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In The

**Supreme Court of the United States**  
October Term, 1985

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STATE OF SOUTH DAKOTA,  
*Plaintiff,*  
v.

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

— o —  
**BRIEF OF DEFENDANTS IN OPPOSITION TO  
MOTION FOR LEAVE TO FILE COMPLAINT  
AND APPENDIX**  
— o —

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**BRIEF OF DEFENDANTS IN OPPOSITION TO  
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**JURISDICTION**

The plaintiff seeks to invoke the original jurisdiction of this Court under Article III, § 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1). However defendant States of Nebraska, Iowa and Missouri contend that South Dakota fails to present an appropriate case or controversy for exercise of this Court's original jurisdiction.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Constitution of the United States

#### Article III, Section 2, Clause 2:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original jurisdiction

....

### United States Code

#### 28 U.S.C. § 1251(a):

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

### Flood Control Act of 1944,

#### 58 Stat. 887, Section 6:

That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. . . .

### Flood Control Act of 1944,

#### 58 Stat. 887, Section 9(c):

Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and



Senate documents, 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 . . . .

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### STATEMENT OF THE CASE

South Dakota has moved for leave to file a complaint in this Court, invoking its original jurisdiction. South Dakota alleges a dispute exists between it and Nebraska, Iowa, and Missouri because those states filed a suit in August 1982, against officials of the Department of Interior and Department of Army. (*Missouri v. Andrews*, No. CV-82-L-442, D. Neb. at Lincoln). See Complaint, ¶ 9.

That case challenged a Department of Interior decision to allow Energy Transportation Systems, Inc., or ETSI, a private concern interested in the construction of a coal slurry pipeline, to use Missouri River water. The purpose of the pipeline is to transport pulverized coal from Wyoming mines to southern states. In furtherance of the project, ETSI was to withdraw 20,000 acre-feet of water annually from the Oahe Reservoir, a project constructed and operated by the Army Corps of Engineers on the Missouri River located in North and South Dakota. ETSI planned to pipe the water to Wyoming, where it would be injected into the proposed coal slurry pipeline. App. 1, p. A-1.

In 1981, the South Dakota Conservancy District, a political subdivision of South Dakota, obtained from the state a permit to withdraw water from Oahe Reservoir. The District agreed to transfer its permit to withdraw the water to ETSI in December 1981. ETSI and the District

executed a contract the same day requiring the company to make annual payments to the District. App. 2. Both South Dakota and ETSI recognized in their contract that in addition to the state permit, ETSI needed approval from appropriate federal authorities before it could withdraw the water from the reservoir. App. 2, pp. A-3, A-5.

ETSI approached the Department of Interior and obtained an industrial water service contract purporting to authorize withdrawal of the water. In its July 1982 approval, the Department of Interior also announced that it would make available up to one million acre-feet of water annually from the Missouri River for energy use. App. 1, p. A-2; App. C-3-7. The Department of Interior's alleged authority to contract with ETSI was section 9(c) of the Flood Control Act of 1944, 58 Stat. 887, which Interior claimed incorporated the Reclamation Projects Act of 1939, 53 Stat. 1187. App. 1, pp. A-1, A-2.

Missouri, Iowa, and Nebraska feared that the Department of Interior's actions would result in substantial diversion of Missouri River waters to large industrial users outside the Missouri River Basin without regard to federal laws governing industrial use of the Missouri River main-stem reservoirs and without adequate environmental analysis. In August 1982, the States filed an action in United States District Court in Nebraska challenging the validity of the water service contract between ETSI and the Department of the Interior, claiming the Department of the Interior lacked authority to enter into such water service contracts. *Missouri v. Andrews*, App. A.

The complaint alleged, *inter alia*, that under the Flood Control Act of 1944, the Secretary of the Army, not the Secretary of Interior, had jurisdiction over the industrial use of water in the Oahe and other Army reservoirs along the Missouri River. App. A, ¶¶ 46-55. As admitted by South Dakota in this proceeding, the complaint in *Missouri v. Andrews* did not challenge the validity of ETSI's state water permit or its sales contract with South Dakota. Motion, ¶ 5.

South Dakota moved to intervene in *Missouri v. Andrews* in October 1982. On January 24, 1983, the Magistrate determined that South Dakota was only a "concerned spectator" to the federal actions in question. App. C-1-12. The Magistrate held that the action did not challenge South Dakota's water rights or appropriation of Missouri River water, but only the actions of federal officials. App. C-1-15.

One month later, South Dakota withdrew its motion to intervene and its appeal to the District Court of the ruling denying intervention. App. 3. South Dakota requested and obtained leave to participate as an *amicus curiae* in the subsequent legal proceedings. App. 4.

The District Court ultimately agreed with the plaintiffs' contention that the Secretary of the Army, not the Department of the Interior, had jurisdiction over use of Oahe water for industrial purposes. App. C-3. The District Court held that the Secretary of Interior's assertion of industrial marketing authority at Army reservoirs violated the Flood Control Act of 1944. App. C-3. On May 3, 1984, the Court granted partial summary judgment in favor of Missouri, Iowa, and Nebraska and en-

joined enforcement of the ETSI-Department of Interior contract. App. C-2. The federal defendants and ETSI appealed to the United States Court of Appeals for the Eighth Circuit.

ETSI later abandoned the project and cancelled its contract with the South Dakota Conservancy District, due to unrelated state court litigation. App. 5. ETSI's action resulted in forfeiture of the state water permit which it had previously obtained from South Dakota. App. 2, p. A-3; App. 5. The Court of Appeals upheld the District Court's conclusion that the case was not mooted by these developments on the grounds that the states were challenging not simply the ETSI contract but an entire federal water program, and because the Department of Interior had not cancelled ETSI's federal water service contract.

