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JOSEPH F. SPANIOL, JR.,  
Clerk

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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

---

*ON MOTION FOR LEAVE TO FILE  
ORIGINAL BILL OF COMPLAINT*

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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## **QUESTION PRESENTED**

Whether leave should be granted at this time for the filing of a bill of complaint by the State of South Dakota against the States of Nebraska, Iowa, and Missouri to resolve conflicting claims by those states concerning their sovereign authority over the waters of the Missouri River.



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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

## STATEMENT

Plaintiff, the State of South Dakota, has requested leave to file an original action in this Court against the States of Nebraska, Iowa, and Missouri (the lower basin states) to establish its sovereign authority to control the use of water from the Missouri River presently stored in federal mainstem reservoirs within its borders. South Dakota contends that the Flood Control Act of 1944 (FCA), ch. 665, 58 Stat. 887 *et seq.* (partially codified in scattered sections of 16, 33, and 43 U.S.C.), worked a statutory apportionment of these waters and that the lower basin states—through legal challenges to the federal

government's Missouri River Basin activities—have contested South Dakota's right to control the use of its apportioned share. The lower basin states contend that there presently is no genuine controversy within this Court's original jurisdiction. They argue that the FCA does not work a statutory apportionment. Furthermore, they contend that their pending lawsuit, *Missouri v. Andrews*, No. 84-1674-NE (8th Cir. argued Aug. 20, 1985), challenges only the federal government's authority to contract for uses of impounded water and does not affect South Dakota's sovereign right to grant water rights according to its state law.

1. The FCA authorized construction of numerous federal water resources development projects, including a program for development of the Missouri River Basin. That program originated in separate recommendations by the Army Corps of Engineers (the Corps) and the Department of the Interior's Bureau of Reclamation (the Bureau). The Corps' recommendation, known as the Pick Plan, is described in H. R. Doc. 475, 78th Cong., 2d Sess. (1944). The Bureau's recommendation, known as the Sloan Plan, is described in S. Doc. 191, 78th Cong., 2d Sess. (1944).

The Pick Plan proposed construction of five major reservoirs on the main stem of the Missouri River, including a 6 million acre-foot reservoir at Oahe, South Dakota. See H. R. Doc. 475, *supra*. The Corps described in detail the important flood control benefits that would result from its construction of these reservoirs (*id.* at 22-28). However, the Corps also noted (*id.* at 28-29):

In addition to providing flood control benefits on the Missouri and Mississippi Rivers, the comprehensive plan would also provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation.



The Bureau commented on the Pick Plan, urging that the Missouri River Basin be developed in a manner that "is most beneficial to the residents of the basin." H.R. Doc. 475, *supra*, at 6.<sup>1</sup> The Bureau later submitted the Sloan Plan, representing its view of optimal development for the Missouri River Basin. See S. Doc. 191, *supra*. The Bureau's plan differed from the Corps' Pick Plan in a number of significant respects. For example, the Sloan Plan called for the construction of three multiple-purpose mainstem reservoirs, including a 19.6 million acre-foot storage reservoir at Oahe, South Dakota. It also contemplated shared responsibility in the construction and operation of the program, stating that "[t]he agency with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature, giving full recognition, in the design, construction, and operation, to the needs of other agencies with minor interests" (*id.* at 11).<sup>2</sup>

The conflicts between the Pick and Sloan Plans were reconciled through conferences between the Corps and the Bureau. See S. Doc. 247, 78th Cong., 2d Sess. (1944).

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<sup>1</sup> The Bureau specifically stated (H.R. Doc. 475, *supra*, at 7):

It is, for example, the view of the Bureau of Reclamation, that the waters of the Missouri River and its tributaries west of or entering above Sioux City are more useful to more people if utilized for domestic, agricultural, and industrial purposes than for navigation-improvement purposes. To the extent that these uses are competitive, domestic, agricultural and industrial uses should have preference.

<sup>2</sup> The Bureau specifically stated (S. Doc. 191, *supra*, at 11):

All reservoirs where flood control and navigation are dominant should be operated by the Corps of Engineers, and where the flood control and navigation functions are minor, the reservoirs should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. All irrigation features should be operated by the Bureau of Reclamation or its agents.

Among the issues resolved, the Corps and the Bureau agreed to construct five multiple-purpose mainstem reservoirs, including a 19.6 million acre-foot reservoir at Oahe, South Dakota (*id.* at 2-3). This design was intended “to more fully utilize the water resources of the basin and to most effectively serve the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power, and other uses” (*id.* at 3). In addition, the Corps and the Bureau agreed to recognize certain “basic principles” in dividing responsibility for design, construction, and operation of the project (*id.* at 1).<sup>3</sup> The coordinated program became known as the Pick-Sloan Plan.

