial" and the further admission of the existence of the Memorandum of Understanding between the two Secretaries, the federal defendants deny these allegations.

In Count Two plaintiffs allege that the actions of all defendants in executing and approving the Water Service Contract, and the permit for the water intake facility violated certain provisions of the National Environmental Policy Act, specifically 42 U.S.C. §§4332(2)(C) and (E); the Fish and Wildlife Coordination Act, 16 U.S.C. §661 et seq.; and the

Endangered Species Act of 1973, 16 U.S.C. §1531 et seq. Numerous deficiencies are alleged regarding the description of the project, scope of environmental impact, procedures followed in adopting the Environmental Impact Statements, and lack of substantive review and public comment in their preparation. The federal defendants have denied all of the substantive allegations in these paragraphs of the complaint.

Count Three of the complaint includes one of the pivital allegations in the case, that the ETSI Water Service Contract is void because it purports to provide water for a purpose that Congress did not authorize, *i.e.,* a "transportation" use of water, as opposed to the "industrial" or other uses authorized by the Flood Control Act of 1944. As noted, the federal defendants admit that they characterize the use of the water described in the project as "industrial," but deny these allegations of the complaint.

In Count Four of the complaint plaintiffs claim that even if the use of water proposed by the pipeline project is authorized by the Flood Control Act of 1944, its use is subordinate to navigation and the six beneficial consumptive uses specified in 33 U.S.C. §701-1(b) and to other existing lawful uses of the water authorized by 33 U.S.C. §708. Plaintiffs further allege that the actual use of the water would take place in the states of discharge, Arkansas and Louisiana, which lie wholly east of the 98th Meridian, that the water to be utilized by the project is not surplus water; and that its use will adversely affect existing lawful uses of the water without assurances of subordination. The Contract is therefore alleged to violate the statutory scheme for the use of Missouri River water, in violation of the Flood Control Act of 1944. The federal defendants have denied all substantive allegations in Count Four.

By Count Five plaintiffs claim that the provisions of the Water Supply Act of 1958, 43 U.S.C. §390(b), require that before this project can proceed, specific authorization from

Congress is necessary, for the reason that the use of water from Lake Oahe as proposed in the project represents a "radical modification of established practices" and would seriously affect the purposes for which the mainstem reservoir projects were authorized. The defendants' failure to obtain specific approval of Congress is, therefore, alleged to cause the Water Service Contract to be in excess of statutory authority and void. The federal defendants have denied all of these allegations.

Count Six of the complaint alleges that the finding and conclusions made by the defendants in support of their execution of the Water Service Contract and their issuance of the water intake facility permit are arbitrary, capricious, unreasonable, an abuse of discretion, and contrary to law, and thus violative of the Administrative Procedure Act, 5 U.S.C. §706. These allegations are likewise denied by the federal defendants, who further allege that "many" of such actions are committed to agency discretion, and are not reviewable.

Plaintiffs seek declaratory relief, that the approval and execution of the contract and intake facility violate the statutes alleged, together with injunctive relief, setting aside the contract and the permit and prohibiting the defendants from taking any further actions "until the violations of law declared by the court are corrected."

The federal defendants allege that the plaintiffs lack standing to maintain the action; that plaintiffs have no private right of action under the statutes relied upon; that the complaint fails to state a claim upon which relief can be granted; and that the court lacks jurisdiction over the subject matter of the case.

On October 1, 1982, approximately six weeks after the filing of the complaint and before any of the defendants had filed answers, the State of South Dakota filed its motion to intervene as a defendant, under the provisions of Rule 24(a)(2), and, alternatively, under Rule 24(b)(2). South Dakota also requested a hearing on its motion, which was

denied by earlier order. Its request for oral argument, however, as noted, was granted. In its proposed answer, submitted with the motion to intervene, South Dakota generally denied most of the allegations contained in the complaint. Of significance, however, is its allegation that "[i]f the issues in this case present a controversy between two or more states, this Court is without jurisdiction to hear those issues pursuant to Article III, Section 2 of the United States Constitution and 28 U.S.C. Section 1251(a)." Separate Answer of Intervenor State of South Dakota, filing 10, ¶4.

Supporting the motion to intervene is an affidavit of William J. Janklow, Governor of the State of South Dakota. His affidavit incorporates fully the Agreement for South Dakota Conservancy District to Assign a Water Right to Energy Industry Use to ETSI Pipeline Project" ("ETSI Contract"), dated December 23, 1981, which was executed by the State of South Dakota, the South Dakota Conservancy District, Energy Transportation Systems Inc. (ETSI) and the ETSI Pipeline Project, a joint venture. Claiming an interest in this litigation stemming from its execution of the ETSI Contract, the State of South Dakota through its governor's affidavit, alludes to four specific interests which are said to relate to this litigation: first, an economic interest in the proceeds to be received from the ETSI Pipeline Project, which are estimated to be in the millions of dollars; second, the protection of the Madison Formation Aquifer, use of which the contract allegedly prevents; third, an interest in the construction and operation of the "West River Aquaduct" which, it is claimed, will allow certain communities in western South Dakota to utilize a portion of the water piped from Lake Oahe westward; and fourth, an interest in protecting South Dakota's claimed rights to allocate water from Lake Oahe, which are perceived to be challenged by the plaintiffs' allegations in the complaint. The Janklow affidavit also incorporates a copy of the "South Dakota Water Resources Management Act," SDCL Chapter 46-17A.

The plaintiffs oppose the motion to intervene. Both the federal defendants and the intervening defendant, ETSI, however, support the motion to intervene. No counter-affidavits have been filed.

I

Intervention as of Right

Rule 24(a)(2) provides:

> Upon timely application anyone shall be permitted tc intervene in an action: . . . (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The four matters which must be considered regarding the motion to intervene as of right are: (1) timeliness of the motion; (2) interest in the subject matter of the primary litigation; (3) impairment of the ability to protect that interest by the disposition of the suit; and (4) inadequate protection of that interest by the existing parties. *Planned Parenthood v. Citizens for Com. Action,* 558 F.2d 861, 869 (8th Cir. 1977).

The motion to intervene was filed early in the progression of this case, even before the answers of the defendants. While it is possible that the addition of another defendant may, as a practical matter, cause some delay in these proceedings, South Dakota has indicated that if intervention is allowed it will do all within its power to expedite the disposition of this case. Any delay caused by the intervention, if allowed, does not appear to me to rise to prejudicial proportions, and indeed, no challenge is made to the timeliness of the motion to intervene. I therefore conclude that the motion is timely made within the provisions

of Rule 24(a). *EEOC v. Westinghouse Elec. Corp.,* 675 F.2d 164, 165 (8th Cir. 1982). *See, Jet Traders Inv. Corp. v. Tekair, Ltd.,* 89 F.R.D. 560 (D. Del. 1981).

Before discussing the parameters of the "interest" requirement in Rule 24(a)(2), it is necessary to examine and determine what, in this litigation, constitutes "the property or transaction which is the subject of the action...." Rule 24(a)(2). I have found no satisfactory discussion of this phrase of the Rule to utilize as an adequate guide in determining this question. Two alternative definitions appear to be presented in this litigation: first, the position of the plaintiffs, that the "transaction" which is the subject of the litigation is that series of actions, recited in the complaint, taken by the federal defendants culminating in the granting of the water intake facility permit, and the execution of the ETSI Water Service Contract; second, the apparent position of defendants and South Dakota,[1] that the "transaction" includes questions about the propriety of federal policies involved in the defendants' actions as those actions relate to the ETSI project and South Dakota's water rights.

The plaintiffs' position is supported by *Wade v. Goldschmidt,* 673 F.2d 182 (7th Cir. 1982) in which the plaintiffs challenged the actions of federal officials in approving a plan for an expressway and an accompanying bridge as violative of the National Environmental Policy Act, as well as other federal statutes. In declaring that the case had been brought to "require compliance with federal statutes regulating governmental projects," *id,* at 185, the court ruled the federal officials

[1] While at oral argument counsel for the applicant-intervenor, in response to questioning from the court, indicated that South Dakota views the subject of the litigation as the propriety of the federal defendants' actions, South Dakota's arguments in its briefs indicate a much broader working definition, similar to that of the second alternative above.

were the proper defendants[2], and that the applicant-intervenors, (individuals, a county and several cities), would not be permitted to intervene even though they claimed they would be directly and seriously affected by a judgment in plaintiffs' favor. See also *Donaldson v. United States,* 400 U.S. 517 (1971); *Blake v. Pallan,* 554 F.2d 947 (9th Cir. 1977); *Solien v. Miscellaneous Drivers & Helpers Union,* 440 F.2d 124, 132 (8th Cir. 1971), *cert. denied* 403 U.S. 905, *reh. denied* 404 U.S. 960 (1971), *reh. denied* 405 U.S. 999 (1972); *Edmondson v. State of Nebraska,* 383 F.2d 123 (8th Cir. 1967); *Piedmont Heights Civic Club v. Moreland,* 83 F.R.D. 153 (N.D. Ga. 1979); *United States v. Carrols Dev. Corp.,* 454 F. Supp. 1215 (N.D. N.Y. 1978) *Dodson v. Salvitti,* 77 F.R.D. 674 (E.D. Pa. 1977); *In re Penn Central Commercial Paper Litigation,* 62 F.R.D. 341 (S.D. N.Y. 1974), *aff'd without opinion Shulman v. Goldman, Sachs & Co.,* 515 F.2d 505 (2nd Cir. 1975).

