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Supreme Court, U.S.

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

STATE OF SOUTH DAKOTA,

Plaintiff,

v.

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

Defendants.

REPLY BRIEF OF SOUTH DAKOTA IN SUPPORT OF
MOTION FOR LEAVE TO FILE COMPLAINT

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ARGUMENT

I.

THIS IS A CASE OR CONTROVERSY AMONG STATES

- A. In Disputing That Congress Apportioned The Waters Of The Missouri River By Enacting The Flood Control Act Of 1944, Defendants Concede The Existence Of A Case Or Controversy Among States.**

The core of the dispute between South Dakota and Defendant States is the right, power and authority of the State of South Dakota to make use of, issue permits regarding and otherwise exercise sovereign authority over its congressionally apportioned share of the waters of the Missouri River stored for reclamation and irrigation purposes behind mainstem dams located within the territorial boundaries of the State of South Dakota. *See Motion for Leave to File Complaint* at 1-2; *Complaint in the Nature of a Petition to Quiet Title and for Injunctive Relief* at 2-5, 7-12; *Brief in Support of Motion for Leave to File Complaint*, *passim*. In their *Brief in Opposition*, Defendants specifically claim that, "The Flood Control Act of

1944 is not a Congressional Apportionment of the Missouri River.” *Brief of Defendants in Opposition* at 11. In so doing, Defendant States formally advance here, as they have done in other forums in the past and will do in the future, their contention that no such congressional apportionment has occurred, demonstrating their intention to thwart South Dakota’s exercise of its right, power and authority confirmed by the congressional apportionment. Consequently, these States effectively have conceded the existence of the case or controversy brought before this Court for resolution in this case.

The question of whether a congressional apportionment has occurred is a question of federal law of national import, which this Court has a paramount responsibility to adjudicate. Such a question concerning the use of an interstate stream is, of necessity, a dispute among states because states are the parties most affected by a congressional apportionment scheme, or the lack thereof. See *Arizona v. California*, 373 U.S. 546, 564 (1963). This dispute assumes here for the first time the form of a lawsuit, simply because South Dakota has no other forum besides this Court for resolving a case or controversy with another State. The Defendant States cannot deny the existence of a dispute between South Dakota and themselves, yet simultaneously press their theory that no congressional apportionment has occurred, when the correctness of that theory is the fundamental controversy this Court is asked to adjudicate. The Defendant States are entitled to their view that there has been no congressional apportionment, and South Dakota is entitled to its view that there has been, but the only view that counts is that of this Court. Only this Court can determine whether or not a congressional apportionment has been made and whether, under Section 8 of the Reclamation Law of 1902, South Dakota has the principal right, power and authority to control the waters of the Missouri River within the borders of the State, subject only to clear congressional directives that override state law. *California v. United States*, 438 U.S. 645, 672-79 (1978).

B. *Missouri v. Andrews* Illustrates One Permutation Of The Case Or Controversy But Does Not Establish The Limits Of The Controversy.

Defendant States, in their Brief in Opposition, operate on the faulty premise that, “Whether invocation of this Court’s original jurisdiction is proper depends upon characterization of the legal issues in *Missouri v. Andrews*.” *Brief of Defendants in Opposition* at 7. Having contrived to exclude South Dakota from participating in *Missouri v. Andrews*, as they had to do in order to preserve jurisdiction in any court but this one, the Defendant States’ conclusion that the controversy in this case is not a controversy among states follows quite predictably from their premise. Because the premise is wrong, the conclusion is wrong. Artful pleadings that produce a distorted view of a controversy and exclude from view one of the principal parties to a dispute cannot defeat this Court’s constitutional authority to resolve disputes among states, even if one district judge has lent his imprimatur to such distorted pleadings. The suggestion that South Dakota is somehow at fault for not pursuing an appeal from denial of intervention is specious. If intervention had been granted, *Missouri v. Andrews* would have been dismissed and this case would still be here.