Shortly thereafter, Congress enacted the FCA. Section 9 of that Act authorized the development of the Missouri River Basin pursuant to the Pick-Sloan Plan. 58 Stat. 891. Section 9(b) specified that the plan “shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers” (*ibid.*). However, Section 9(c) stated 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 \* \* \*” (*ibid.*).<sup>4</sup> The FCA also contained a number

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<sup>3</sup> They agreed that (S. Doc. 247, *supra*, at 1):

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

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

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

<sup>4</sup> Section 9(c) specifically cited the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 *et seq.*, and “Acts amendatory thereof or supplementary thereto.” 58 Stat. 891. In general, federal reclamation law

of general provisions, applicable to all FCA projects, concerning water use.<sup>5</sup>

2. Since 1944, the federal government has constructed numerous water development projects on the Missouri River pursuant to the Pick-Sloan Plan, including the Oahe Dam and Reservoir in South Dakota. The dam, like the other mainstem dams on the Missouri River, was built and is operated by the Corps. Although a significant portion of the Oahe Reservoir's storage capacity was designed for irrigation, there is presently a limited need for irrigation in the area. Accordingly, the Bureau has discontinued construction of irrigation works associated with Oahe Reservoir. See Mot. App. C3-6.

In the early 1970's, Energy Transportation Systems, Inc. (ETSI) began a search for a water source to support a proposed coal slurry pipeline stretching from Wyoming to the Gulf Coast states. In 1981, the South Dakota Water Conservancy District issued ETSI a conditional water use permit authorizing the company to divert 50,000 acre-feet of water per year from the Oahe Reservoir. ETSI then approached the Secretary of the Interior and the Corps for permission to divert 20,000 acre-feet per year from the

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requires deference to state water law in the acquisition and distribution of water, except where state law is inconsistent with congressional directives concerning the federal water project involved. See, *e.g.*, *California v. United States*, 438 U.S. 645 (1978).

<sup>5</sup> For example, Section 1 declared "the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control." 58 Stat. 888 (codified at 33 U.S.C. 701-1). Section 6 authorized the Secretary of War "to make contracts with States, municipalities, private concerns, or individuals" for domestic and industrial use of "surplus water." 58 Stat. 890 (codified at 33 U.S.C. 708). Section 8 permitted the Secretary of the Interior, upon concurrence with the Secretary of War, to seek authorization to add irrigation works to Corps operated dams. 58 Stat. 891 (codified at 43 U.S.C. 390).

reservoir. On July 2, 1982, The Secretary executed a water service contract to allow ETSI to withdraw unutilized irrigation water for its proposed industrial use. The Secretary executed this contract pursuant to Section 9(c) of the Reclamation Project Act of 1939, which permits the Secretary "to enter into contracts to furnish water for municipal water supply or miscellaneous purposes." 43 U.S.C. 485h(c). Several days later, the Corps issued permits necessary for the diversion (see 33 U.S.C. 403, 1344). Mot. App. C3-7 to C3-8.

In response, three lower basin states—Missouri, Iowa and Nebraska—filed a complaint in the United States District Court for the District of Nebraska against the Secretary of the Army and the Secretary of the Interior. *Missouri v. Andrews*, No. CV-82-L-442 (filed Aug. 18, 1982). See Mot. App. A1-A37. They challenged the federal officials' approval of ETSI's water diversion, arguing—among other grounds—that the Secretary of the Interior's approval of the diversion violated the FCA (*id.* at A20-A22). South Dakota attempted to intervene in the action; however, a magistrate denied that request (*id.* at C1-1 to C1-18).<sup>6</sup> The federal defendants raised several procedural objections to the suit, arguing that the lower basin states lacked standing and that South Dakota was an indispensable party.<sup>7</sup> The district court rejected these contentions. On May 3, 1984, the court ruled that the Secretary of the Interior lacked authority under the FCA to execute contracts furnishing water from Oahe Reservoir

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<sup>6</sup> South Dakota did not appeal this ruling. It has participated in the litigation as *amicus curiae*.

<sup>7</sup> We explained to the district court that South Dakota's participation was necessary to protect its sovereign interests in the use and allocation of waters within its borders. The joinder of South Dakota as a defendant, however, would deprive the district court of jurisdiction. See 28 U.S.C. 1251(a). We therefore urged dismissal of the action. Cf. *California v. Arizona*, 440 U.S. 59, 61-63 (1979).

for industrial purposes. It permanently enjoined performance of the ETSI water service contract. 586 F. Supp. 1268. See Mot. App. C2-1 to C3-26.