Other courts, in construing the "interest" requirement, have seemingly interpreted the "subject matter" phrase rather broadly, *See, e.g., James v. TVA,* 538 F. Supp. 704 (E.D. Tenn. 1982). In this regard, South Dakota relies upon *Sierra Club v. Froehlke,* 359 F. Supp. 1289 (S.D. Tex., 1973), *modified Sierra Club v. Callaway,* 499 F.2d 982 (5th Cir. 1974) and *Keith v. Volpe,* 352 F. Supp. 1324 (C.D. Cal. 1972), *aff'd sub nom, Keith v. Cal. Highway Comm.,* 506 F. 2d 696 (9th Cir. 1974), *cert. denied* 420 U.S. 908 (1975).

Somewhat helpful in determining an appropriate definition of the term "transaction" is a recent Eighth Circuit Court of

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[2] In *Wade supra* at p. 183, n.1, the court stated that the State of Illinois had been permitted to intervene in the action. The court does not, however, state whether the intervention was of right or by permission. Moreover, the court does not list any of the interests it found to be related to the subject matter of the litigation. Finally, the plaintiffs challenged the defendants' actions under federal statutes which have traditionally involved joint federal-state projects. In contrast, the actions challenged by the plaintiffs are purely federal actions with no showing of state involvement.

Appeals case where in another context the court commented that the term "transaction" "connotes a common nucleus of operative facts." *Poe v. John Deere Co.,* F.2d (Nos. 81-2273 and 82-1135, Slip Op. at 5, filed Dec. 17, 1982). In utilizing this standard to define the "transaction which is the subject of the action," I am persuaded that the "operative facts" giving rise to the complaint are those actions taken by the defendants which are alleged to violate the stated statutory requirements and the policies they embody. I do not read the complaint as attacking the policies themselves, nor as attacking, at least directly, the pipeline project, though a result in plaintiffs' favor would most certainly have a serious effect on that project. *See Wade, supra; Dodson v. Salvitti,* 77 F.R.D. 674 (E.D. Pa. 1977).

Having defined the "transaction which is the subject of the action" to be the actions of the federal defendants, I must next consider whether the interests claimed by the State of South Dakota directly relate to that "transaction." The Supreme Court in *Donaldson v. United States, supra,* has required a Rule 24(a)(2) interest to be "a significantly protectable interest." *Id.* at 531. However, this "interest" need not be "a specific legal or equitable interest in the chose" as required in *Toles v. United States,* 371 F.2d 784 (10th Cir. 1967). *Nuesse v. Camp,* 385 F. 2d 694 (D.C. Cir. 1967). Instead, the Rule 24(a)(2) interest requirement should be used as a "practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with effeciency and due process." *Id.* at 700. This view seems to comport with the Advisory Committee's notes to the 1966 amendments to Rule 24. *See Wright & Miller Fed. Practice and Procedure:* Civil §1908. Utilizing the "practical effect" test as defining the scope of the "interest" required, I nevertheless do not view that as an expansion of the "subject matter" language of the Rule; *i.e.,* the claimed interest, albeit "significantly protectable," must be so within the parameters of "the nucleus of operative facts" of this case.

Turning first to South Dakota's claimed economic interest, it is clear that such interest, if it exists, is founded upon the provisions of the "ETSI Contract". This contract, running over fifty pages in length, was executed December 23, 1981 by the authorized representatives of the South Dakota Conservancy District; ETSI Pipeline Project, a Joint Venture; Energy Transportation Systems Inc.; and the State of South Dakota. Although containing numerous terms, it generally provides that the South Dakota Conservancy District would procure from the South Dakota Water Management Board a permit for the use of Oahe Reservior water, and that this permit would then be sold and assigned to the ETSI Pipeline Project, in return for which the Conservancy District would receive payments, as detailed in the contract, amounting to millions of dollars over the fifty year life of the contract. The contract provides that all payments from ETSI would be made to the order of the Conservancy District. South Dakota's economic interest stems from the payments made under this contract to the Conservancy District, which by the provisions of the South Dakota Resources Management Act, SDCL Chapter 46-17A, must be deposited in a special fund created in the South Dakota Treasury for such monies, which is reserved for water resources projects within the state. *See,* §§46-17A-53 and 54.

The plaintiff states argue that South Dakota's interest in receiving these funds is a contingent interest, similar to that rejected by the court in *Rosebud Coal Sales Company v. Andrus,* 644 F.2d 849 (10th Cir. 1981). That case involved the issue of the Department of Interior's right to raise the royalty rate payable by Rosebud to the United States pursuant to Rosebud's federal coal lease. The applicant-intervenor, Rocky Mountain Energy Co. (RME), also leased coal land to Rosebud in return for a royalty payment which was determined by reference to the royalty rate payable to the United States under the federal coal lease. After judgment in the district court holding that the Department of Interior's attempted upward

adjustment was beyond the Department's authority, RME sought to intervene, claiming an economic interest in the higher royalty rate as a result of the reference "tie-in" contained in the RME-Rosebud lease. The court rejected the application on the basis that RME had no sufficient "interest" in the underlying litigation to permit intervention as of right, reasoning that referencing was insufficient to create a protectable interest, and that RME, by tying its interest to the federal standard, had assumed the risk that the royalty therein would not be raised. *Id.* at 851. Plaintiffs here argue, in effect, that in view of the fact that South Dakota's interests are embodied completely in the "ETSI Contract," South Dakota has chosen to assume the risk that the ETSI project might not receive federal approval, or, if approved, might be halted by litigation. The plaintiffs thus argue that the situation here is analogous to that in *Rosebud.* South Dakota, on the other hand, argues that the "ETSI Contract" has been incorporated by reference into the federal-ETSI "Water Service Contract,"[3] thereby creating a unity of contract and contractual interest not present in the *Rosebud* litigation.

I do not find the relationship between the parties here analogous to that discussed in *Rosebud.* In that case the parties agreed to follow a specific standard price set by the United States in its lease. In this case the references in the "ETSI Contract" to the federal approvals of the project are much more than an incorporation of one external facet to an otherwise all-inclusive relationship between the two contracting parties; rather, they are references to interrelated series of transactions, without which there would be little if any relationship between the contracting parties in the ETSI Contract. That distinction is not, however, sufficient to disregard the similarities between

[3] Although it has been argued that the ETSI Contract is incorporated into the Water Service Contract, the Water Service Contract is not before the court so it is impossible to determine in what fashion this claimed incorporation has taken place, or what effect that may or may not have.

Rosebud and this case. It is clear, for example, from the provisions of the ETSI Contract that the contracting parties recognized and fully considered in their negotiations and agreements the risk that the Water Service Contract and/or the Water Intake Facility Permit would not be forthcoming from the federal officials. *See, e.g.,* Art. 2, ¶ C; Art. 6; Art. 9, Art. 11, ¶ C. Like *Rosebud,* the fact that the parties to the ETSI Contract made their agreements independent of, yet in anticipation of certain actions to be taken by the federal government does not give them protectable rights or remedies resulting from the ETSI Contract, vis-a-vis the federal officials; rather their rights or remedies can stem only from the other contractual parties to the ETSI Contract itself. South Dakota's principal obligation under the ETSI Contract is to assist and cooperate with ETSI in seeking approval for its project from the federal officials who are defendants here. South Dakota has no claim or entitlement to any particular action from those officials. Having no such claim, it also has no stake in defending their actions. It is, like RME in the *Rosebud* matter, "a concerned spectator," 644 F. 2d at 851, whose interests—as dictated by its own agreement with ETSI—ripen or wither according to the actions of the federal officials, over whom it can claim no influence. It follows, then, that South Dakota's economic interest in receiving ETSI's payments pursuant to the "ETSI Contract," are not sufficiently related to the "nucleus of operative facts" described above. Hence, South Dakota's interest, though it is significant, is in my view outside the scope of the provisions of Rule 24(a)(2). *Wade v. Goldschmidt, supra, Cf. Rosebud Coal Sales Co. v. Andrus, supra.*

South Dakota also claims an interest in protecting the Madison Formation Aquifier from use by ETSI, which use was apparently contemplated by ETSI prior to the execution of the ETSI Contract. Although as asserted in the Janklow affidavit "South Dakota perceives that the utilization of the Madison Formation Aquifier will cause a substantial and detrimental

injury to the citizens of South Dakota and its water supply," there is nothing in the record to support this conclusion and, accordingly I am unable to evaluate South Dakota's claimed interest in this respect. By the provisions of the ETSI Contract, ETSI agrees not to utilize water from the Madison Aquifier, and, in some circumstances at least, that agreement may continue for a period of fifty years, even though the contract itself be sooner terminated. (*See,* Art. 11, ¶ B.1; E; and F) South Dakota argues, however, that a judgment in this action in plaintiffs' favor would cause South Dakota to "again be threatened with use of the Madison Formation Aquifier. . . ." There is nothing in the record before me to support such an assertion. While the provisions relating to a termination of the ETSI Contract due to litigation do not appear to include a provision for the continuation of the agreement regarding use of the Madison Aquifier, no showing has been made about the reasons for this omission. In any event, however, it is speculation to forecast what might be the actions of any of the contracting parties following a judgment in this case in plaintiffs' favor, should that occur. Such a contingency is not contemplated within the scope of the "interest" requirements of Rule 24(a)(2). *Donaldson v. United States, supra; Wade v. Goldschmidt, supra; United States v. Carrols Dev. Corp.,* 454 F. Supp. 1215 (N.D. N.Y. 1978); *Vazman, S.A. v. Fidelity International Bank,* 418 F. Supp. 1084 (S.D. N.Y. 1976).