The parties and *amicus* South Dakota have fully briefed the cause on the merits and the Court of Appeals heard oral argument on August 20, 1985. South Dakota filed its motion for leave to file a complaint in this Court on August 16, 1985.

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### SUMMARY OF ARGUMENT

In this purported "quiet title" and "apportionment" action, South Dakota seeks to invoke this Court's original jurisdiction to decide prematurely a straightforward question of federal statutory law that the real parties in interest are thoroughly litigating in the lower federal courts. While South Dakota claims it is seeking to "quiet title" or "apportion" its ownership rights over Missouri

River water, it is in fact seeking an adjudication by this Court on the statutory question whether the Department of the Army or the Department of the Interior has jurisdiction over contracts with private industries regarding water held in federally built and controlled reservoirs within South Dakota. This Court should deny South Dakota leave to file its complaint and allow the pending federal court litigation to proceed to decide the statutory questions in an orderly and conventional fashion.

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## ARGUMENT

**I. BECAUSE THE UNDERLYING ACTION IS NOT AN "APPORTIONMENT" OR "QUIET TITLE" ACTION BUT RATHER A DISPUTE BETWEEN NEBRASKA, IOWA, AND MISSOURI AND THE FEDERAL DEFENDANTS, THIS IS NOT A CONTROVERSY BETWEEN STATES.**

The "controversy" requirement of 28 U.S.C. § 1251 (a)(1) requires that a complaining State establish not only that a case or controversy exists in the constitutional sense but also that the controversy is one directly arising between the States. *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976); *Alabama v. Arizona*, 291 U.S. 286 (1934). No such controversy exists here.

**A. The Only Issues in *Missouri v. Andrews* Are Questions of Interpretations of Federal Statutes.**

Whether invocation of this Court's original jurisdiction is proper depends upon characterization of the legal issues in *Missouri v. Andrews*. If that case presents an

“apportionment” or “quiet title” controversy between South Dakota and its neighboring states, exercise of this Court’s original jurisdiction might be appropriate. If the case simply involves an effort by Nebraska, Iowa and Missouri to force a federal agency to comply with federal law, however, no basis exists for exercise of this Court’s original jurisdiction.

South Dakota presented this precise question to the District Court in its motion to intervene in *Missouri v. Andrews*. The Magistrate held that Nebraska, Iowa, and Missouri had simply challenged the actions of the federal defendants and had not raised any issues in the nature of apportionment. “A fair reading of the complaint,” declared the Magistrate, does not include apportionment issues. App. C-1-15.

The Magistrate’s holding was correct. The complaint in *Missouri v. Andrews* alleges only that the ETSI-Interior water service contract and Corps of Engineers construction permits violated a number of federal statutes. In addition to violations of the Flood Control Act of 1944 (App. A, Counts 1, 3, 4), the complaint alleges violations of the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, (Count 2), the Water Supply Act of 1958, 43 U.S.C. § 390(b), (Count 5), and the Administrative Procedure Act, 5 U.S.C. § 706 (Count 6). It requests that the Interior-ETSI water service contract and the Corps of Engineers permits be declared void, and that the Court enjoin their performance. App. A, p. 33.

South Dakota’s peripheral involvement with ETSI does not transform *Missouri v. Andrews* into an attack on South Dakota. Consideration of the proper characteriza-

tion of actions brought under the National Environmental Policy Act may be helpful. A state that challenges federal action involving water rights under NEPA cannot be said to challenge a state's right to apportionment, but only the action of federal officials. Similarly, a challenge under the substantive and procedural provisions of the Flood Control Act of 1944 does not raise "apportionment" or "quiet title" issues, but only the question whether a federal agency complied with federal law.

South Dakota thus seriously mischaracterizes the issue when it informs this Court that "a dispute exists between the State of South Dakota and the States of Nebraska, Iowa, and Missouri over *the right, power, and authority of the State of South Dakota* to make use of, issue permits regarding and otherwise exercise its authority over its congressionally apportioned share of waters of the Missouri River stored for reclamation and irrigation purposes behind main-stem dams located within the territorial boundaries of the State of South Dakota." See Motion for Leave to File Complaint, ¶ 2.

At no time in *Missouri v. Andrews* have Missouri, Iowa, and Nebraska questioned the "right, power, and authority of the State of South Dakota" to issue water permits to ETSI or anyone else. They have never challenged the concurrent permitting authority of South Dakota, as both the Magistrate and District Court recognized. App. C-1-15, C-3-8. Indeed, these states have an interest similar to South Dakota's in state control over water, and have argued a state permit is a prerequisite to federal marketing. App. 8. The issue decided in *Missouri v. An-*

*drews* is whether the Department of Interior violated procedural and substantive provisions of federal law when it granted ETSI the federal water service contract for its proposed pipeline. App. C-3.

South Dakota's assertions before this Court that the District Court in *Missouri v. Andrews* lacked jurisdiction are raised three years after suit was filed and are directly contradictory to the position taken by South Dakota in *Missouri v. Andrews*. Attorney General Mark Meierhenry stated South Dakota's position in argument before the United States Magistrate:

*. . . . Particular litigation is, here is whether the federal action was proper under the federal statute. And we can be a party for the purposes of defending that action. Without giving rise to, at least in our opinion, and I think the court's aware there's not a great body of law in this area, but it would be our position that we would not divest the Court of its jurisdiction.* (emphasis added).

#### App. 6.

As recently as February 1985, nearly a year after the District Court had granted summary judgment, South Dakota urged the District Court to retain jurisdiction of *Missouri v. Andrews*. South Dakota stated, "the Bureau of Reclamation's authority to contract with industrial users was the true focus of this case . . ." App. 7.

