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No. 103 Original

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

STATE OF SOUTH DAKOTA,

Plaintiff,

v.

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

Defendants.

MOTION OF THE STATE OF NORTH DAKOTA
FOR LEAVE TO INTERVENE AS PLAINTIFF,
AND COMPLAINT IN INTERVENTION

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MOTION OF THE STATE OF NORTH DAKOTA
FOR LEAVE TO INTERVENE AS PLAINTIFF

The State of North Dakota, appearing herein through the Honorable Nicholas J. Spaeth, its Attorney General, acting pursuant to the authority and powers vested in him by statute, N. D. Cent. Code § 54-12-02 (1981), respectfully moves for leave to file the attached Complaint in Intervention, and in support of that motion states that:

1. On or about August 16, 1985, South Dakota filed the above captioned original action seeking to have this Court declare South Dakota's right, power and authority to use or allocate the waters of the Missouri River stored for reclamation and irrigation purposes behind mainstem dams within South Dakota, and to enjoin the Defendant States from further interference with South Dakota's exercise of its right, power and authority over its share of such Missouri River water.

2. North Dakota is situated in almost precisely the same position as South Dakota. It, too, has a major mainstem Missouri River dam and reservoir, Garrison Dam and Lake

Sakakawea, located within its boundaries, which contains water stored for reclamation and irrigation purposes. In addition, Lake Oahe, one of the reservoirs made the subject of South Dakota's pleadings, is located partly in North Dakota.

North Dakota has the same right, power and authority to use or allocate the waters of the Missouri River stored for reclamation and irrigation purposes within North Dakota as South Dakota has for water within South Dakota, based on the same laws, legislative history, and subsequent administrative history set forth in South Dakota's complaint in this action. A declaration of South Dakota's right, power and authority over waters stored for reclamation and irrigation purposes in South Dakota will necessarily affect the nature of the right of North Dakota to exercise its right, power and authority over waters stored for reclamation and irrigation purposes in North Dakota.

North Dakota is a semi-arid state. *North Dakota Plan for Development of the Garrison Diversion Unit*, at 17 (1984). Water is North Dakota's most precious natural resource. Cf. *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U. S. 593, 594 (1968). The portion of the Missouri River System lying within North Dakota constitutes more than 87% of all the available surface water in the State. See *North Dakota Plan, supra*, at 17 and fig. 2. Absent the construction of the Garrison and Oahe dams, the Missouri River would have provided a source of water for development within North Dakota. As a result of construction of the reservoirs behind those dams considerable North Dakota productive farmland was flooded and removed from agricultural production.

North Dakota enacted Title 61 of the North Dakota Century Code, which generally provides for the issuance of permits by the State to its citizens and others for the use of the water of the State, and which contains provisions for state planning and development of water resource projects beneficial to the citizens of the State. In order to realize the benefits from

reclamation and irrigation waters stored within its borders, North Dakota has planned to make productive use of such Missouri River waters. North Dakota has already issued permits for the diversion of Missouri River waters from Lake Sakakawea, a mainstem reservoir, to supply water for Department of Interior contracts with the Basin Electric Power Cooperative for a power plant, and the ANG Coal Gasification Company for a coal gasification plant. In addition, North Dakota holds a state water permit for the Southwest Water Pipeline Project under which the State has contracts to provide Missouri River water from Lake Sakakawea for municipal and light industrial use to nineteen cities in North Dakota. These projects are described in greater detail in paragraph XI of the attached Complaint in Intervention. North Dakota plans to issue other permits and make other contracts for the use of stored Missouri River waters.

3. The Defendant States have taken various actions to interfere with existing and planned contracts and to call into question North Dakota's right, power and authority to use or allocate a portion of the Missouri River waters stored within North Dakota. Through their actions in the *Missouri v. Andrews* litigation, described more fully in South Dakota's pleadings and in the attached Complaint in Intervention, these States have clouded if not negated North Dakota's ability to grant future permits for use of Missouri River waters and to assure existing contract holders of the continued validity of their permits. In addition, Defendant State Iowa has submitted comments to the Bureau of Reclamation on a Draft Environmental Impact Statement concerning the Southwest Water Pipeline Project that gratuitously undermine North Dakota's authority in regard to this project and question Bureau of Reclamation authority to execute a contract and Department of Interior policy for the upstream diversion and marketing of stored Missouri River water. See Appendix B.

As confirmed in their Brief filed in the instant action, Defendant States contend that the Flood Control Act of 1944 “is not a Congressional Apportionment of the Missouri River.” *Brief of Defendants in Opposition* at 11. They have advanced this view in the past and will no doubt do so in the future in order to thwart upstream states such as North Dakota from using or allocating a portion of the water to which they are entitled. These actions by Defendant States jeopardize North Dakota’s ability to protect its own interests and the interests of its citizens in water resources.