The district court acknowledged that Section 9(c) of the Reclamation Project Act of 1939 authorizes the Secretary of the Interior to provide water service contracts for "miscellaneous purposes" (43 U.S.C. 485h(c)). See Mot. App. C3-9. And the court agreed that Section 9(c) of the FCA requires reclamation and power activities under the Pick-Sloan Plan to be conducted by the Secretary pursuant to federal reclamation laws such as 43 U.S.C. 485h(c). See Mot. App. C3-9 to C3-10. However, the court concluded 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" (Mot. App. C3-10). It rejected the federal defendants' argument that proposed individual uses of waters stored in Corps-constructed reservoirs for irrigation purposes are governed by federal reclamation law even in the absence of Bureau-constructed irrigation works and structures (*id.* at C3-14 to C3-19). The court ultimately concluded that the Secretary lacked authority to execute the ETSI water service contract for water from the Oahe Reservoir (*id.* at C3-21).

The federal defendants took an appeal from the district court's decision, challenging the court's rulings on the lower basin states' standing, the indispensability of South Dakota, and the authority of the Secretary to execute the water service contract. *Missouri v. Andrews*, No. 84-1674-NE (8th Cir.). The case was argued and submitted to the court of appeals on August 20, 1985.<sup>8</sup>

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<sup>8</sup> Following the district court's injunction, ETSI and the Secretary of the Interior suspended obligations under the water service contract. Prior to argument, the court of appeals remanded the case to the district court for a determination of mootness. The district court concluded that a live controversy remained because the contract had not been terminated or abandoned. See Mot. App. D1-D5. This conclusion was affirmed on appeal by the 8th Circuit.

3. South Dakota, excluded from direct participation in the *Missouri v. Andrews* litigation, has responded by seeking leave to file a bill of complaint in this Court. Based on the lower basin states' lawsuit, it contends (Mot. 1-2):

A dispute exists between the State of South Dakota and the States of Nebraska, Iowa, and Missouri over the right, power and authority of the State of South Dakota to make use of, issue permits regarding and otherwise exercise sovereign authority over its congressionally apportioned share of the waters of the Missouri River stored for reclamation and irrigation purposes behind mainstem dams located within the territorial boundaries of the State of South Dakota.

South Dakota asserts that the FCA has apportioned these waters among the Missouri River Basin states and that the lower basin states, in initiating the *Missouri v. Andrews* litigation, are actually challenging South Dakota's right to control the use of its apportioned share (Mot. 3-4). South Dakota therefore seeks a declaration from this Court establishing its right to use and allocate Missouri River water impounded in federal mainstem reservoirs within its borders.

#### DISCUSSION

The present dispute between South Dakota and the lower basin states may eventually present a case or controversy within this Court's original and exclusive jurisdiction. Nevertheless, the initiation of an original action at this juncture is premature. The outcome of the *Missouri v. Andrews* litigation may well either effectively resolve the present dispute or clarify its precise contours. We therefore suggest that this Court should postpone action on South Dakota's motion for leave to file an original bill of complaint pending a final decision in that litigation.

1. South Dakota seeks to vindicate its sovereign power to determine the use and allocation of irrigation water stored in federal reservoirs within its borders. Relying on *Arizona v. California*, 373 U.S. 546 (1963), South Dakota claims that the FCA has worked a statutory apportionment of the Missouri River and that the lower basin states' pending lawsuit presents a conflicting claim to South Dakota's apportioned share (Plaintiff's Br. 6-7). The lower basin states respond that the FCA did not result in a statutory apportionment (Br. in Opp. 11-12). Furthermore, they carefully disclaim any conflict with South Dakota's water allocation authority; instead, they characterize their suit as strictly challenging the Secretary of the Interior's power to execute water supply contracts for water stored in Oahe Reservoir (*id.* at 7-11).

We disagree with South Dakota's contention that the FCA apportioned the flow of the Missouri River among basin states. The FCA does not contain any express apportionment provisions; instead, it authorizes the development of specific federal multi-purpose projects in the Missouri River Basin while "recogniz[ing] the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control." 33 U.S.C. 701-1. Unlike the Boulder Canyon Project Act<sup>9</sup> at issue in *Arizona v. California*, the FCA was not intended to apportion water rights among the states. Nonetheless, we do agree with South Dakota that the *Missouri v. Andrews* litigation presents an interstate dispute. Even though the FCA does not effect an apportionment of the Missouri

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<sup>9</sup> Act of Dec. 20, 1928, ch. 42, 45 Stat. 1057 *et seq.* (43 U.S.C. 617-617t). That Act specifically addressed the interstate conflicts over the use and control of the Colorado River's limited flow. See *Arizona v. California*, 373 U.S. at 560-562.