Other features of South Dakota's complaint demonstrate that it is not an "apportionment" or "quiet title" action. The relief sought by South Dakota does not even include a request that this Court apportion Missouri River water among the affected states. Six of the other nine Missouri River Basin states, including Kansas, another



downstream state, are not named as parties as is typical in an apportionment action. *See, e.g., Arizona v. California*, 298 U.S. 558 (1936). South Dakota's complaint states that it does not seek an adjudication of rights to water from the Missouri River at places other than federal reservoirs. Complaint, ¶ 25.

South Dakota merely seeks a determination of its rights as against Nebraska, Iowa and Missouri to an undefined portion of the reclamation and irrigation waters<sup>1</sup> stored in federal reservoirs "subject to the appropriate federal authority." Complaint, ¶ 25. *Missouri v. Andrews* concerns only those "federal authority" issues; it does not create a controversy between states within this Court's original jurisdiction.

**B. The Flood Control Act of 1944 is not a Congressional Apportionment of the Missouri River.**

South Dakota claims that Congress "statutorily apportioned" to it waters stored for reclamation and irrigation purposes in federal reservoirs located in South Dakota under the Flood Control Act of 1944, 58 Stat. 887. This argument is based on the claimed similarity of the 1944 Flood Control Act to the Boulder Canyon Project Act, 45 Stat. 1057, which this Court held was a comprehensive apportionment of the Colorado River in *Arizona v. California*, 373 U.S. 546 (1963). The Acts are not remotely similar in purpose or structure.

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<sup>1</sup>As the District Court recognized, there is no specific storage allocation in Oahe Reservoir for irrigation and reclamation. App. C-3-13. Instead there is multiple use storage at Oahe.

The Boulder Canyon Project Act and its legislative history demonstrate that the purpose of the Act was to facilitate the apportionment of water to particular states. See *Arizona v. California*, 373 U.S. at 557-61. The Act was a Congressional attempt to adopt a solution to water appropriation issues among the Colorado River Basin states after years of effort by those states to ratify a compact. *Arizona v. California*, 373 U.S. at 555-59. Recognizing its apportionment purpose, the Act provided for ratification by Colorado River Basin states. *Arizona v. California*, 373 U.S. at 561-62.

Unlike the Boulder Canyon Project Act, the Flood Control Act of 1944 is not an apportionment statute. As recognized by South Dakota, the legislative history of the 1944 Flood Control Act shows an intent to reconcile potentially inconsistent and contradictory claims of jurisdiction between two federal agencies. See South Dakota Brief, pp. 12-13; App. C-3-2. Because the Flood Control Act of 1944 only sought to coordinate *federal* water policies, Congress did not require ratification by Missouri Basin states. The District Court's decision in *Missouri v. Andrews* has nothing to do with "statutory apportionment," but simply analyzes the powers of federal agencies in relation to each other.

## **II. SOUTH DAKOTA HAS NOT DEMONSTRATED IMMINENT INJURY TO LEGALLY PROTECTABLE INTERESTS SUFFICIENT TO INVOKE THIS COURT'S ORIGINAL JURISDICTION.**

As a jurisdictional prerequisite, South Dakota must demonstrate that the threatened injury by the defendant States is clearly shown to be of serious magnitude and imminent. *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976); *Alabama v. Arizona*, 291 U.S. 286, 292 (1934). South Dakota has failed to demonstrate "imminent injury" to a legally protectable interest as is necessary to support exercise of this Court's original jurisdiction.

### **A. South Dakota's Third Party Monetary Interest in the ETSI-Department of Interior Water Service Contract Is Insufficient to Establish Imminent Injury.**

#### **1. Lost Profit is not an Adequate Interest to Invoke this Court's Original Jurisdiction.**

South Dakota's claimed loss of benefits due to the inability of ETSI to perform its contract with the South Dakota Conservancy District is not an interest of either the nature or the gravity required for invocation of the original jurisdiction of this Court. In *Alabama v. Arizona*, this Court held that profits allegedly lost by Alabama as a result of its contractor's inability to sell convict-made goods in the defendant states did not establish sufficient injury to warrant recourse to this Court. 291 U.S. at 292. The Court further noted that the impact of Alabama's third party contract did not create a direct controversy between the states and that Alabama had not shown that the issues could not be conveniently resolved in litigation by its contractor, the party directly affected. These dual holdings of *Alabama v. Arizona* have full force in the present proceeding.

South Dakota's monetary interests in the federal water service contract with ETSI were even more remote than the state's interests in *Alabama v. Arizona*. The financial benefits from ETSI would have accrued to the benefit of the South Dakota Conservancy District and not South Dakota. (App. C-1-10). Neither the District nor the municipalities which might someday have received water from the pipeline sought to intervene in *Missouri v. Andrews*. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 98 (1972).

**2. Because ETSI Has Abandoned its Project, South Dakota Does Not Face Imminent Injury to its Third Party Monetary Interest if the Court Declines to Exercise its Original Jurisdiction in this Case.**

In July 1984 ETSI abandoned its effort to obtain Oahe Reservoir waters and cancelled its contract with the South Dakota Conservancy District. App. 5. A divided Court of Appeals later upheld the District Court's conclusion that the issues in *Missouri v. Andrews* are not moot because of the Department of Interior's interest in ascertaining the validity of its water marketing program. ETSI's cancellation of its contract with the South Dakota Conservancy District and resulting forfeiture of its state permit, however, clearly removed any potential threat of immediate injury to South Dakota. Original jurisdiction is properly invoked to prevent imminent threat of future injury and not to seek redress for claimed past wrongs. *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1028 (1983).