South Dakota also claims a protectable interest in its desire to provide Lake Oahe water to communities and citizens in western South Dakota, as permitted under the terms of the ETSI Contract. The contract provides that a portion of the water transferred from the Oahe Reservior to Wyoming by way of the West River Aquaduct will be made available to communities in *western* South Dakota, provided that those communities absorb the cost of transporting the water from the aquaduct to their water systems. See, ETSI Contract, Article 8. In his affidavit, Governor Janklow states that the fulfillment of

the ETSI Contract will provide "urgently needed" water to various communities in South Dakota now experiencing a "serious and immediate threat to health" as a result of water quality problems. There are, however, no facts stated to support these conclusions. In any event, assuming the conclusions to be justified, it is apparent that a state has an interest, indeed an obligation, to provide for the general health and welfare of its citizens. South Dakota has chosen to embark on the West River Aquaduct venture as a means of meeting that responsibility. The receipt of a portion of the Lake Oahe waters is, like the receipt of the ETSI payments, an agreement between the parties to the ETSI contract. It does not give the parties to the ETSI contract any independent expectation or claim to any actions by the federal defendants here; and, as earlier noted, their agreement was made in full realization of the risk that the federal officials may not approve the project. Thus, for the same reasons South Dakota's claimed economic interest is outside the "nucleus of operative facts" forming the subject of this case, so the claimed interest in the use of water from the "West River Aquaduct" is also outside of the scope of the "transaction which is the subject of the action" under Rule 24. It is, therefore, insufficient to support South Dakota's intervention as of right.

Of critical concern to South Dakota are the possible inferences from the complaint which may challenge, either directly or indirectly, the rights of South Dakota to appropriate the Missouri River water from Lake Oahe. South Dakota correctly points out that if the plaintiffs' complaint raises issues of the right of South Dakota to appropriate Missouri River water, the court would have no jurisdiction to bear that matter. U.S. Constitution, Article III; 28 U.S.C. §1251(a); *see also State Water Control Board v. Washington Suburban San. Comm.*, 61 F.R.D. 588 (D. D.C. 1974). South Dakota's position is, generally speaking, that those allegations of the complaint which challenge the defendants' authority and ac-

tions in allocating waters from Lake Oahe also inherently challenge South Dakota's authority to allocate waters from Lake Oahe. In addition, South Dakota contends that various allegations of the complaint raise issues of appropriation of the Missouri River waters. In support of these contentions, South Dakota has listed over thirty specific references to the complaint which, it claims, raise these issues.[4]

Plaintiffs claim that their complaint does not raise issues of water rights or appropriation of the Missouri River Water. Plaintiffs further claim that South Dakota's claimed interest in issues of water allocation is unrelated to the plaintiff's action "to enforce federal agencies' obedience to federal laws." I agree.

When taken in context, the complaint challenges specific actions of the federal officials who are named as defendants. While South Dakota infers that those challenges also challenge the policies under which it claims water rights, it appears to me that the plaintiffs' challenge is really that the federal defendants have violated such policies, together with statutory procedural requirements in implementing them. In short, I do not believe that a fair reading of the complaint includes the issues advanced by South Dakota in its Motion to Intervene.

Indeed, if it did, the court would be without jurisdiction to hear those issues, in any event. *State Water Control Board v. Washington Suburban San. Com'n, supra.* The jurisdictional issues raised by South Dakota's Motion to Intervene arise from Article III, Section 2, Clause 2, of the Constitution, which states:

> In all cases . . . in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.

Congress has further constricted the Supreme Court's jurisdiction in 28 U.S.C. §1251:

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[4] The allegations are included in the following paragraphs of the complaint: 6, 7, 13, 16, 18, 19, 20, 23, 27, 48, 49, 55, 64, 68, 75, 79, 81, 86, 87, 89, 90, 92, 1, 8, 9, 10, 25, 33, 42, 59, 84, and 85.

> (a) The Supreme Court shall have original *and exclusive* jurisdiction of all controversies between two or more states. (Emphasis added)

In *Washington, supra,* the district court refused to allow the State of Maryland to intervene as a defendant in an action originally brought by Virginia and the District of Columbia against the Washington Metropolitan Area Sanitation Commission, in a controversy over discharges of untreated sewage into the Potomac and Anacostia Rivers. In rejecting Maryland's argument that the court could exercise ancillary jurisdiction[5], the court distinguished *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972) and relied on the statute itself in holding that to allow the intervention would present a case between states, divesting the court of jurisdiction.

> Maryland has cited no authorities which would persuade this court to relax such a definitive jurisdictional statement in order to sustain jurisdiction over the proposed intervention against the state plaintiffs.

Id. at 591. Likewise, here, although South Dakota, the federal defendants, and the intervening defendant all claim that South Dakota's intervention as a defendant in this action would not divest this court of jurisdiction, no authority has been cited for that proposition.[6] I therefore conclude that to allow the broadening of the issues raised so as to include those issues perceived by South Dakota would deprive the court of jurisdic-

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[5] *Cf. Wright & Miller Federal Practice Fed. Practice and Procedure:* Civil §1917, pp. 603-4.

[6] Although I have found one case in which such intervention was allowed, *State of Delaware v. Bendar,* 370 F. Supp. 1193 (D. Del. 1974, the court's conclusion there is not supported and I choose not to follow it.

tion to decide such issues; hence, I find them to be outside the scope of the "transaction which is the subject of the action."[7]

Because I have found that South Dakota can claim no sufficient "interest" to support its intervention in this matter, I need not consider whether the interests it has advanced would be impaired or impeded by this litigation, or whether those interests are adequately protected by present parties. I therefore conclude that South Dakota has no right to intervene in this action under the provisions of Rule 24(a)(2) of the Federal Rules of Civil Procedure.

II

Permissive Intervention

Although the provisions of Rule 24, as amended in 1966, generally would encourage granting leave to intervene in circumstances such as this, *see, e.g., Wright & Miller, supra,* §1903, the jurisdictional problems raised by South Dakota's motion preclude permissive intervention, as well. It is fundamental that an independent jurisdictional ground must support an applicant's motion to intervene under Rule 24(b). *Babcock and Wilcox Co. v. Parsons Corp.,* 430 F.2d 531 (8th Cir. 1970). At oral argument, counsel for South Dakota indicated that South Dakota relies upon the provisions of Rule 24 itself to provide jurisdiction for permissive intervention. However, it is clear that the rule does not expand the otherwise limited jurisdiction of the United States District Courts. Rule 82, *Fed.R.Civ.P.* South Dakota's Motion for Leave to Intervene

[7] The same jurisdictional issues would arise irrespective of the "interest" for which South Dakota's intervention is sought. While counsel for South Dakota and the intervening defendant argued that a distinction could be made as to certain issues so as not to deprive the court of jurisdiction, no authority was cited to support that theory, and I see no basis for such a distinction.

under the provisions of Rule 24(b)(2) will, therefore, likewise be denied.[8]

Since South Dakota's Motion to Intervene will be denied, so also will be its motion to file additional motions.

IT THEREFORE IS ORDERED:

1. The motion of the State of South Dakota to intervene as a defendant, filing 10, is denied.

2. The motion of South Dakota for leave to file additional motions, filing 13, is denied.

Dated January 12, 1983.

BY THE COURT

United States Magistrate

[8] There has been discussion in the briefs and arguments regarding whether South Dakota is so situated as to be an "indispensable" party within the provisions of Rule 19(a)(2), raising the question of whether the entire action should be dismissed in South Dakota's absence. As I conclude that South Dakota does not claim interests sufficiently related to the subject of this action for purposes of intervention under Rule 24(a)(2), I also conclude, for the same reasons, that South Dakota is not an indispensable party. Furthermore, the doctrine of indispensability is inapplicable in litigation seeking to vindicate public rights such as those in this case. *National Licorice Co. v. NLRB,* 309 U.S. 350 (1940); *Jeffries v. Georgia Residential Finance Authority,* 678 F. 2d 919 (11th Cir.) *U.S. app. pending* No. 82-408 (1982); *Natural Resources Defense Counsel Inc. v. Berklund,* 458 F. Supp 925 (D.C. 1978), *aff'd* 609 F. 2d 553 (D.C. Cir. 1979).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF MISSOURI, et al,

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JUDGMENT OF PERMANENT INJUNCTION

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Defendants.

CV82-L-442

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vs.

COLONEL WILLIAM R. ANDREWS, JR., et al,

Defendants.

CV82-L-443

In accordance with the accompanying memorandum,

IT IS ORDERED:

1. That the motion of ETSI for summary judgment, filing 57 in CV82-L-442, is denied as to Count I of the amended complaint, filing 175;

2. That the motion of ETSI for summary judgment, filing 67 in CV82-L-443, is denied as to Count III of the second amended complaint, filing 168;

3. That the joint motions of the federal defendants and ETSI to dismiss, filings 73 and 97 in CV82-L-442, are denied as to Count I of the amended complaint, filing 175;

4. That the joint motions of the federal defendants and ETSI to dismiss, filings 70 and 104 in CV82-L-443, are denied as to Count III of the second amended complaint, filing 168;

5. That the motion of the States of Missouri, Iowa, and Nebraska for summary judgment, filing 143 in CV82-L-442, is granted as to Count I of the amended complaint, filing 175;

6. That the motion of the Sierra Club and the Nebraska, Rocky Mountain and Iowa chapters of the Farmers Educational and Cooperative Union of American for summary judgment, filing 147 in CV82-L-443, is granted as to Count III of the second amended complaint, filing 168; and

7. That the defendants are enjoined from performing the "Industrial Water Service Contract Between the United States and ETSI Pipeline Project, a Joint Venture," dated July 6, 1982.

Dated May 3, 1984.

BY THE COURT

/s/ WARREN K. URBOM

Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF MISSOURI, et al,

Plaintiffs,

MEMORANDUM ON MOTIONS TO DISMISS AND ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

vs.