4. North Dakota urges that South Dakota’s construction of the Flood Control Act of 1944, Reclamation Project Act of 1939, Reclamation Law of 1902, and other statutes and authorities concerning use of stored waters of the Missouri River is correct. North Dakota agrees that the Flood Control Act of 1944 is a congressionally mandated, comprehensive development plan for the Missouri River. It both authorized major reclamation development works for the Upper Missouri Basin and incorporated existing laws reserving to the states well-established rights for the regulation and use of such waters. As such it is, with respect to the waters of the Upper Missouri Basin, a congressional apportionment of the waters of the Missouri River. The State of North Dakota joins with South Dakota in petitioning this Court to interpret and enforce such apportionment as to the Missouri River waters located within their respective territorial boundaries that are stored for reclamation and irrigation purposes behind mainstem dams.

5. A case or controversy exists between North Dakota and the Defendant States that can only be adjudicated in this Court’s original jurisdiction. This Court has in the past permitted states to intervene in an original action when they had a concrete interest in the outcome of the suit and standing to challenge the actions of the defendants therein. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (“[W]e agree that New Jersey, whose allegations of injury are identical

to that of the original plaintiff States, clearly has standing and should be permitted to intervene.”). Indeed, this Court has encouraged participation by other states when the issues in the litigation were so related to the possible interests of several other similarly situated states “that the just, orderly, and effective determination of such issues” required that all interested parties appear before the Court. *See United States v. Louisiana*, 354 U.S. 515, 516 (1957).

6. There is no controversy between North Dakota and South Dakota about use or allocation of Missouri River waters located within each State’s territorial boundaries. North Dakota is authorized to state that South Dakota concurs and supports North Dakota’s motion to intervene herein.

WHEREFORE, the State of North Dakota prays:

(1) That this Honorable Court grant North Dakota’s Motion For Leave to Intervene as Plaintiff; and

(2) That this Court grant the relief prayed for in the attached Complaint in Intervention and issue such Orders as the Court may deem appropriate in respect to the Complaint in Intervention in aid of its original, exclusive jurisdiction and agreeable to the usages and principles of law.

3/4 , 1986.

Respectfully submitted,

NICHOLAS J. SPAETH,
Counsel of Record
Attorney General
State of North Dakota

ROSELLEN M. SAND
Assistant Attorney General

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COMPLAINT IN INTERVENTION

The State of North Dakota, appearing herein through the Honorable Nicholas J. Spaeth, its Attorney General, acting pursuant to the authority and powers vested in him by statute, N.D. Cent. Code § 54-12-02 (1981), respectfully states that:

I. The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and Paragraph (a), Section 1251, Title 28, United States Code.

II. This is a civil action brought within the original jurisdiction of this Court by the State of South Dakota to quiet title regarding its sovereign right, power and authority to administer the waters of the Missouri River located within its territorial boundaries that are stored for reclamation and irrigation purposes behind mainstem Missouri River dams. The State of South Dakota further seeks injunctive relief against the States of Nebraska, Iowa and Missouri to prevent their interference with the exercise by South Dakota of said right, power and authority. Intervenor, North Dakota, by this Complaint in

Intervention seeks the same relief as to Missouri River waters located within its territorial boundaries that are stored for reclamation and irrigation purposes behind mainstem dams.

III. Plaintiff in Intervention, the State of North Dakota, brings this action to protect its sovereign right, power and authority to use and to allocate waters of the Missouri River located within its territorial boundaries that are stored for reclamation and irrigation purposes behind mainstem dams. North Dakota, a body politic and a sovereign entity, brings this action on behalf of itself as an entity capable of granting water rights and permitting their transfer through contractual agreements. North Dakota also sues as *parens patriae* on behalf of all its residents and citizens who are directly affected by any negation of the State's ability to grant such rights and by any negation of its separate but related ability to protect the water resources of the State.

IV. There exists between North Dakota and the Defendant States an actual and present controversy requiring a declaration of rights by this Court. North Dakota therefore seeks a declaration that it, like South Dakota, has the right, power and authority to issue permits for the use of Missouri River water stored for reclamation and irrigation purposes within North Dakota, and that no use of said water can legally be made without issuance of such permits. North Dakota joins with South Dakota in requesting that the Court find that under current federal statutes no diversion of water out of the mainstem reservoirs located within the States' territorial boundaries can lawfully be made without compliance with applicable state water law; and further, that in the operation for reclamation and irrigation purposes of dams and reservoirs within the boundaries of both States, the Corps of Engineers and the Bureau of Reclamation provide water storage only; they do not provide water or grant water rights. These rights are North Dakota's and South Dakota's to grant within their respective jurisdictions.