**B. South Dakota's Alleged Environmental Interest in the ETSI-Department of Interior Water Service Contract is Speculative and Unripe.**

South Dakota claims that if ETSI could not obtain water from the Oahe Reservoir, other less environmental-

ly advantageous alternatives might be considered to supply water for the coal slurry pipeline. As the Magistrate held, these claims are entirely speculative and unripe. App. C-1-13. They are even more speculative now that the ETSI pipeline project has been cancelled. *See* App. 5. If ETSI should seek to withdraw water from other locations in a fashion that impairs South Dakota's environmental interests, South Dakota could challenge such action at that time.

**C. A Request that this Court Determine in the Abstract a State's Ownership Interest of Water or its Power vis-a-vis the Federal Government Does Not Present a Justiciable Controversy.**

Indefinite assertions that the pending litigation in *Missouri v. Andrews* "clouds" South Dakota's right to grant permits for Missouri River water (Complaint, ¶ 23), are not a sufficient basis for invoking the exercise of the judicial power of this Court. In *New Jersey v. Sargent*, 269 U.S. 328 (1926), this Court denied New Jersey leave to file a complaint raising similarly indefinite assertions concerning the relative authority of the federal government and the state in waters within state borders. The Court held the complaint constituted a request for an advisory opinion on state sovereignty, and presented only a political question. *Id.*

As demonstrated above, *Missouri v. Andrews* does not "cloud" any right of South Dakota to issue permits for

Missouri River water.<sup>2</sup> The States of Nebraska, Iowa, and Missouri have always assumed that a state permit was necessary for the ETSI project and for other industrial withdrawals from the Missouri River. *See* pp. 9-10, *supra*.

Any controversy between South Dakota and federal agencies can be resolved by a South Dakota suit in District Court or in state courts. *United States v. Nevada*, 412 U.S. 534, 538 (1973). Indeed a water rights adjudication including the United States was filed by South Dakota in state court. *See In re General Adjudication of All Rights to Use Water and Water Rights on the Missouri River*, 531 F.Supp. 449 (D.S.D. 1982) (denying removal to federal court). If the Corps of Engineers or the Department of Interior refused to enter a contract and South Dakota asserted that the diversion could occur without federal approval solely on the basis of the state permit, the issue of state versus federal authority could be determined in an appropriate action. Because these issues are not presented in *Missouri v. Andrews*, that litigation can-

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<sup>2</sup>South Dakota hints that it disagrees with a Corps of Engineers regulation strictly limiting water available for marketing under section 6 of the 1944 Flood Control Act. Brief, p. 9. Any dispute between South Dakota and the Corps is not ripe because the Corps has not taken action on an application for industrial marketing, nor has South Dakota sought to challenge that regulation through appropriate administrative or judicial proceedings. An original action in the Supreme Court is not an appropriate vehicle to challenge a Corps regulation.

Moreover after the District Court's ruling in *Missouri v. Andrews*, South Dakota and the South Dakota Conservancy District applied to the Corps of Engineers for permission to withdraw water from Oahe under the Water Supply Act of 1958 for the ETSI project. *See* 49 Fed. Reg. 30,223 (1984) printed at App. 9. That application was put on hold due to cancellation of the pipeline project. 49 Fed. Reg. 32,097, 33,702 (1984), App. 9. South Dakota's argument further demonstrates that it is actually disputing actions of federal officials, and not actions of Nebraska, Iowa and Missouri.

not provide the basis for this Court to assume original jurisdiction to resolve them.

### III. THE ISSUES OF FEDERAL AGENCY ACTION CONCERNING WATER IN FEDERAL RESERVOIRS ARE BEING RESOLVED BY THE PROPER PARTIES IN THE APPROPRIATE FORUM.

Usually, litigants seeking to invoke this Court's original jurisdiction allege that no other forum exists for adjudication of the controversy. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). Here, however, South Dakota attempts to use the presence of litigation in another forum as a basis for invoking this Court's original jurisdiction. A review of *Missouri v. Andrews* demonstrates the insufficiency of South Dakota's attack on that litigation.

First, the action is nothing more nor less than a challenge to federal agency action under federal law. Nebraska, Iowa, and Missouri do not challenge the validity of any South Dakota water permits. The plaintiff states in *Missouri v. Andrews* do not seek a declaration of their share of Missouri River water against encroachment by South Dakota. That action simply seeks to enforce the Congressional mandate in the Flood Control Act of 1944 against a private party (ETSI) and a federal agency.

Second, all proper parties with respect to the narrow issues of federal statutory law are before the lower federal courts. South Dakota implies that it was denied intervention because to do so would create a dispute among states, thereby ousting District Court jurisdiction. *See* Motion, ¶ 9. This allegation does not fairly represent the Magistrate's ruling. The Magistrate denied South Dakota participation as a party as a matter of right under Fed.

R. Civ. P. 24(a), and held it was not an indispensable party under Rule 19, because its asserted interest in the resolution of the purely federal statutory questions presented was insufficient as a matter of law. App. C-1-15-18. Only permissive intervention was denied on jurisdictional grounds. App. C-1-17.

Third, after its unsuccessful motion to intervene, South Dakota elected not to appeal the ruling but to participate in the *Missouri v. Andrews* litigation as *amicus curiae*. App. 3, 4. South Dakota thus voluntarily spurned its opportunity to appeal the Magistrate's ruling to the District Court, the Court of Appeals and, ultimately, to this Court if necessary. Instead, South Dakota elected to allow the District Court to proceed to judgment, only to attempt to circumvent the litigation by filing this original complaint once the outcome in *Missouri v. Andrews* proved unfavorable. The issue of indispensability did not seem to concern South Dakota until an adverse judgment was entered. "[I]t is somewhat late to be concerned with this possibility now." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968). The original jurisdiction of this Court does not establish a substitute forum for issues that could have been timely raised by direct appeal. *Illinois v. Michigan*, 409 U.S. 36, 37 (1972). Any potential injury caused by South Dakota's decision to withdraw its motion to intervene and abandon any potential appeal is self-inflicted. *Pennsylvania v. New Jersey*, 426 U.S. 660, 663-664 (1976).