COLONEL WILLIAM R. ANDREWS, JR., et al,

Defendants.

CV82-L-442

KANSAS CITY SOUTHERN RAILWAY CO., et al,

Plaintiffs,

vs.

COLONEL WILLIAM R. ANDREWS, JR., et al,

Defendants.

CV82-L-443

This memorandum concerns the issue of the authority of the Secretary of the Interior to sign a contract with Energy Transportation Systems, Inc. (ETSI) which would allow ETSI to use water from Oahe Reservoir in the coal slurry pipeline. The complaints in both of these cases allege that the Secretary lacked authority to enter into the contract.The defendants have moved to dismiss these claims, and cross-motions for partial summary judgment also have been filed. Filings 57, 73, 93 and

143 in CV82-L-442 and filings 67, 70, 104 and 147 in CV82-L-443. The State of South Dakota, proceeding as amicus curiae, argues that the issue is irrelevant.

I. General History

The authority of the Secretary of the Interior depends on an interpretation of the Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887, the single most important subject of which was the Missouri River Basin. The lower basin suffered severe floods in 1942, 1943 and 1944. Flood Control: Hearings on H.R. 4485 before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess. (1944), at 659-663 (testimony of Col. Miles Reber) (hereinafter cited as 1944 Hearings); H.R. Doc. No. 475, 78th Cong. 2d Sess. (1944), at 24-25. Residents of the lower basin pressured Congress for flood control, and residents of the upper basin wanted reservoirs for storage of water for irrigation.

The basin's development concerned two agencies—the War Department's Corps of Engineers[1], which was responsible for flood control and navigation throughout the country, and the Bureau of Reclamation of the Department of the Interior, which was organized to reclaim the arid lands of the nation's seventeen western states. These different responsibilities produced some conflict between the two agencies over where the dams would be built, who would build them, how the resulting reservoirs would be used, and who would control them. The Corps wanted as much empty storage space as possible to hold back flood waters and to use stored water during droughts to maintain the Missouri below Sioux City at a level high enough for navigation and sewage disposal. The Bureau wanted as much full storage space as possible for irrigation, especially during long droughts.

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[1] In 1947, the Department of War became the Department of the Army. P.L. 80-253, § 205(a), 61 Stat. 495, 501. I shall use the two designations interchangeably.

The Corps' plan for the basin, H.R. Doc. No. 475 (the Pick Plan) proposed building five dams on the main stem of the Missouri River below Fort Peck Reservoir in Montana, including six million acre-feet reservoirs at Oahe and Oak Creek in South Dakota. The dams were to be used for flood control, navigation, irrigation, and power production, while a number of very small flood control dams were to be built on the Missouri's tributaries. *Id.*, at 28, 29.

The Bureau's report (the Sloan Plan) disagreed with the Pick Plan as to where the dams should be built, 1944 Hearings, at 516-518 (testimony of W. G. Sloan); Sen. Doc. No. 191, at 115-118, and as to the size of Oahe Dam. The Sloan Plan proposed a 19.6 million acre-feet Oahe Reservoir which would have flooded out the Oak Creek Dam and furnished water for irrigation of 750,000 acres in South Dakota's James River Basin, navigation, and power production, as well as flood control. Sen. Doc. No. 191, at 115.

Although the parties disagree on the seriousness of the conflict between the Corps and the Bureau, it is impossible and unnecessary to characterize accurately the agencies' relationship. No matter how bitter the dispute may have been, the agencies never disagreed over who was to build and control the main stem dams. The Pick Plan assigned those duties to the Corps of Engineers. H.R. Doc. No. 475, at 31. Maj. Gen. Reybold, the Chief of Engineers, told Bureau Commissioner H. W. Bashore that Corps' control of those dams was essential. Sen. Doc. No. 191, at 7. Bashore's formal commentary on the Pick Plan said that the main stem dams should be "constructed, operated, and maintained by the Corps of Engineers" because of "their peculiarly close relationship with flood control and navigation." H.R. Doc. No. 475, at 7; see, also, Letter of H. W. Bashore to the Secretary of the Interior, reprinted in Sen. Doc. No. 191, at 4. The Bureau's Board of Review recommended that the Corps operate all reservoirs where flood control and

navigation dominated; it also recommended that the Bureau operate all "irrigation features" and that where a reservoir's irrigation function was minor compared with flood control, it should be operated "under regulations of the Bureau" as far as irrigation was concerned. Sen. Doc. No. 191, at 11.

During Senate committee hearings on the Flood Control Act, representatives of the Corps and the Bureau met to reconcile their differences. The resulting document was called the Pick-Sloan Plan, Sen. Doc. No. 247, 78th Cong., 2d Sess. (1944). Two parts of the plan are relevant here. First, it recommended the high Oahe dam proposed by the Bureau. *Id.*, at 3. The Corps had proposed low dams at Oahe and Oak Creek because it did not believe the ground at Oahe could provide a strong enough foundation for a high dam. When the Bureau's surveys reached the opposite conclusion, the Corps endorsed the high dam and said the extra storage should be used for irrigation, flood control, and navigation. 1944 Hearings, at 508, 518 (testimony of Col. Reber); at 518 (testimony of W. G. Sloan); at 594 (testimony of Rep. Case). The plan said that the high dam would supply water for irrigation in the James River Basin, flood control, navigation, and power production. Second, the Pick-Sloan Plan's only discussion regarding control was the following:

> "3. It was possible to bring into agreement the plans of the Corps of Engineers and the Bureau of Reclamation by recognizing the following basic principles:
>
> (a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control.
>
> (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."
>
> Sen. Doc. No. 247, at 1

Ultimately, in § 9(a) of the Flood Control Act, Congress adopted the Pick and Sloans Plans "as revised and coordinated" by Sen. Doc. No. 247 and authorized construction by the Departments of War and the Interior. P.L. 78-534, § 9(a), 58 Stat. 887, 891. Section 9(b) of the Act expanded earlier flood control acts to include those works authorized in § 9(a) which were to be built by the War Department. Section 9(c) said that the developments to be undertaken by the Interior Department were to be governed by the federal reclamation laws. Although § 9 concerned only the Missouri River Basin, § 10 authorized construction projects throughout the country, which were to be built by the Corps. Sections 4 through 8 allocated control of all the projects authorized in the Act. Section 4 permitted the Secretary of War to build and operate recreation facilities at reservoirs under his control; § 5 said that electricity generated at projects controlled by the War Department was to be turned over to the Interior Department for sale to the public; § 6 authorized the War Department to furnish water from Corps reservoirs for domestic and industrial use; § 7 required the War Department to prescribe regulations for the use of storage allocated at all federal dams for flood control and navigation; § 8 said that if the War Department determined that a dam it operated could be used for irrigation, the Secretary of the Interior was to build and control the works needed to distribute that water, under the provisions of the reclamation laws.

Pursuant to §§ 9(a) and 9(b), the Corps finished construction of the Oahe Dam in 1962. 128 Cong. Rec. S8479 (daily ed. July 16, 1982) Table II. The Corps always has operated and maintained all of the main stem dams and reservoirs on the Missouri. Letter of Col. C. A. Selleck, Jr. to E. R. Wilde, October 4, 1978, filing 337 in CV82-L-442, Administrative Record Document No. 900399; 1975 Memorandum of Understanding between the Secretary of the Interior and the Secretary of the Army, February 24, 1975, Admin. Rec. Doc. No. 900072, reprinted in Missouri River Basin Industrial Water Marketing: Hearings before Senate Committee on Interior and Industrial Affairs, 94th Cong., 1st Sess. (1975), Part 1, at 10-11 (hereinafter cited as 1975 Hearings). The Interior Department did not begin construction of the Oahe irrigation works described in the Sloan Plan until after 1968 and construction later was halted.

In response to the energy crisis of 1973 and 1974, the federal government began plans to develop the large deposits of coal, oil, and gas in eastern Montana and Wyoming. 128 Cong. Rec. S8482 (daily ed. July 16, 1982) (statement of Sen. Wallop). The government thought that the main stem reservoirs could supply the water needed for this development. Report of the Ad Hoc Committee on Water Marketing, July 1, 1974, Admin. Rec. Doc. No. 900336, at 5. The Bureau and the Corps agreed that one million acre-feet of water could be made available each year for industrial use from the main stem reservoirs. 1975 Hearings, at 6. On February 24, 1975, the Secretary of the Army and the Secretary of the Interior signed a "Memorandum of Understanding" designed to expedite the use of water for energy development in the Missouri River Basin. Admin. Rec. Doc. No. 900072; 1975 Hearings, at 10-11. The memorandum said that the Interior Department would determine the amount of water available from the main stem reservoirs for irrigation and the extent to which that water would not be needed for irrigation; the Army then would

determine how much of that excess water could be made available for industrial uses. Admin. Rec. Doc. No. 900072, at 1. The Secretary of the Interior was authorized then to contract for that water, on terms acceptable to it and the Army. *Id.* The memorandum was to last two years, *id.* at 2, but because of an extension, it did not expire until December 31, 1978. Letter from the Commissioner of the Bureau of Reclamation to the Assistant Secretary for Land and Water Resources, November 5, 1980, Admin. Rec. Doc. No. 900241, at 1. The Corps, in refusing to agree to another extension, pointed out that industrial water no longer was needed urgently and that the Interior Department had not executed a single contract for water delivery under the memorandum. Letter of Col. Selleck to E. R. Wilde, October 4, 1978, supra. However, the Interior Department later announced that it intended to contract unilaterally for service of up to one million acre-feet of water for industrial uses from the main stem dams. Admin. Rec. Doc. No. 900241, at 1.