Missouri v. Andrews is relevant to this Court’s determination of its jurisdiction to resolve this controversy over congressional apportionment only because it provides an example of the Defendant States’ theory that no congressional apportionment has occurred and that South Dakota has no right, power and authority over its portion of the Missouri River waters. In *Missouri v. Andrews*, they have claimed that the Missouri River is overappropriated and that any use thereof by South Dakota violates the rights of Defendant States. See Appendix B-2. Moreover, they have called into question South Dakota’s authority over Missouri River waters with unmistakable clarity:

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.*

Appendix A-13 (complaint in *Missouri v. Andrews*, allegation no. 26 (emphasis added)); *see also Complaint in the Nature of a Petition to Quiet Title and for Injunctive Relief* at 9-10; Appendix B-1 (especially allegations of Defendant States nos. 6, 7, 49, 81, 86, 90 and 92).

Despite these and similar allegations, Defendants would have this Court believe that *Missouri v. Andrews* and this case are the same. *Missouri v. Andrews* is a suit under the Administrative Procedure Act asserting wrongful actions by federal officials. This is a case asserting that South Dakota has rights under a congressional apportionment. The Eighth Circuit cannot decide that claim, for South Dakota and South Dakota's claim are not before it. The Defendant States' scheme in *Missouri v. Andrews* is to obtain through the inferior federal courts a judgment that indirectly deprives South Dakota of its right, power and authority over its resources without South Dakota being heard.

South Dakota's response is an appropriate one under the Constitution: it asserts its rights in an interstate stream and denies the claims of the Defendant States. *Missouri v. Andrews* is certainly not a suit among states; Defendants did not want it to be such and in any event, it could not be such. This Court, and only this Court, can adjudicate the respective rights of the four litigant States in the River.

In essence the Defendant States, by claiming that this case is nothing more than *Missouri v. Andrews* revisited, seek to make this Court an accessory to their effort to deprive South Dakota of its rights in the Missouri River. The decision by the Eighth Circuit in *Missouri v. Andrews* cannot dispose of the claims made by South Dakota against Defendant States and *vice versa*. Only this Court can issue a definitive decree confirming the congressional apportionment and allocating rights in the Missouri River to South Dakota. In the absence of such a decree, South Dakota is immediately and irreparably harmed because a principal natural resource of the State has by the action of the Defendant States been, as a practical matter, removed from the jurisdiction of the State. Under the Constitution, this Court has the authority and the responsibility to adjudicate the dispute, for the State of South Dakota is without redress if this Court denies jurisdiction.

The claims of Defendant States, and their actions implementing their claims, cast a cloud on the right, power and authority of the State of South Dakota to manage its water resources and such claims as to interstate streams have been a well accepted ground for accepting jurisdiction in this Court. See, e.g., *Arizona v. California*, 373 U.S. 546, 564 (1963). Consequently, the instant action presents a case or controversy among states and this Court should dismiss Defendants' arguments based on the scope of *Missouri v. Andrews* and accept jurisdiction over this original action.

II.

**THIS CASE OR CONTROVERSY IS JUSTICIABLE
BECAUSE SOUTH DAKOTA HAS DEMONSTRATED THE
THREAT OF IMMEDIATE AND IRREPARABLE HARM**

In denying that South Dakota has demonstrated a sufficiently serious threat of harm to invoke this Court's original jurisdiction, Defendant States again base their argument on the faulty premise that *Missouri v. Andrews* defines the contours of the instant dispute. Thus, Defendant States assert that lost benefits from the ETSI contract are not an "adequate interest" to make this case justiciable, and in any event performance of the ETSI contract has been suspended. This suit is not about the ETSI contract; this suit is about the actions Defendant States took to interfere with that contract and threaten to take to interfere with any other exercise by South Dakota of its sovereign right to issue permits for and make contracts about the use of stored water from the Missouri River reservoirs.