Fourth, the question whether the case in fact presents an "apportionment," "quiet title," or other controversy between the states rather than a contest between Nebraska, Iowa, and Missouri and the federal defendants has been fully litigated in *Missouri v. Andrews*. At this stage



of the proceedings, the best and most expeditious course is to allow that litigation to continue rather than begin a duplicative and unnecessary original proceeding in this Court before a special master on the identical issue. *Massachusetts v. Missouri*, 308 U.S. 1, 20 (1939). After a judgment is rendered by the Court of Appeals, the parties will have the opportunity to request that this Court review the jurisdictional question. If accepted by this Court, the issue would be presented with full briefing and a fully developed record rather than upon the bare (and incorrect) allegations presented in South Dakota's complaint in the present action. Cf. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 505 (1971). Moreover, if allowed to proceed in this Court, South Dakota will have created an enormous waste of judicial resources in the District Court and Court of Appeals.

In sum, there is no basis for South Dakota to invoke this Court's original jurisdiction in order to resolve issues being adjudicated in entirely appropriate lower federal court proceedings merely because South Dakota is not a named party in these proceedings. *Arizona v. New Mexico*, 425 U.S. 794, 796-798 (1976); *Massachusetts v. Missouri*, 308 U.S. 1, 19-20 (1939). To permit States to remove actions for judicial review of federal water permits to this Court whenever the State is an interested spectator would immensely expand the original jurisdiction of this Court.

## CONCLUSION

For the reasons set forth above, the States of Nebraska, Iowa, and Missouri respectfully request that the Court deny South Dakota's Motion for Leave to File Complaint.

Respectfully submitted,

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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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**APPENDIX TO BRIEF OF DEFENDANTS  
IN OPPOSITION TO MOTION FOR LEAVE  
TO FILE COMPLAINT**

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## **APPENDIX 1**

**Department of Interior Approval Document  
for ETSI Water Service Contract  
June 22, 1982**

(SEAL)

UNITED STATES DEPARTMENT  
OF THE INTERIOR  
BUREAU OF RECLAMATION  
WASHINGTON, D.C. 20240

JUNE 22, 1982

IN REPLY  
REFER TO: 440  
840.

Memorandum

To: Secretary of the Interior

From: Commissioner

Subject: Proposed Water Service Contract with the ETSI Pipeline Project, A Joint Venture for Use of 20,000 Acre-Feet of Lake Oahe Water Annually in a Coal Slurry Project—Pick-Sloan Missouri Basin Program, South Dakota

1. *Introduction:* Attached for your consideration and approval as to form is the proposed water service contract for 20,000 acre-feet of water service with the ETSI Pipeline Project, A Joint Venture (ETSI). ETSI's plan involves pumping water from Lake Oahe in South Dakota and transporting it by pipeline to a point near Gillette, Wyoming, mixing the water with coal mined in the Gillette area, and then transporting the slurry by pipeline to the middle Southern States for use in coal-fired, steam-electric generating facilities. The proposed contract has been prepared pursuant to Reclamation law, particularly section 9(c)(2) of the Reclamation Project Act of 1939 (53 Stat. 1187), and the Flood Control Act of 1944 (58 Stat. 887). Also attached are a copy of the Record of Decision signed by the Regional Director, Billings, Montana, and a fact sheet setting forth pertinent information concerning the proposed contract.

\* \* \*

4. *Background:*

The water being provided for industrial use from the main-stem reservoirs is limited to 1 million acre-feet destined for future Federal irrigation units of the P-SMBP which are not scheduled for development for periods of 40 years or longer. The Solicitor's opinion of November 27, 1974, concluded that the Secretary of the Interior has authority to market such water for interim industrial purposes. The MOU established administrative procedures among the Federal Executive Departments involved with managing the main-stem dams and reservoirs and facilities of the P-SMBP. The administrative procedures, as set forth by our memorandum of November 5, 1980 (copy attached), are being followed even though the MOU has not been further extended or renewed.

\* \* \*

6. *Findings and Recommendations:* All prerequisites required to allow the water delivery to ETSI to proceed under South Dakota law have been completed. The Governor of South Dakota, the South Dakota Legislature, and water users who stand to benefit from water deliveries in western South Dakota are solidly behind the proposed contract action.

\* \* \*

(Sgd) R. N. Broadbent

Attachments

*Approved:*

(Sgd) James G. Watt  
Secretary of the Interior

June 29, 1982  
Date

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## **APPENDIX 2**

Agreement for South Dakota Conservancy District  
to Assign a Water Right to Energy Industry Use  
to ETSI Pipeline Project  
December 23, 1981

A-3  
AGREEMENT  
FOR  
SOUTH DAKOTA CONSERVANCY DISTRICT TO  
ASSIGN A WATER RIGHT TO ENERGY  
INDUSTRY USE  
TO  
ETSI PIPELINE PROJECT  
\* \* \*

[3.A.2.] c. If the Circuit Court decision on the issuance or assignment of the Oahe Permit is appealed to the South Dakota Supreme Court, then ETSI shall pay the SDCD Two Million Dollars (\$2,000,000) on or before the fifth (5th) day following the date a decision by the South Dakota Supreme Court on such appeal is filed and becomes final, unless ETSI has cancelled this Agreement by giving the SDCD one of the following two notices:

(i) If no South Dakota Supreme Court decision on such appeal is filed and becomes final on or before October 1, 1982, then ETSI may give the SDCD notice of cancellation no later than the date such a decision is filed and becomes final; or

\* \* \*

In the event of cancellation by ETSI under this Paragraph A.2, the Oahe Permit shall revert to the SDCD \* \* \*

ARTICLE 6 — FEDERAL OAHE RESERVOIR  
PERMISSION

ETSI, at its sole cost and expense, shall be responsible for securing from the United States of America and its agencies any permission required for the storage, transportation or use of Oahe Reservoir Water, rights of

way for construction of necessary facilities to divert the water and for construction of the West River Aqueduct, in accordance with this Agreement. The SDCD shall assist and cooperate with ETSI in securing such permission, and shall be entitled to participate in negotiations, hearings or other procedures required for securing said permission, including any relevant agency or court proceedings. ETSI shall provide the SDCD with timely notice of such negotiations, hearings and proceedings, and shall furnish the SDCD with copies of all legal or public filings in connection therewith.

\* \* \*

*C. Cancellation — Use of Oahe Reservoir Water Prevented.* ETSI may cancel this Agreement by giving the SDCD notice of cancellation in the manner and for the reasons specified below:

1. If the United States of America or its agencies do not issue a decision on or before March 31, 1982, on any appropriate request by ETSI for federal permission required to utilize at least twenty thousand (20,000) acre-feet of Oahe Reservoir Water per year or required to obtain the necessary Federal Rights of Way for access to the Oahe Reservoir and construction of West River Aqueduct facilities on such Rights of Way, then ETSI may cancel by giving the SDCD notice of same. Any such notice shall be given no later than December 1, 1982, or the date of the decision on each respective request, whichever occurs first.

\* \* \*

*D. Cancellation Due to Pending Litigation.* If prior to the date of the first field welding of the main coal slurry pipe on the Coal Slurry Pipeline Project, any court or ad-

ministrative action other than direct appeals from original court or administrative actions described in ARTICLE 3 or Paragraph C of this ARTICLE 11 is pending which challenges the validity of the Oahe Permit or the ability to use Oahe Reservoir Water thereunder, ETSI may cancel this Agreement on thirty (30) days' notice to the SDCD, provided that:

1. Either ETSI, the SDCD, or South Dakota have brought on for hearing at the agency or trial court level, appropriate motions to dismiss, or for summary judgment or other summary disposition of such court or administrative action and such motions have been granted and appealed or have been denied, provided that if ETSI does not have standing to make such motions, and so informs the SDCD or South Dakota, the SDCD and South Dakota agree that if one or both do not make such motions in a timely manner, this condition specified in this Paragraph D.1 shall be deemed satisfied; and

\* \* \*

## ARTICLE 13 — LEGAL RELATIONSHIPS AND RESPONSIBILITY TO PUBLIC

A. *Permits, Licenses and Taxes.* Except as otherwise provided in this Agreement ETSI shall procure all permits and licenses, obtain any and all necessary safety waivers, pay all charges, fees and taxes, and give all notices necessary and incidental to the due and lawful prosecution of this Agreement and ETSI shall defend, indemnify and hold harmless the SDCD and South Dakota and their representatives from any liability resulting from ETSI's failure to do so. Any interest, penalties, or other liabilities arising from such failure shall be solely for ETSI's account.

\* \* \*

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### **APPENDIX 3**

**Notice of Withdrawal of Motion to Intervene  
filed by State of South Dakota  
February 28, 1983**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

No. CV-82-L-442

STATE OF MISSOURI, ET AL.,  
Plaintiffs,  
v.

COL. WILLIAM R. ANDREWS, JR., ET AL.,  
Defendants.

NOTICE OF WITHDRAWAL  
OF MOTION TO INTERVENE

COMES NOW the State of South Dakota, Applicant for Intervention and respectfully withdraws its Motion to Intervene and further withdraws its appeal from the magistrate to the district court.

Dated this 28th day of February, 1983.

/s/ Mark V. Meierhenry  
MARK V. MEIERHENRY  
ATTORNEY GENERAL  
State Capitol  
Pierre, South Dakota 57501-5090

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#### **APPENDIX 4**

Motion to Participate as Amicus Curiae  
filed by State of South Dakota  
February 28, 1983

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

NO. CV-82-L-442

STATE OF MISSOURI, et al.,  
Plaintiffs,

v.

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

MOTION TO PARTICIPATE AS  
AMICUS CURIAE

COMES NOW the State of South Dakota and respectfully moves for permission to participate as amicus curiae in this case for the reasons that South Dakota has an interest in the outcome of the litigation and is in a unique position by virtue of its participation in the administrative proceedings on the ETSI project to assist this Court on points of law and fact.

Dated this 28th day of February, 1983.

/s/ Mark V. Meierhenry  
MARK V. MEIERHENRY  
ATTORNEY GENERAL  
State Capitol  
Pierre, South Dakota 57501-5090

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## **APPENDIX 5**

**Cancellation Letter from ETSI Pipeline Project  
to South Dakota Conservancy District**

**July 31, 1984**

**Deposition of ETSI President**

**Paul Doran**

**January 9, 1985**

A-8

ETSI Pipeline Project, A Joint Venture  
P.O. Box 2521  
Houston, Texas 77252  
(713) 759-3131

July 31, 1984

South Dakota Conservancy District  
Secretary of the Department of  
Water and Natural Resources  
Joe Foss Building  
Pierre, South Dakota 57501

Re: Agreement for South Dakota Conservancy District to Assign a Water Right to Energy Industry Use to ETSI Pipeline Project ("Agreement"), dated December 23, 1981, among Energy Transportation Systems Inc., ETSI Pipeline Project, the South Dakota Conservancy District and the State of South Dakota, as amended

Gentlemen:

ETSI Pipeline Project, a Joint Venture created as a partnership under the laws of Delaware and now consisting of Northern Coal Pipeline Company, Overseas Bechtel Incorporated, Slurco Corporation and Texas Eastern Slurry Transport Company, hereby cancels the Agreement, pursuant to Article 3.A.2.c(i) thereof, by giving this notice to the South Dakota Conservancy District, since ETSI may cancel by giving notice under that provision no later than August 8, 1984.