ETSI had expressed interest in water from Oahe long before the memorandum of understanding had expired. On December 5, 1973, ETSI asked the Corps for permission to remove 75,000 acre-feet of water annually from Oahe for use in a coal slurry pipeline, 1975 Hearings, at 10, and on December 18, 1974, ETSI made a similar request to the Bureau, 1975 Hearings, at 9. On July 2, 1982, the Secretary of the Interior and ETSI executed an "Industrial Water Service Contract." Admin. Rec. Doc. No. 900331. The contract said ETSI had received a conditional water permit from the South Dakota Conservancy District for an annual diversion of 50,000 acre-feet from Oahe Reservoir and that ETSI now sought the Interior Department's approval for diverting 20,000 of the acre-feet awarded by the conditional permit. Although the contract said that this decision had been reached "after consultation with the Secretary of the Army," it did not say whether the Army favored or opposed the contract. The contract was to last for

forty years and said that the water was to be used in a coal slurry pipeline. At the time the contract was signed, neither the Army nor the Interior Department had executed any contracts for the use of water from the main stem reservoirs for irrigation purposes. 128 Cong. Rec. S8477 (daily ed. July 16, 1982) Table I, n. 3.

The issue now before me is whether the Secretary of the Interior had the authority to execute the ETSI contract. But before I address that issue I must consider South Dakota's amicus curiae briefs, which contend that the federal government cannot "sell" water but can only "contract for" water. Representatives of western States have resisted the former term, because they believe it implies that the United States owns the water. 90 Cong. Rec. 8231 (statement of Sen. Millikin), 128 Cong. Rec. S8482 (daily ed. July 16, 1982) (statement of Sen. Wallop); but see 90 Cong. Rec. 8231 (statements of Reps. Overton and White). Solely to avoid needless controversy, I shall avoid the term "sell." The existence of such a propriety interest is not in question here. South Dakota's assertion that it owns and absolutely controls the water in Oahe Reservoir ignores the federal government's interest in exercising some control over water, see *California v United States,* 438 U.S. 645, 668, n. 21, 679 (1978), the relation of navigable streams to interstate commerce, the federal government's sizable investment in the construction and operation of Oahe Reservoir, and the Flood Control Act's express grants of authority to federal agencies in regard to dams built by the federal government. Because the United States has an interest in controlling Oahe Reservoir, South Dakota cannot successfully argue that the issue of which federal officials may exercise that control is irrelevant.

II. Substantive Merits

A.

The plaintiffs argue that nothing in the Flood Control Act permitted the Secretary of the Interior to sign the contract with ETSI. The defendants contend that § 9(c) of the Flood Control Act, coupled with § 9(c) of the Reclamation Project Act, P.L. 76-260, 53 Stat. 1187, 1194 (1939), authorized the Secretary's action. The contract itself says that it was authorized by those two sections. Admin. Rec. Doc. No. 900331, at 1. Section 9(c) of the Reclamation Project Act allows the Secretary of the Interior to enter contracts to furnish water for municipal or miscellaneous purposes[2], subject to certain repayment requirements. The Flood Control Act, after adopting the Pick, Sloan, and Pick-Sloan plans in § 9(a), says in § 9(c) that "the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws," including the Reclamation Project Act of 1939. The defendants argue that § 9(c) of the Flood Control Act incorporates the Reclamation Project Act's provision which allows the Interior Department to furnish water for miscellaneous purposes from dams built under the Flood Control Act.

At least two courts have accepted this incorporation theory in regard to dams built by the Bureau of Reclamation. In *Environmental Defense Fund, Inc. v Morton,* 420 F. Supp. 1037, 1040-1043 (U.S.D.C. Mont. 1976), the court allowed the Bureau to furnish water for industrial purposes from the Yellowtail and Boysen Reservoirs, which the Bureau had built as reclamation developments under the Flood Control Act. The court's opinion said that "miscellaneous purposes" included industrial use, and pointed out that department had told

[2] The parties disagree on whether a coal slurry pipeline is a miscellaneous use as contemplated by the Reclamation Project Act. My disposition of the authority issue makes resolution of this secondary question unnecessary.

Congress that it was selling water from its Flood Control Act dams for such purposes and Congress had not halted the practice. The district court's ruling on this issue was affirmed on appeal, although other parts of the decision were reversed. *Environmental Defense Fund, Inc. v Andrus,* 596 F.2d 848, 850 (C.A. 9th Cir. 1979).

This holding, however, concerned only dams built by the Bureau of Reclamation. Although the defendants contend that the holding also applied to the Missouri River's main stem dams, the appellate court's statement of the controverted issues referred only to the Yellowtail and Boysen Reservoirs. *Id.,* at 850. The district court's opinion discussed only those two projects, which are in the Yellowstone Basin, and projects built in the Upper Missouri River Basin. 420 F. Supp. at 1041-1042. Neither basin contains the main stem dams built by the Corps. See Sen. Doc. No. 191, at 49-50, 53, 54-55. Furthermore, even an intentional reference to the main stem dams would have been dictum. As for as I know, no court has ever considered whether the Flood Control Act and the Reclamation Project Act should be read together to allow the Interior Department to furnish water for industrial purposes from a main stem reservoir such as Oahe.

B.

Three factors persuade me that Oahe Dam was not a reclamation or power development to be undertaken by the Secretary of the Interior pursuant to § 9(c) of the Flood Control Act but was built under § 9(b), which concerned projects to be built by the Corps.

First, Oahe Dam was built by the Corps, and the dam and reservoir always have been operated and maintained by the Corps. In 1944, the Corps and the Bureau agreed that the Corps was to build, operate, and maintain Oahe because of its importance to flood control and navigation. H.R. Doc. No.

475, at 7; Sen. Doc. No. 191, at 4, 7. Proponents of the Flood Control Act said the Corps should build and control those dams in the basin which were primarily for flood control and navigation, 90 Cong. Rec. 8315, 8625 (statements of Sen. Overton), 9282 (statement of Rep. Whittington). There is no dispute that the Corps built Oahe.

Even the Department of Interior has recognized repeatedly that Oahe is controlled by the Corps. In 1957, the department's assistant solicitor said that since his department had not built the main stem dams, it did not consider them reclamation developments and was not depositing revenues from their electrical production into the reclamation fund. Missouri Basin Water Problems: Joint Hearings before the Senate Committee on Interior and Insular Affairs and the Senate Committee on Public Works, 85th Cong. 1st Sess. (1957), Part 2, at 318, 319 (hereinafter cited as 1957 Hearings) (testimony of Edward Weinberg). A 1974 memorandum by the department's solicitor, upon which the department relied in asserting that it unilaterally could market Oahe's water, said that "the Corps has six dams and reservoirs on the Missouri River." Letter of the Solicitor to the Secretary of the Interior, November 27, 1974, at 2, Admin. Rec. Doc. No. 900065. The 1975 Memorandum of Understanding, signed by the Secretary of the Interior, says that the Army was to "retain all operational and managerial control" over the mainstem reservoirs, Admin. Rec. Doc. No. 900072, at 1, and even the ETSI contract says that the Corps "constructed and is operating" Oahe. Admin. Rec. Doc. No. 900331, at 1. Except for the fact that the Bureau investigated the feasibility of erecting a high dam at Oahe by conducting surveys and exploratory drillings, see 1944 Hearings, at 508 (testimony of Col. Reber), and 517-518 (testimony of W. G. Sloan), the defendants have not pointed to any evidence that the Interior Department has assisted in the construction, operation, or maintenance of the Oahe Dam and

Reservoir. All the evidence before me is that Oahe was undertaken by the Army, not by the Interior Department, and therefore is not covered by § 9(c).

The second factor is that Oahe's dominant purpose was flood control, and it has not been used for irrigation. The Sloan Plan said that Oahe should be used to irrigate 750,000 acres of land in the James River Basin of eastern South Dakota. Sen. Doc. No. 191, at 115-116. The Sloan Plan did not say who would build the necessary irrigation works or when they would be built. The Pick-Sloan plan said merely that Oahe was to "be developed in accordance with" the Sloan Plan. Sen. Doc. No. 247, at 6. The Corps finished the main dam in 1962, as I have said, but the Interior Department did not begin work on the irrigation works until sometime between 1968 and 1975. See Act of August 3, 1968, P.L. 90-453, 82 Stat. 624, 625; 1975 Hearings, at 9. Congress later authorized the Interior Department to cancel construction, WEB Rural Water Development Project Act of 1982, P.L. 97-273, § 3(a)(1) and § 4, 96 Stat. 1181, 1182, and South Dakota opposes any further construction, S.D. Cod. Laws Ann. § 46A-1-78 (1983). As of 1982, there were no contracts in effect for water diversions from the main stem dams by any private irrigators, 128 Cong. Rec. S8477 (daily ed. July 16, 1982), Table I, n. 3, and there is no evidence that any Oahe water ever has been used for irrigation or will be in the near future. Indeed, only two years ago, when Senator Patrick Moynihan asked Congress to declare that the federal reclamation laws applied to all the reservoirs which the Corps had built, he exempted all of the main stem Missouri projects—including Oahe—from the scope of his unsuccessful proposal. 128 Cong. Rec. S8475 (daily ed. July 16, 1982). From the evidence before me, I find no basis for my considering Oahe to be a reclamation development.

