

No. 103 Original

Supreme Court, U.S.

FILED

OCT 11 1985

JOSEPH F. SPANIOL, JR.  
CLERK

**In the Supreme Court  
of the United States**

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OCTOBER TERM, 1985

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STATE OF SOUTH DAKOTA,  
*Plaintiff,*

v.

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

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BRIEF OF THE STATE OF WYOMING AS  
*AMICUS CURIAE* IN SUPPORT OF THE  
STATE OF SOUTH DAKOTA'S MOTION  
FOR LEAVE TO FILE COMPLAINT

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DAKOTA'S MOTION FOR LEAVE TO FILE  
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The State of Wyoming hereby submits its brief as *amicus curiae* in support of Plaintiff, the State of South Dakota, and for the reasons set forth below urges this Court to take original jurisdiction over this controversy.

The State of Wyoming has standing to file this brief pursuant to Rule 36.4 of the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

Although the State of Wyoming has no reservoirs built by the United States Army Corps of Engineers under the Flood Control Act of 1944, it is the site of several large reservoirs built by the United States Bureau of Reclamation. The State of Wyoming has exercised authority over the waters stored in those reservoirs by virtue of the constitutional provision declaring all of the natural waters within Wyoming to be the property of the state.<sup>1</sup> Wyoming, of course, does not assert absolute ownership of reclamation project waters in the proprietary sense of that word. The Wyoming constitutional provision, however reflects the degree of authority which states possess over all of the waters within their boundaries, including the waters stored in Bureau of Reclamation reservoirs. Congress, in enacting Section 8 of the Reclamation Act of 1902,<sup>2</sup> expressly recognized this authority. The downstream Missouri River basin states of Nebraska, Iowa and Missouri have recently attempted to undermine the clear congressional policy embodied in Section 8. Because Section 8 affects not only South Dakota, but all states which are the sites of dams built under the Reclamation Act, Wyoming supports South Dakota's motion to have the Court assume jurisdiction over the controversy and to declare South Dakota's right, under the provisions of section 8 of the Reclamation Act of 1902, to exercise authority over its share of the waters of the Missouri River.

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1. Wyo. Const. art. 8, §1.

2. Pub. L. No. 57-161, 32 Stat. 388, 390.

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## SUMMARY OF THE ARGUMENT

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The case presented by South Dakota's motion and accompanying complaint presents a dispute between states over the use of the waters of an interstate river — the Missouri River. This case is not one in which an equitable apportionment of that river is sought. The case arises as a result of an attempt by Defendants to limit if not totally restrict South Dakota's right to exercise sovereign control over the authorized use of its share of the Missouri River.

South Dakota's motion asks the Court to assume jurisdiction under its original jurisdiction to resolve disputes between states.<sup>3</sup> For several reasons, this particular dispute presents justiciable issues that can only be resolved in this Court. First, it involves a dispute over the use of an interstate river between states acting as sovereigns and as *parens patriae* on behalf of their citizens. Next, it asks the Court for declaratory relief to resolve that dispute between states. Finally, there is no other forum in which to resolve this dispute.

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## ARGUMENT

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It is well settled that the creation of the Court's original jurisdiction has made justiciable issues that would otherwise have evaded judicial disposition.

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3. U.S. Const. art. III, §2, cl. 2 and 28 USC §1251(a).

Among those issues have been disputes over the allocation and use of interstate waters. *Kansas v. Colorado*, 185 U.S. 125 (1902), *Missouri v. Illinois*, 180 U.S. 208 (1901). In *Kansas v. Colorado*, the Court discussed the nature of its original jurisdiction as follows:

[T]he Constitution made some things justiciable "which were not known as such at the common law, - such, for example, as controversies between states as to boundary lines and other questions admitting of judicial solution." And as the remedies resorted to by independent states for the determination of controversies raised by collision between them were withdrawn from the states by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justiciable by that instrument.<sup>4</sup>

Although the majority of interstate water disputes heard by the Court have involved the apportionment of interstate streams, the Court has not limited its jurisdiction over interstate water disputes to only those questions.<sup>5</sup> While South Dakota does not seek an equitable interstate water apportionment, this dispute presents a justiciable controversy for the Court to hear and resolve under its original jurisdiction. In this instance, South Dakota acting as *parens patriae*, in the face of an attack by neighboring states,

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4. *Kansas v. Colorado*, 185 U.S. at 141.