Very truly yours,

\* \* \*

IN THE DISTRICT COURT  
OF THE UNITED STATES  
FOR THE DISTRICT OF NEBRASKA

CV82-L-442

STATE OF MISSOURI, ET AL

VS.

COLONEL WILLIAM R.  
ANDREWS, JR., ET AL

CV82-L-443

KANSAS CITY SOUTHERN  
RAILWAY CO., ET AL

VS.

COLONEL WILLIAM R.  
ANDREWS, JR., ET AL

DEPOSITION OF PAUL DORAN

January 9, 1985

Houston, Texas

(p. 4) EXAMINATION BY MR. HOURIHAN:

Q Would you state your name?

A Paul Doran.

Q Mr. Doran, where do you live?

A I live in Houston, Texas.

Q Where are you employed?

A I'm employed with Texas Eastern Transmission Corporation.

Q In what capacity?

A I'm president of Texas Eastern Products Pipeline Company, a division of Texas Eastern Transmission Corporation.

Q Do you have any affiliation or association with the ETSI joint—ETSI Pipeline Joint Venture Project?

A Yes, I have.

Q What is it?

A I'm currently president of the ETSI Project.

\* \* \*

#### EXAMINATION BY MR. THOMPSON

(p. 19) Has the ETSI Partnership terminated the coal slurry pipeline project from Wyoming to the south?

A Yes.

\* \* \*

(p. 21) Q Does the ETSI Pipeline Project, the partnership, have any present plans to use the water from the Oahe reservoir?

A We have no specific plans at this moment.

\* \* \*

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## **APPENDIX 6**

Transcript of Hearing Before  
United States Magistrate David L. Piester,  
Lincoln, Nebraska  
December 20, 1982

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

CV 82-L-442

THE STATE OF MISSOURI, et al.,  
Plaintiffs,

vs.

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

TRANSCRIPT

Hearing held before the Honorable David L. Piester,  
United States Magistrate, on December 20, 1982 in Lincoln,  
Nebraska.

\* \* \*

(p. 12) MR. MEIERHENRY: Well, I guess our view is the subject of the litigation is whether or not the procedure used by the federal defendants was correct. The subject of the litigation in my view is that. As far as the use of water out of the Missouri River, I don't think that's really the subject as far as the rule intends.

THE COURT: Okay. With respect to the argument that you alluded to about South Dakota's posture in terms of defeating jurisdiction, do you have a proposal by which South Dakota could be made a party without defeating the Court's jurisdiction?

MR. MEIERHENRY: Well, I think if we're made a party, and none of these issues that I think most of us are aware of that would give rise to whether or not the Sup-

reme Court's jurisdiction, I think if the situation is such that the judgments and orders will actually directly affect United States government in the procedure, that we could be a party insofar as this case is concerned without, without giving rise to Supreme Court jurisdiction. Because it is not a suit by Nebraska against South Dakota in the literal sense. If it is, there's almost a catch 22 provision in the sense that if that is the case our mere entry into the litigation divests the Court of jurisdiction, then I think we have to be a party any way and the Court won't have any jurisdiction if we're not in.

(p. 13) THE COURT: Are you suggesting that your participation be one of an amicus

MR. MEIERHENRY: No, certainly not. As I said before, we certainly have more of an interest than amicus. Well, it's the contract, first of all. We have a contract with ETSI. ETSI has a contract with the United States of America. Like two halves of a house, neither one very good without the other. It's not one contract. But certainly they're related and we have an interest for the purposes of intervention in both of them. Particular litigation is, here is over whether the federal action was proper under the federal statute. And we can be a party for the purposes of defending that action. Without giving rise to, at least in our opinion, and I think the court's aware there's not a great body of law in this area, but it would be our position that we would not divest the Court of its jurisdiction.

\* \* \*

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## **APPENDIX 7**

**Memorandum of Amicus Curiae South Dakota in  
Opposition to Motions of Plaintiffs to  
Dismiss in *Missouri v. Andrews*  
filed February 4, 1985**



IN THE UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF NEBRASKA

CIV. 82-L-442

STATE OF MISSOURI, et al.,  
Plaintiff,  
v.

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

CIV. 82-L-443

KANSAS CITY SOUTHERN  
RAILWAY COMPANY, et al.,  
Plaintiff,  
v.

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

MEMORANDUM OF AMICUS CURIAE STATE OF  
SOUTH DAKOTA IN OPPOSITION TO THE  
MOTIONS OF PLAINTIFFS TO DISMISS

(Filed February 6, 1985)

\* \* \*

The Plaintiffs have a heavy burden of demonstrating that this case is moot. *County of Los Angeles v. Davis*, 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979); *U.S. v. W. T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). In order to meet this heavy burden, Plaintiffs

must show that there is no reasonable expectation that the alleged violation will occur again *and* that new events have completely and irrevocably eradicated the effects of the alleged violation. *Id.* The Plaintiffs cannot meet this burden.

First, the Bureau of Reclamation's authority to contract with industrial users was the true focus of this case and was the issue appealed by the Defendants. Repeatedly the Plaintiffs asserted that this case was about the "program", "plan", or "policy" of the Department of the Interior.