The defendants contend that there are several reasons to consider Oahe as a reclamation development. ETSI argues, first, that only a small part of the Oahe Reservoir is needed for

flood control and navigation and a much larger part was allocated for irrigation. To support this ETSI cites Col. Reber's testimony that only twenty million of the sixty million acre-feet of storage in the main stem reservoirs is needed for flood control. But ETSI fails to provide any statistics which show that a majority of storage at Oahe—instead of the main stem reservoirs as a whole—is devoted to irrigation, and I do not know that any such statistics exist. The 1976 storage allocation for Oahe said that 5.5 million acre-feet was in "Inactive" storage, 1.1 million acre-feet exclusively for flood control, 3.2 million acre-feet for "Annual Flood Space and Multiple Use," and 13.7 million acre-feet for "Carryover Multiple Use." "Water for Energy: Missouri River Reservoirs Final Environmental Impact Statement," filing 202 in CV82-L-442, Exhibit 1, at 2-2, Table 2-1. The table lumps navigation, power, and irrigation storage together. Furthermore, Congress and the Bureau of Reclamation considered flood control and navigation to be Oahe's dominant purposes, regardless of how much storage space those uses require. See 1944 Hearings, at 611 (statement of Sen. Overton); 90 Cong. Rec. 8625 (statement of Sen. Overton) (Corps to build only flood dams whose primary purpose is flood control); H.R. Doc. No. 475, at 7 (letter of H. W. Bashore). See, also, 1944 Hearings, at 671 (statement of Col. Reber) (amount of storage needed for a particular use does not establish the priority of that use). And, even if Oahe was an irrigation development, it was not undertaken by the Interior Department.

ETSI also argues that most of the costs and benefits of developing the basin were attributable to irrigation. But ETSI's statistics are for the entire basin, so they include the many irrigation dams built on the Missouri River's tributaries. Actually, only 18.1 per cent of Oahe's cost was allocated to irrigation. 128 Cong. Rec. S8479 (daily ed. July 16, 1982) Table II.

The defendants also contend that Oahe is a reclamation development undertaken by the Interior Department because the Pick-Sloan Plan and the Flood Control Act gave the Bureau and the Corps joint and coordinate jurisdiction over the main stem dams, with control allocated by function, pointing out that the Act's legislative history repeatedly says that the Interior Department is to regulate irrigation storage in reservoirs built by the Corps. They also observe that the Pick-Sloan Plan's sole discussion of control says that the Bureau should determine the main stem reservoirs' capacity for irrigation. Sen. Doc. No. 247, at 1. Col. Reber's testimony indicates that if the Corps were to be allocated a specific amount of storage space for its purposes, while the Bureau were to receive specific space for irrigation, the two agencies could operate independently, 1944 Hearings, at 729, but he also said that divided control of a reservoir would be impractical. Rivers and Harbors Omnibus Bill: Hearings before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess. (1944), Part 1, at 1242.

I am persuaded that Congress did not intend to create joint and coordinate jurisdiction over each dam. The statements of congressmen, Secretary of the Interior Harold Ickes, and officials of his department show that the basin's development was to be cordinated by assigning construction, operation, and control of each dam to the agency with the dominant interest in the dam: the Corps would build flood control dams and the Bureau would build those dams intended primarily for irrigation; the Bureau's interest in the irrigation aspects of a flood control dam would be accommodated by letting the Bureau control the irrigation distribution system, not the water or storage space in the reservoir.

Although many people discussed the division of control over the main stem reservoirs, nobody said that the Bureau's level of control over certain water stored for irrigation in Corps-built dams was so complete that the Bureau could furnish that

irrigation water for nonirrigation purposes—i.e., industrial or miscellaneous uses. Indeed, as I shall discuss later in more detail, Secretary Ickes expressly distinguished irrigation and industrial uses. 1944 Hearings, at 312. It also is significant that nobody said that the Bureau was to have complete control over a specific block of water which had been reserved for irrigation in a reservoir built by the Corps; the strongest support for that proposition is Rep. Whittington's statement that reclamation storage should "be under the supervision of the Interior Department." 90 Cong. Rec. 4127. In contrast, there were many statements which gave authority over flood control dams to the Corps of Engineers. The Bureau itself said that the main stem dams "should be constructed, operated and maintained by the Corps of Engineers." Letter of H. W. Bashore, H.R. Doc. No. 475, at 7. Senator Overton, the Flood Control Act's primary sponsor in the Senate, explained:

> "Someone must have control of a dam. If it is a flood-control or navigation dam, the Secretary of War has charge of it, and if it is an irrigation dam, the Secretary of Interior has charge of it."

90 Cong. Rec. 8315. See, also, 90 Cong. Rec. 8245 (statement of Sen. Overton). Senator O'Mahoney said:

> "The flood-control policy envisaged the construction of vast new works which would store great amounts of water, over which the War Department and the Army engineers would have jurisdiction. . . . [S]o far as the War Department is concerned, it should have jurisdiction over those works which are to be constructed primarily for flood control, but if they store surplus water, such waters should be made available for any purpose. . . ."

90 Cong. Rec. 8548. Neither senator qualified his statements or implied that the Interior Department had any authority over the water in reservoirs built by the Corps. Senator O'Mahoney

did say that surplus water should be made available for any use, but he did not say that the Interior Department was to make it available.

The main support for the defendants comes from the statements of several congressmen that the Interior Department should prescribe regulations for irrigation storage in reservoirs operated by the Corps. See 90 Cong. Rec. 4130 (statement of Rep. Curtis); 1944 Hearings, at 527 (statement of Maj. Gen. Reybold); 90 Cong. Rec. 4127 (statement of Rep. Whittington).

Section 6 of the House version of the Flood Control Act used the same language. Section 5 of the House bill applied the same language to a parallel situation and said that the War Department was to prescribe regulations for the use of flood control storage in all federal reservoirs. See 1944 Hearings, at 2.

However, Interior Secretary Ickes requested that Congress abandon that language. He said that § 6 of the House bill contained provisions which were "not entirely apt in their relation to the various technical features of the Federal reclamation laws" and he asked Congress to adopt a new section which said that when the Secretary of War determined that a new reservoir could be used for irrigation, the Secretary of Interior was authorized to "construct, operate, and maintain under the provisions of the Federal reclamation laws . . . such additional works in connection therewith as he may deem necessary for irrigation purposes," 1944 Hearings, at 313. Congress adopted Ickes' proposal as § 8 of the final Flood Control Act.

The difference between the two sections is striking: the former allows regulations about storage; the latter permits construction and operation of irrigation works which are added to a Corps-operated reservoir. The focus shifts from water in

the reservoir to water that has been removed from the reservoir. Furthermore, § 8 concerns only dams and reservoirs "operated under the direction of" the Army, indicating that the Army retains control of the water still in the reservoir.

It is significant that § 5 of the House bill, which required the War Department to prescribe regulations for flood control storage, was adopted without change as § 7 of the Flood Control Act. The implication that the authority to operate irrigation works and the authority to prescribe regulations are different is reinforced by the fact that the Department of the Army has prescribed regulations for the use of flood control storage at Bureau-built dams, 33 C.F.R. § 208.11, while, to my knowledge, the Code of Federal Regulations does not contain any Interior Department rules for the use of irrigation storage in reservoirs built by the Corps.

The defendants argue that Secretary Ickes would not have proposed new language that would have reduced his authority. This assumes that Ickes believed he enjoyed the authority which his successors now claim, but his statements on the subject are quite inconsistent with that assumption, as I shall explain later. Moreover, the purpose of his proposal was to clarify and affirm his authority to impose the new reclamation laws' acreage restrictions and repayment requirements on California landowners who were irrigating with water from reservoirs built by the Corps. *United States v Tulare Lake Canal Co.,* 535 F.2d 1093, 1106-1107 (C.A. 9th Cir. 1976), cert. denied 429 U.S. 1121 (1977). He did not need to control the irrigation storage to accomplish this purpose. Indeed, it is not clear that such control would have been helpful. His purpose was best accomplished by his new language, which said that water from Corps reservoirs could be used for irrigation only through irrigation works and distribution systems built by the Bureau under the reclamation laws, and his plan succeeded, see, e.g., 41 Op. Atty's Gen. 377 (1958); *Tulare Lake Canal*

Co., supra; 43 U.S.C. § 390ll(a)(2), although recently Congress has said that such restrictions do not apply in certain circumstances. 43 U.S.C. § 390ll(a).

My reading of Secretary Ickes' proposal, whereby the Secretary of War was to control the water in reservoirs built and operated by the Corps and the Secretary of the Interior was to control the additional irrigation works used to distribute the water, is consistent with a number of congressional remarks that the Interior Department was to control irrigation features or works. See, e.g., 1944 Hearings, at 457 (statement of Secretary Ickes); 90 Cong. Rec. 9282 (statement of Rep. Whittington); 90 Cong. Rec. 8245, 8625 (statements of Sen. Overton). It is also consistent with § 8's requirement that the Secretary of War must determine that the reservoir can be used for irrigation before the Secretary of Interior can build any irrigation works. If the Interior Department already controlled certain water in the reservoir because the reservoir had been built for flood control, navigation and irrigation, why should be it required to seek the War Department's approval to use that water?

My interpretation is also consistent with the control scheme proposed by the Bureau's Board of Review in the Sloan Plan. Sen. Doc. No. 191, at 11. The board said that the Corps should operate all reservoirs where flood control and navigation dominated, while the Bureau should operate all "irrigation features." *Id.* "Irrigation features" must mean the irrigation works built by the Bureau after the Corps finished the main dam; interpreting the phrase to include stored water and water storage space would conflict with the board's express statement that the Corps was to operate all reservoirs where flood control was the dominant purpose. I note that the board's suggestion that the Bureau prescribe regulations for irrigation storage was rejected when Secretary Ickes' replacement language was adopted.

In short, the congressional proceedings show that Congress intended the Corps to build, operate, and control the main stem reservoirs, while the Bureau was to build, operate, and control the irrigation works and distributions systems attached to those reservoirs.