It is not the legal issues in *Missouri v. Andrews*, carefully contrived to exclude South Dakota from participating in the case, that are crucial to justiciability in this case; it is the position that the States assert in that case that gives rise to justiciability in this case. *Missouri v. Andrews* is an action by the Defendant States that reflects both their intent and ability to interfere with the administration of South Dakota waters in South Dakota, and the allegations in that case make clear that the Defendant States have taken a formal position denying South Dakota's right, power and authority over such waters. These actions pose the threat of immediate, continuing and irreparable harm to the State of South Dakota.

Unless this Court takes jurisdiction of this case, every permit for the use of stored Missouri River waters granted by the State of South Dakota is under the threat of litigation from the Defendant States, a threat which chills if it does not destroy the ability of the State of South Dakota to make use of its waters. Allegations that South Dakota's use of the water threatens downstream drinking supplies, wildlife habitats and power generation impair South

Dakota's rights and administrative authority. *See* Appendix A-4 to A-6, paras. 6, 7 and 8. Such threat of continued harassment of the exercise of South Dakota's rights under the congressional apportionment poses severe harm to a western state like South Dakota whose economic survival is tied in large part to its water resources and the industries these sustain. The ETSI contract is not the universe; every attempt of South Dakota to use its Missouri River water faces challenge by the Defendants. As Defendants concede, original jurisdiction is properly invoked to prevent imminent threat of future injury. *See Brief of Defendants in Opposition* at 14. South Dakota has demonstrated a sufficient threat of immediate, continuing and irreparable harm to make this case justiciable and qualify it for this Court's original jurisdiction.

III.

THE CONSTITUTION AUTHORIZES AND THIS COURT SHOULD ACCEPT JURISDICTION IN A CASE PRESENTING IMPORTANT QUESTIONS OF FEDERAL LAW IN AN INTERSTATE DISPUTE

This Court has sometimes abstained from hearing cases within its original jurisdiction but has done so in the context of suits in its original but *nonexclusive* jurisdiction, such as suits by a State against municipal entities or private parties. *See, e.g., United States v. Nevada*, 412 U.S. 534 (1973); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *see also Arizona v. New Mexico*, 425 U.S. 794, 798-99 (1976) (Stevens, J., concurring). The prudential concerns developed in those cases have no application to a case such as this, which is in the Court's *exclusive* original jurisdiction and involves matters of federal law of national import as to which this Court is the primary overseer. *Cf. Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 497-500 (describing basis for declining to exercise certain types of its original jurisdiction). Congress has never diluted the category of original jurisdiction invoked here, suits by one state against other states, in the way that it has done for all other categories of this Court's original

jurisdiction, because in its judgment there is no other appropriate forum besides this Court.

Therefore, Defendant States' suggestion that this Court decline jurisdiction in favor of the Eighth Circuit or the District Court is misplaced. Neither of those courts have jurisdiction to resolve the controversy among States presented in the instant case. The fact that Defendants have led those courts to believe they had jurisdiction in *Missouri v. Andrews* does not diminish this Court's authority or responsibility under the Constitution to decide the instant controversy. Defendants' suggestion that this Court can resolve the congressional apportionment issues raised here by granting certiorari in *Missouri v. Andrews* once the "parties" request it and present a "full briefing" is disingenuous in view of South Dakota's status as a nonparty in that case. See *Brief of Defendants in Opposition* at 19. Further, Defendants have only themselves to blame for the "enormous waste of judicial resources," *Brief of Defendants in Opposition* at 19, that they have caused by contriving to bring their action in *Missouri v. Andrews* in the lower federal courts to evade this Court's original jurisdiction.

IV.

CONCLUSION

South Dakota is not seeking to “remove” *Missouri v. Andrews* to this Court. Instead, it is seeking to resolve the entire case or controversy among these States respecting congressional apportionment of the Missouri River in this Court in accord with constitutional and statutory dictates. To that end, it respectfully requests that this Court grant its Motion For Leave To File Complaint.

Respectfully submitted,

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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 Reply Brief Of South Dakota In Support Of Motion For Leave To File Complaint have been served by depositing same in a United States mailbox with postage prepaid, addressed to:

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