River, South Dakota is correct in claiming that the lower basin states' lawsuit effectively disputes South Dakota's right to use and allocate water within its borders.

The lower basin states contend that, since they have simply challenged the Secretary of the Interior's authority to execute a water service contract with ETSI, their suit does not question South Dakota's authority "to issue water permits to ETSI or anyone else" (Br. in Opp. 9-10). However, that position is directly contradicted by their pleadings. As South Dakota's argues (Mot. App. B1-1 to B1-7), the lower basin states have effectively disputed South Dakota's right to authorize ETSI's use of water stored in Oahe Reservoir. For example, their complaint states (*id.* at A-13):

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.

Furthermore, the lower basin states premised their standing to bring suit upon an alleged right to use the reservoir waters that conflicts with South Dakota's designated use. Their complaint states that diversion of water for ETSI's use would result in immediate and irreparable harm "by creating the substantial risk that [the lower basin states] 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" (Mot. App. A5). As South Dakota notes (Mot. App. B2-1 to B2-4), the lower basin states' complaint repeatedly alleges that the ETSI diver-

sion will deprive them of their right to allocate Missouri River water to their designated uses. Those allegations, while factually infirm,<sup>10</sup> nonetheless demonstrate that South Dakota and the lower basin states assert conflicting claims to the control of waters presently impounded in federal mainstem reservoirs within South Dakota's borders. Although the lower basin states sued the federal government to prevent supply of reservoir waters, their suit actually presents a dispute with South Dakota over the use and allocation of those waters.<sup>11</sup>

2. Although this Court has original and exclusive jurisdiction over controversies between the states,<sup>12</sup> that power is subject to "prudential and equitable limitations." *California v. Texas*, 457 U.S. 164, 168 (1982). In the present case, South Dakota and the lower basin states "are asserting inconsistent claims and are undeniably adversaries." *Id.* at 165. Nonetheless, prudential considerations counsel against granting South Dakota leave to file an original bill of complaint at this time, to conduct essentially duplicative litigation. It would be wiser for the Court to await resolution of the *Missouri v. Andrews* litigation, which may effectively resolve the present dispute or serve to sharpen the focus of the controversy.

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<sup>10</sup> We contested the lower basin states' standing in both the district court and the court of appeals, noting, among other deficiencies, that the ETSI diversion would have a negligible effect on the downstream flow of the Missouri River.

<sup>11</sup> Thus, as previously noted, we argued to the district court and the court of appeals that plaintiff South Dakota is an indispensable party to the lower basin states' suit.

<sup>12</sup> U.S. Const. Art. 3, § 2, Cl. 2; 28 U.S.C. 1251(a). See, e.g., *Colorado v. New Mexico*, No. 80, Orig. (June 4, 1984) (equitable apportionment of an interstate river); *Louisiana v. Mississippi*, No. 86, Orig. (Apr. 2, 1984) (boundary dispute); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (constitutionality of a state tax).

As previously discussed, the federal appellants in *Missouri v. Andrews* presented three grounds for reversal of the district court decision. We argued first, that the lower basin states lack standing to challenge the Secretary of the Interior's execution of the ETSI water service contract; second, that South Dakota is an indispensable party; and third, that, in any event, the Secretary of the Interior has authority under the FCA and federal reclamation laws to execute water service contracts to supply ETSI with irrigation water from Oahe Reservoir pursuant to a state water permit. The United States Court of Appeals for the Eighth Circuit has taken the case under submission. *Missouri v. Andrews*, No. 84-1674-NE (argued Aug. 20, 1985). If the federal appellants ultimately prevail on any of these issues, South Dakota's impetus for filing an original action should dissipate. If the federal appellants are unsuccessful on all three issues, the conflicting claims of South Dakota and the lower basin states to the control of impounded water in federal mainstem reservoirs will be squarely presently for this Court's determination. Accordingly, we suggest that this Court withhold leave to file the complaint until that litigation has run its course.

**CONCLUSION**

The motion of the State of South Dakota for leave to file an original bill of complaint against the States of Nebraska, Iowa, and Missouri should be held pending a final decision in *Missouri v. Andrews*, No. 84-1674-NE (8th Cir. argued Aug. 20, 1985). In the alternative, the Court may wish to deny the motion without prejudice and subject to renewal following a final decision in that litigation.

Respectfully submitted.

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