The second major part of the defendants' argument regarding control of water stored for irrigation in reservoirs built by the Corps is based on the premise that the main stem reservoirs, including Oahe, contain water that has been stored for irrigation purposes but which will not be used for irrigation in the near future. The argument seems to be that once water storage is reserved or allocated for irrigation, the Interior Department assumes and retains control of that space and the water within it. As I recall Secretary Ickes' comment that industrial uses of water are not considered to be reclamation or irrigation uses, 1944 Hearings, at 312, I find it curious that the Interior Department is arguing, in effect, that having obtained control of certain water because of the water's intended use for irrigation, it can abandon that use (in the sense that no Oahe water has ever been used for irrigation and the Department does not expect that any will be used for irrigation for some time) and then use that water for a nonirrigation purpose.

The defendants have not pointed to any evidence which would show that specific storage space in Oahe Reservoir was assigned to irrigation. Instead, Col. Reber testified that in a multiple-purpose dam, a single block of water is allocated for navigation, power production, and irrigation together, 1944 Hearings, at 729, and statistics on storage allocation show this was done at Oahe. See "Water for Energy," supra, at 2-2, Table 2-1; 128 Cong. Rec. at S8479-8480 (daily ed. July 16, 1982) Table II. Earlier I said that joint coordination over a reservoir was possible if separate storage space was alloted for each purpose, but there is no evidence that separate allocations were made at Oahe. I also note that the defendants' briefs,

when discussing the water which the Interior Department allegedly controls, refer to different blocks of water. See ETSI brief of February 3, 1983, at 19 (one million acre-feet of water in the mainstem reservoirs allotted for industrial use by the Bureau and Corps in 1975), and at 14 (indeterminate amount of water intended but never used for irrigating the James River Basin); federal defendants' brief of March 15, 1983 (indeterminate amount of water stored in the mainstem reservoirs for irrigation); ETSI brief of December 2, 1983 (indeterminate amount of water reserved in Lake Oahe for irrigation purposes). These terms do not describe the same body of water, and one wonders how the Interior Department is to control what cannot be identified.

The more important point is that while Congress undoubtedly thought that some of Oahe's water would be used for irrigation, that intent and any allocation of storage space for irrigation purposes are material only to the extent that they show that Oahe is a reclamation or power development undertaken by the Secretary of the Interior. See § 9(c), Flood Control Act. The implied argument that the Interior Department's reservation of storage space for irrigation in a reservoir built by the Corps of Engineers can constitute a reclamation development undertaken by the Secretary of the Interior does not persuade me. The Secretary of the Army undertook and developed Oahe; his department built it, always has operated it, and always has maintained it. The Secretary of the Interior, at best, merely said that some of the space in the reservoir built and operated by the Army should be available for irrigation. I say "at best," because there is scant evidence that the Secretary of the Interior ever took any action in regard to Oahe. The Pick-Sloan Plan said that his department was to determine the capacity of the reservoir for irrigation, Sen. Doc. No. 247, at 1, but the defendants have not presented any evidence that this determination was ever made. Instead, in 1957, Congress was told that a committee comprised of representatives from seven

states and seven federal agencies annually determined storage allocations for the upcoming year, and the Corps implemented those recommendations. 1957 Hearings, Part 1, at 131 (testimony of James R. Smith). Furthermore, as I earlier discussed, there is no evidence that a specific block of water was ever assigned solely for irrigation use. The only evidence that the Secretary of the Interior took any action in regard to Oahe is an unsupported assertion that he included capacity for municipal, industrial, and irrigation purposes in the main stem reservoirs. Letter of Solicitor to the Secretary of the Interior, November 27, 1974, Admin. Rec. Doc. No. 900065, at 4. I am not sure what, if anything, the Secretary of the Interior did in regard to reserving Oahe storage, but allocating space or determining reservoir capacity at a reservoir built, operated, and maintained by the Corps does not mean that the Interior Department undertook a reclamation development at Oahe.

The above discussion shows that the Corps, the Bureau, and Congress believed that § 9(c)'s reference to "reclamation and power developments undertaken by the Secretary of the Interior" meant the irrigation dams which the Bureau was to build on the Missouri River's tributaries, while § 9(b) encompassed the dams which the Army was to build, including Oahe.

C.

The text and purposes of §§ 5 through 8 of the Flood Control Act reinforce my belief that the Secretary of the Interior lacked authority to contract with ETSI.

It is clear that the Corps, the Bureau, and Congress believed that the Missouri River's water should not remain idle but should be put to the maximum possible use, including industrial uses, although the propriety of large industrial uses was not resolved. See 90 Cong. Rec. at 8547-8548. This does not mean that the Interior Department must be able to market unused irrigation water to industrial users. Section 6 of the

Flood Control Act authorizes the Secretary of the Army to make contracts for the domestic and industrial use of surplus water available at reservoirs under his control. It does not give similar authority to the Secretary of the Interior, and its legislative history shows that its grant of authority to the Army is exclusive.

Section 6 (§ 4 of the House bill) was enacted because the financial requirements of the then-existing law often prevented cities and factories from obtaining water from nearby dams built by the Corps. Section 6 solved this problem by allowing the Army to furnish water for domestic or industrial uses and to set the rates for such use. 90 Cong. Rec. 4126 (statement of Rep. Whittington). Shortly after his explanation, Rep. Whittington addressed § 6 of the House bill, which said that the Interior Department was to prescribe regulations under the reclamation laws for the use of irrigation storage in Corps reservoirs. 90 Cong. Rec. 4127. This provision's reference to the reclamation laws was similar to § 9(c) of the Act as finally adopted, yet nobody suggested that the Interior Department could solve the problem by furnishing unused irrigation water. Instead, Rep. Whittington said that § 6 was needed so that "the Government" could provide water for domestic and industrial use, 90 Cong. Rec. 4197, implying that the Interior Department did not have sufficient authority. Rep. Whittington also said that § 6 would make the authority of the two departments comparable because it would give the Corps the power in reservoir districts that the Interior Department already had in reclamation districts, 90 Cong. Rec. 4134, which are associated with dams built by the Bureau, not by the Corps. Rep. Whittington's statement does not show, as the defendants claim it does, that the Interior Department could furnish industrial water from reservoirs controlled by the Corps.

Interior Secretary Ickes' discussion of § 6 (while it still was § 4 of the House bill) shows that he did not believe he could furnish unused irrigation water from Corps reservoirs for

industrial use. He knew that the section gave that authority to the Army, but he did not ask Congress to amend the section to include the Interior Department nor did he claim that his department already had such authority; instead, he said that the section "does not involve reclamation but covers merely the sale of water for industrial purposes." 1944 Hearings, at 312. Rep. Curtis and Rep. Whittington also said that the section concerned industrial uses, while irrigation was addressed elsewhere. 90 Cong. Rec. 4133, 4197. These remarks show that industrial uses and irrigation were placed in two separate categories, and there is no indication that the categories ever could be merged. There is no reason to believe that § 6's grant of authority to the Army was not an exclusive one.

Sections 5 and 7 of the Flood Control Act also support the plaintiff's position. Section 5 says that electricity produced at reservoirs "under the control of the War Department" shall be delivered to the Secretary of the Interior, who then shall sell it[3]. Section 7 authorizes the Secretary of War to prescribe regulations for the use of storage allocated for flood control at all federal reservoirs. These explicit grants of authority show that when Congress wanted to give an agency control over a particular function of the main stem dams, it did so expressly and not by the implicit, indirect method upon which the defendants rely. The absence of an explicit grant of authority is even more important because Congress considered a wide range of proposals for allocating control: one rejected amendment would have given complete control to the Bureau, see 90 Cong. Rec. 8616-8618, 8626, while another would have let the

[3] The federal defendants argue that § 5 does not apply to Oahe. The argument does not show that Congress intended to make a single implicit grant of authority to one agency, in contrast to its many explicit grants. Furthermore, the defendants' position is unreasonable. See 90 Cong. Rec. 9282-9283 (statement of Rep. Whittington); 1957 Hearings, at 323-326 (statements of Sen. Case and Sen. Anderson), 341 (testimony of Edward Weinberg), and 366-371 (memorandum of Interior Department Solicitor).

Army control irrigation. *Id.,* at 8458-8550. When debate is so broad in scope and so detailed in nature, it is unlikely that matters were left for implication. I believe that Congress said what it meant and did not intend to leave anything regarding authority to implication.

D.

The defendants argue that I should defer to the Interior Secretary's decision to sign the ETSI contract because it is the decision of an administrative agency and because it is supported by the 1975 Memorandum of Understanding between his department and the Army and by a 1974 memorandum of the Interior Department's solicitor.

The 1975 memorandum does not support the Secretary's decision, but could be read to mean that the Secretary entered it because he believed that he could not act unilaterally. I do not draw that inference, because the Secretary may have entered it for other reasons. Nor shall I defer to the 1974 memorandum, in which the department's solicitor said that the Flood Control Act and the Reclamation Projects Act, when read together, allow the Interior Department to contract with ETSI. Admin. Rec. Doc. No. 900065. The memorandum is just the solicitor's interpretation of several statutes; it does not employ any special technical expertise nor rely on any policy consideration. Therefore, it is entitled to little deference. *Texas Gas Corp. v Shell Oil Co.,* 363 U.S. 263, 270 (1960); *Hi-Craft Clothing Co. v National Labor Relations Board,* 660 F.2d 910, 914 (C.A. 3rd Cir. 1981). The memorandum and the Secretary's decision also attempt to expand the department's jurisdiction, and an agency may not decide the limits of its statutory power. *Social Security Board v Nierotko,* 327 U.S. 358, 369 (1946); *Office of Consumers' Counsel v Federal Energy Regulatory Commission,* 655 F.2d 1132, 1142 (C.A. D.C. Cir. 1980); *Hi-Craft Clothing Co.,* supra, at 916; *Office of Communication of the United Church of Christ v Federal Communications Commission,* 707 F.2d 1413,

1422-1423 (C.A. D.C. Cir. 1983). This is particularly true here, because the Interior Department is asserting control over reservoirs built and operated by the Army, which has disputed the Interior Department's authority to market water unilaterally. See Memorandum of Richard Kearney, Acting General Counsel of the Army, December 16, 1974, Admin. Rec. Doc. No. 900407, at 7, n. 1. When the chief attorneys for the two departments affected by a statute disagree, neither enjoys any deference.