5. *Missouri v. Illinois*, 180 U.S. 208 (1901) (involving interstate pollution).



seeks a judicial declaration of its interest in its share of the Missouri River. This Court provides the only forum to resolve this dispute between states.

The particular facts that give rise to South Dakota's motion are set forth in detail in the documents filed with its motion and need not be restated here. It is enough to note that the dispute before the Court involves the waters stored in Lake Oahe - a federal reservoir located in South Dakota. In particular, the dispute involves the question of South Dakota's authority to exercise control over its share of the water in Lake Oahe and its right to allocate the use of those waters in a manner consistent with the federal purpose of the reservoir.

The State of South Dakota relies on the language in the various reclamation acts to make the point that Congress expressly preserved state authority over the waters impounded in federal reclamation reservoirs.<sup>6</sup> Of particular interest is the language of Section 8 of the Reclamation Act of 1902 which provides in part:

[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior in carrying out the provisions of this Act, shall proceed in

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6. Flood Control Act of 1944, §1(b) Pub. L. No. 78-534, 58 Stat. 887; Reclamation Act of 1902, §8, Pub. L. No. 57-161, 32 Stat. 388.

conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof...

The meaning of that language was most recently at issue before the Court in *California v. United States*, 438 U.S. 645 (1978). In that case, the Court held that a state may impose any condition on the control, appropriation, use or distribution of water through a federal reclamation project that is not inconsistent with clear congressional directives.<sup>7</sup> Relying on the legislative history of the Reclamation Act of 1902, the Court declared that Congress intended to defer not only to the form of state water law but to its substance as well.

In reaching its decision, the Court discussed the circumstances and events surrounding the enactment of the Reclamation Act of 1902. The Court observed that Section 8 of the Act embodies the spirit of "cooperative federalism" reflected by the enactment of the act.<sup>8</sup> In fact, Congress expressly intended to defer to state water law. Congress declared an intent to "follo[w] the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water."<sup>9</sup> The Court went on to observe that at the time the act was considered, Congress expressed constitutional doubts

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7. *California v. United States*, 438 U.S. at 672.

8. *California v. United States*, 438 U.S. at 645.

9. *California v. United States*, 438 U.S. at 669 (quoting 35 Cong. Rec. at 6678).

as to its power to override state regulation of water. Congress was fully aware that the Court recognized the right of states to regulate and control the use of water within their borders.<sup>10</sup>

The State of South Dakota also argues that the language of the O'Mahoney-Millikin Amendment passed as a part of the Flood Control Act of 1944 further demonstrates congressional insistence on the primacy of state law, and its insistence that upstream uses be protected. The amendment provides:

The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.<sup>11</sup>

The State of South Dakota does not seek to establish itself as the absolute owner of the waters stored in Lake Oahe or any other federal reservoir. South Dakota recognizes that its authority is limited to the extent that it is not inconsistent with congressional directives. It seeks only to establish its right, power and authority over its congressionally

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10. *California v. United States*, 438 U.S. at 669, 670.

11. 58 Stat. 887, 889.

protected share of the waters stored for reclamation, irrigation and other purposes behind the mainstem dams on the Missouri River in South Dakota and to secure those rights against the claims of Defendant States of Nebraska, Iowa and Missouri.<sup>12</sup> The language set out above from the Reclamation Act of 1902 and the Flood Control Act of 1944 support South Dakota's claims. With regard to reclamation projects, Congress has consistently intended that state law be followed in all respects not inconsistent with the purpose of the projects. This Court has agreed with that view.<sup>13</sup>

Quite simply, the State of South Dakota is before the Court because Defendants ignored its sovereign rights when they attacked the allocation and use of South Dakota's share of the water stored in Lake Oahe. The attack was launched in the United States District Court for the District of Nebraska. *Missouri v. Andrews*, 586 F. Supp. 1286 (D. Neb. 1984). In that action, Defendants deliberately chose to ignore South Dakota's sovereign interest by not joining it as a party and then opposing South Dakota's move to intervene. All of this was done in an apparent attempt to avoid the appearance of an interstate dispute. The District Court obliged Defendants and ignored South Dakota's sovereign interest in its waters.