\* \* \*

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## **APPENDIX 8**

Brief of Missouri, Iowa, and Nebraska on  
Issue of Mootness  
United States Court of Appeals  
for the Eighth Circuit  
filed March 15, 1985

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

Nos. 84-1674-NE; 84-1675-NE;  
84-1719-NE; 85-1720-NE; 84-1721-NE

STATE OF MISSOURI et al.,  
Plaintiffs-Appellees-  
Cross-Appellants,

v.

COLONEL WILLIAM R. ANDREWS, JR., et al.,  
Defendants-Appellants-  
Cross-Appellees.

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT  
OF NEBRASKA

BRIEF FOR PLAINTIFFS-APPELLEES STATES OF  
MISSOURI, IOWA, AND NEBRASKA ON  
THE ISSUE OF MOOTNESS

(Filed March 15, 1985)

\* \* \*

(p. 6)

The federal water service contract for 20,000 acre-feet of water from Lake Oahe was conditioned upon use of the water in a coal slurry pipeline.<sup>3</sup> [footnote omitted] The federal water service contract also required, as a condition precedent, a water permit from the State of South Dakota.

\* \* \*

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## **APPENDIX 9**

Corps of Engineers Notices of Intent  
Related to ETSI Coal Slurry Pipeline  
July 27, 1984; August 10, 1984; August 24, 1984

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

Intent To Prepare a Draft Supplemental Environmental Impact Statement (DSEIS) for a Proposed Water Storage Contract for a Coal Slurry Pipeline From Montana to Texas Using Missouri River Water From Oahe Reservoir in South Dakota

*AGENCY:* U.S. Army Corp of Engineers, Omaha District.

*ACTION:* Notice of Intent to Prepare a Draft Supplemental Environmental Impact Statement (DSEIS).

---

*SUMMARY:*

*1. Description of the Proposed Actions*

The State of South Dakota and the South Dakota Conservancy District propose to acquire, pursuant to the Water Supply Act of 1958, storage in Oahe Reservoir, South Dakota. The storage would be sufficient to yield 20,000 acre-feet of water annually on a firm basis for industrial use by Energy Transportation Systems, Inc. (ETSI) Pipeline Project in a coal slurry pipeline project. In connection with this, ETSI proposes to build a water pipeline from South Dakota to Wyoming and Montana and a coal slurry pipeline from Montana to southern Texas, which would require additional Section 10/404 and National Pollutant Discharge Elimination System (NPDES) permits. A Final EIS on a similar ETSI proposal was filed by the Bureau of Land Management (BLM) in 1981. However, a supplement will be prepared because project changes have been proposed and review by several agencies will be required.

The water delivery system would consist of an intake at Oahe Reservoir, pumping stations, buried pipe leading from Oahe Reservoir to northeastern Wyoming and to southeastern Montana, and an upland reservoir in Wyoming. The slurry system would consist of slurry preparation plants in Montana and Wyoming; buried pipe from Montana to Texas; holding ponds, pump stations and maintenance bases along the route; and tank farms and dewatering plants at user points. Cogeneration powerplants are also part of the proposal.

An industrial water service contract was issued to ETSI in 1982 by the Bureau of Reclamation (BR) for the proposed Oahe water. However, in a 1984 ruling, the U.S. District Court for the District of Nebraska enjoined the BR from performing that contract. Because of that ruling, the Omaha District has received an application from the State of South Dakota for Oahe Reservoir storage to provide Missouri River water. As the Federal agency responsible for marketing storage for the industrial water and for section 10/404 permit actions under the new proposal, the Corps is acting as lead agency in the DSEIS effort.

\* \* \*

Federal Register / Vol. 49, No. 156 /  
Friday, August 10, 1984 / Notices 32097

Corps of Engineers, Department of the Army

\* \* \*

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*SUMMARY:* 1. The Omaha District of the U.S. Army Corps of Engineers hereby cancels its Notice of Intent to Prepare a Draft Supplemental Environmental Impact Statement as published in 49 FR, page 30223, July 27, 1984. The DSEIS was to be prepared for a proposed water storage contract and other actions needed for a coal slurry pipeline from Montana to Texas using Missouri River water from Oahe Reservoir in South Dakota. The State of South Dakota had applied to the Omaha District for the contract, and the coal slurry pipeline project was sponsored by Energy Transportation Systems, Inc. (ETSI).

The Notice is cancelled because the pipeline sponsor, ETSI, has terminated its proposal to construct a coal slurry pipeline from Wyoming and Montana to southern states. In an announcement dated August 1, 1984, the firm cited protracted railroad opposition, which has brought about costly delays in securing necessary permits, rights of way, and other clearances for the project as the reason for termination. The cancellation of the project nullifies any need for environmental review associated with that project.

\* \* \*



33702                      Federal Register / Vol. 49, No. 166 /  
Friday, August 24, 1984 / Notices

Corps of Engineers, Department of the Army

Supplement to Cancellation of Intent To Prepare a  
Draft Supplemental Environmental Impact Statement  
(DSEIS); Proposed Water Storage Contract for the  
ETSI Coal Slurry Pipeline Project

*AGENCY:* U.S. Army Corps of Engineers, Omaha Dis-  
trict, DOD.

*ACTION:* Supplement to Cancellation of Earlier Notice  
of Intent.

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*SUMMARY:* As published in 49 FR 32097-32098, August  
10, 1984, the Omaha District of the Corps of Engineers  
does not presently intend to prepare a Draft Supplemental  
EIS for the ETSI project. However, the State of South  
Dakota has not withdrawn its application for water stor-  
age for the ETSI project. Should the State pursue a  
water storage contract, the Corps will conduct an appro-  
priate environmental review.

\* \* \*

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