My reluctance to defer to the Secretary of the Interior is strengthened by the fact that the department did not assert such authority while Congress was considering the Flood Control Act but waited until 1974. *Federal Trade Commission v Bunte Brothers, Inc.,* 312 U.S. 349, 351-352 (1941); *Federal Trade Commission v Miller,* 549 F.2d 452, 457 (C.A. 7th Cir. 1977). Additionally, deference is not proper when the agency's decision is neither adequately articulated nor reasonable. *Obremski v Office of Personnel Management,* 699 F.2d 1263, 1269 (C.A. D.C. Cir. 1983). The only expressed basis for the Secretary's decision was the 1974 memorandum of his solicitor, but that memorandum neither mentions the fact that § 9(c) of the Flood Control Act only applies to reclamation developments undertaken by the Interior Department nor explains why Oahe satisfies that requirement.

E.

Two other matters remain. First, the parties attached their exhibits to their briefs instead of filing them with supporting affidavits. I have not relied on any such exhibits which were not photocopies of congressional material or documents contained in the administrative record.

Second, South Dakota, participating as amicus curiae, argues that the entire issue discussed in this memorandum is irrelevant, because the Army has delegated its authority to the

Interior Department. It bases this argument on the fact that the Corps approved ETSI's request for permission to build an intake structure in Lake Oahe, which would be used to remove the water pursuant to the contract. As I understand it, the permit was granted pursuant to 33 U.S.C. § 403, whose purpose is to prevent private parties from building obstructions in navigable waters. *United States v Logan and Craig Charter Service,* 676 F.2d 1216, 1218 (C.A. 8th Cir. 1982). I do not know that the Corps could have rejected the request merely because it believed that the Interior Department could not have authorized the withdrawal of the water which will require the intake structure. Furthermore, the extensive briefs of the defendants do not raise this issue, even though several were submitted after South Dakota's briefs. Given the defendants' ample opportunity in which to present evidence or to argue on this point, I shall not delay my resolution of the pending motions.

The plaintiffs have shown that the Flood Control Act did not authorize the Secretary of the Interior to execute the ETSI contract, and I shall grant their requests for a permanent injunction barring the defendants from performing that contract.

Dated May 3, 1984.

BY THE COURT

/s/ WARREN K. URBOM

Chief Judge

APPENDIX D

Memorandum and Order dated February 12, 1985

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

STATE OF MISSOURI, et al,
Plaintiffs,

MEMORANDUM AND ORDER

vs.

COLONEL WILLIAM R. ANDREWS, JR. et al,
Defendants,

CV82-L-442

KANSAS CITY SOUTHERN RAILWAY COMPANY, et al,
Plaintiffs,

vs.

COLONEL WILLIAM R. ANDREWS, JR., et al,
Defendants.

CV82-L-443

The United States Court of Appeals for the Eighth Circuit has remanded this case for consideration and determination of whether the action is now moot. Based upon the record now completed, I conclude that the case is not moot.

The injunction dated May 5, 1984, prohibits the defendants from performing an industrial water service contract, dated July 6, 1982, between the United States and ETSI Pipeline Project. That contract is the immediate and primary target of this litigation. Central to the question of whether the action now is moot is: Are any issues relating to that contract still alive? My answer is: Yes.

The water service contract, if it is valid, obligates the United States to permit ETSI to divert up to 20,000 acre-feet of water annually from Lake Oahe in South Dakota for transport to the Powder River Basin in Wyoming and thereafter as the transportation medium in the coal slurry pipeline project and it requires ETSI to pay for that water service. In mid-1984 ETSI "decided to put this pipeline activity on the back shelf," deposition of Paul Doran, president of ETSI Pipeline Project, 1-9-85, 7:9, filing 438, but considers the contract to remain in effect. *Id.,* 10:10. A payment of $60,000 by ETSI was due in July 1984, but because of the injunction by this court it has not been paid. *Id.,* 10:14. ETSI considers the contract to be a valid asset to ETSI, because under some conditions it is assignable to others and because in the development of any other project ETSI would have need for the water supply represented by that contract. *Id.,* 8:6-22.

The United States considers that the contract is in "a hold pattern because of court actions." Testimony of Joseph Marcotte, Jr., regional director for the Bureau of Reclamation, Upper Missouri Region, 6:12, filing 438. The contract is considered to be valid, *id.,* 9:2, and continues to obligate ETSI to make payments, including one due in July 1984. *Id.,* 9:23. There has been no action by ETSI or by the United States to terminate the contract. *Id.,* 9:13-19; deposition of Paul Doran, 10:7. There is no automatic termination provision in the contract.

ETSI during the past ten years has invested more than 100 million dollars in the development of slurry technology, deposition of Paul Doran, 5:14, and outside of the ETSI project, continues to perfect and document the technology which it has been developing. *Id.,* 7:9-14. ETSI has terminated its contract with the South Dakota Water Conservancy to avoid making payments under that contract, in view of the shelving of the project which was the subject of the ETSI contract with the United States, but is continuing discussions with the State of

South Dakota to reach modified terms for continuation of a contractual arrangement for water rights in Lake Oahe. *Id.*, 9:6-24.

The Bureau of Reclamation has executed three contracts similar to the one between the United States and ETSI and is negotiating a fourth, testimony of Joseph Marcotte, Jr., 10:11-13:23, all or some of which are reliant upon the authority of the Secretary of Interior which is being challenged in the present actions and which is at the heart of the appeal now pending in the court of appeals.

County of Los Angeles v Davis, 440 U.S. 625, 631 (1979), sets the standard for mootness:

> " 'Simply stated, a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' *Powell v McCormack,* 395 U.S. 486, 496 (1969). We recognize that, as a general rule, 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.,* does not make the case moot.' *United States v W. T. Grant Co.,* 345 U.S. 629, 632 (1953). But jurisdiction, properly acquired, may abate, if the case becomes moot because
>
> (1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, see *id.,* at 633; see also *SEC v Medical Committee For Human Rights,* 404 U.S. 403 (1972), and
>
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. See, *e.g., DeFunis v Odegaard,* 416 U.S. 312 (1974); *Indiana Employment Security Div. v Burney,* 409 U.S. 540 (1973).
>
> "When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law."

The first condition of mootness has not been satisfied here, because each party has a legally cognizable interest in the final determination of the question of whether the Secretary of Interior had authority to enter into the ETSI contract. The contract has not been terminated and has not been abandoned. If the injunction is lifted on appeal, there is nothing to prevent ETSI and the United States from proceeding to implement the terms of the contract, including, as a minimum, the 1984 payment, and, as a maximum, the full development of the coal slurry project. That either ETSI or the United States or both could choose to terminate the contract and to require no performance under it does not mean that either must do so or that either has made an irrevocable choice to do so. If the injunction is lifted, the plaintiffs may well be directly affected by a rejuvenation of the project.

The second condition of mootness has not been met, because the putting of the project "on the shelf" by ETSI and the holding it "in abeyance" by the United States can scarcely be said to have "completely and irrevocably" brought the project to its knees. The implication is that the cause of the suspension has been primarily, at least, this court's action in enjoining enforcement of the contract. The propriety of that injunction will determine in all probability the permanency of the parties' decisions.

Another factor is of some weight. There is a strong public interest in the issue of whether the Secretary of Interior has the authority to enter into contracts like the ETSI contract. Others have been executed and still others are undoubtedly in the offing. Such consideration militates against mootness. Apropos is the case of *Dyer v Securities and Exchange Commission,* 266 F.2d 33, 47 (C.A. 8th Cir. 1959):

> "In still wider horizon, there also is a recognized right of judicial discretion, in the public interest, to deal with the validity or propriety of administrative regulations and actions, where they have justiciably been

> brought into court, even though they may perhaps have ceased thereafter to have a direct significance in the particular situation. This does not mean that a court is required or has the right to engage in a decision of this character in every such situation; but it is judicially entitled to do so where it appears that some general benefit may public-wise, or in relation to the possibility of further similar litigation, come from having it established whether the administrative agency has acted within or without its authority. One of the things, among others, that could tend to prompt such a consideration here is petitioners' repeated charge that the members of the Commission are holding-company-minded and have been biased and prejudiced against petitioners—a charge for which we find not the slightest basis in the record, and the cloud of which the Commission is entitled to have here lifted."

IT THEREFORE IS ORDERED that the above-entitled actions are not moot.

Dated February 12, 1985.

BY THE COURT

Chief Judge

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 Appendices A, B, C and D for Motion To File Complaint, Complaint and Brief in Support thereof, have been served by depositing same in a United States mailbox with postage prepaid, addressed to:

Hon. Robert Kerrey
Governor
State of Nebraska
State Capitol
Lincoln, Neb. 68509

Hon. Robert M. Spier
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Hon. Terry E. Branstad
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This day of August, 1985.

GIBSON, DUNN & CRUTCHER

Charles J. Meyers,
Counsel of Record