Despite Defendants' attempt to conceal their purpose, at the heart of their action was the notion that South Dakota lacks authority to control and

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12. Paragraph 25 of South Dakota's "Complaint in the Nature of a Petition to Quiet Title and for Injunctive Relief."

13. *California v. United States*, 438 U.S. 645 (1978).

beneficially use its portion of Missouri River waters.<sup>14</sup> Even more disturbing was the District Court's willingness to agree with Defendant and to litigate claims against the use of South Dakota's share of the Missouri River without allowing South Dakota to intervene and defend its asserted interests. It is interesting to note that the District Court recognized that, if the State of South Dakota were made a party, the court would lose jurisdiction over the suit because the controversy would then only be justiciable in this Court.

Obviously, this action is not an appeal from the District Court's decision in *Missouri v. Andrews*, 586 F. Supp. 1286 (D. Neb. 1984); it cannot be one. The State of South Dakota's motion to the Court, however, is prompted by Defendants' actions in the District Court and the District Court's handling of South Dakota's interest in that suit.

The State of South Dakota's motion asks the Court for leave to file a complaint in which it seeks a declaration of its rights under the federal reclamation laws. The request for declaratory relief is appropriate in this Court. Both the common law and the Declaratory Judgment Act<sup>15</sup> allow the Court to declare the rights of those before it in original actions. Although the Court has been reluctant to simply enter a declaratory judgment, it has been willing to fashion remedies which have essentially granted

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14. Paragraph 26 of Plaintiff's complaint in *Missouri v. Andrews*, 586 F. Supp. 1286 (D. Neb. 1984). (Appendix A accompanying South Dakota's motion).

15. 28 USC § 2201.

declaratory relief where it found a genuine controversy. *Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945).

In *Nebraska v. Wyoming*, Colorado argued that the declaratory relief requested could not be granted in the absence of an actual injury. The Court rejected that argument and chose to grant relief that can only be characterized as declaratory in nature. In responding to Colorado's claim, the Court noted that a dependable source of water was essential and that climatic conditions had:

precipitated a clash of interest which between sovereign powers could be traditionally settled only by diplomacy or war. The original jurisdiction of this Court is one of the alternative methods provided by the Framers of our Constitution.<sup>16</sup>

In this instance, as in *Nebraska v. Wyoming*, a genuine controversy exists over the use of the water of an interstate stream. The State of South Dakota has important interests in the use of its share of the water of the Missouri River. Those interests have been attacked by Defendants. An original action in this Court is the only means of resolving the dispute.

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## CONCLUSION

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Although invoking the original jurisdiction of the Court is an extraordinary procedure, it is the only appropriate means to resolve the dispute between the parties to this action. In view of the events that have

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15. 28 USC § 2201.

16. *Nebraska v. Wyoming*, 325 U.S. at 608.

led to the State of South Dakota's appearance before the Court, a genuine controversy exists between states. That controversy can be resolved by declaring South Dakota's right, power and authority to control, manage and provide for the use of reclamation and irrigation waters stored in federal reservoirs within its borders.

Respectfully Submitted,



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# PROOF OF SERVICE

The undersigned, counsel of record for the State of Wyoming, and a member of the Bar of the Supreme Court of the United States, hereby certifies that the foregoing Brief of the State of Wyoming as *amicus curiae* in support of the State of South Dakota's motion for leave to file complaint, has been served by depositing same in a United States mailbox with postage prepaid, addressed to:

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This \_\_\_\_\_ day of October, 1985

A handwritten signature in cursive script, reading "Archie G. McClintock", written over a horizontal line.

Archie G. McClintock  
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