V. The State of North Dakota, like South Dakota, has enacted statutes, and under such statutes, has issued permits for use of stored waters in the past and intends to do so in the future. More particularly, such permits have pertained to waters subject to its jurisdiction and control in accordance with an Act of Congress that apportions waters of the Missouri River to it. The Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (codified at 16 U.S.C. §§ 460d, 825s; 33 U.S.C. §§ 701-1, 701a-1, 701b-1, 701c note, 708, 709; 43 U.S.C. § 390) (the "Flood Control Act"), constituted an apportionment scheme under which the State of North Dakota has authority to administer Missouri River water located within the State that is stored for reclamation and irrigation purposes behind mainstem dams. Under the provisions of the Act, the United States Army Corps of Engineers (the "Corps") and the Bureau of Reclamation (the "Bureau"), as applicable, also exercise certain authority with respect to such water.

VI. Paragraphs 4, 6 and 8 of the Complaint, containing introductory material, are adopted and incorporated herein by reference.

VII. Paragraphs 9 and 10 of the Complaint, containing a description of the *Missouri v. Andrews* litigation, are adopted and incorporated herein by reference. The Defendant States' allegations in *Missouri v. Andrews* concerning the scope of state and federal authority with regard to the ETSI contract equally attack and seek to negate North Dakota's power to allocate its share of the waters of the Missouri River within its territorial boundaries and thus threaten existing and future water service contracts in North Dakota.

VIII. Paragraphs 11 and 12 of the Complaint, describing the parties and their interests are adopted and incorporated herein by reference.

IX. Paragraphs 13-22 of the Complaint, historical background, and Paragraph 25 of the Complaint, a statement

of relief sought, are adopted and incorporated herein by reference.

X. North Dakota has a major mainstem dam and reservoir, Garrison Dam and Lake Sakakawea, located within its boundaries, which reservoir contains water stored for reclamation and irrigation purposes. In addition, Lake Oahe is located in both North Dakota and South Dakota. The portion of the Missouri River System lying within North Dakota constitutes more than 87% of all the available surface water in the State. Some 566,000 acres of land within the State of North Dakota are inundated by mainstem reservoirs on the Missouri River. North Dakota has a comprehensive system of water use regulation and management over all waters within its boundaries and a long-standing policy of using Missouri River water for the benefit of its citizens.

XI. Two projects are currently in operation to divert Missouri River water from a mainstem reservoir in North Dakota for industrial use under the authority of a North Dakota water permit. The ETSI contract in South Dakota was patterned after the contracts for these projects, described below, and contains clauses relating to state water rights that are functionally identical to these North Dakota contracts. *See* Appendix A (comparing North Dakota's ANG contract and South Dakota's ETSI contract clauses); Memorandum of June 22, 1982 from Commissioner of Bureau of Reclamation to Secretary of Interior, at 6 (describing ETSI contract's similarity to North Dakota's ANG and Basin contracts). The Basin project provides 15,000 acre-feet per year of water to Basin Electric Power Cooperative for operation of the Antelope Valley Station, a coal-fired power plant that produces electricity for consumers in North Dakota and nearby states. Basin Electric has a state water permit and a contract in effect until 2018 with the Department of Interior for diverting water from Lake Sakakawea. There is no other economically viable source of water for this power plant. If the water contract were

cancelled and the plant shut down, individual consumers of electricity in North Dakota would suffer, as would persons and companies that supply coal to the plant. In addition, numerous persons would lose their jobs at the power plant and in supporting industries, and two cities, Beulah and Hazen, that depend on the power plant and the coal gasification plant discussed below, would suffer serious economic dislocation.

The ANG Coal Gasification Company has contracted with the Department of the Interior to utilize 17,000 acre-feet of Missouri River water per year for use at the only commercial coal gasification plant in the United States. ANG has a state water permit for diverting that water from Lake Sakakawea. As with the Basin project, there is no other economically viable source of water for this plant. If the water contract were cancelled and the plant shut down, individual consumers of natural gas and persons and companies that supply coal to the plant would suffer. In addition, persons who lose their jobs at the plant, persons in supporting industries, and residents of two nearby cities, Beulah and Hazen, would all suffer severe economic dislocation.

In addition to these two energy projects, there is also a water supply project for diversion of Missouri River water for which the state holds the North Dakota water permit and has contracted with nineteen cities in North Dakota to provide water for municipal and light industrial use. Under the Southwest Water Pipeline Project, North Dakota will divert 10,600 acre-feet per year of water from Lake Sakakawea under the authority of a state water permit. The affected cities have no alternative source of drinkable water. At least one Defendant State has already demonstrated a desire to interfere with this project. The State of Iowa submitted comments to the Bureau of Reclamation that question "the authority of the Bureau to enter into the proposed water service contract." See

Appendix B at 1. Thus Iowa has taken action with respect to this contract similar to the actions of all of the Defendant States with respect to the ETSI contract. Cf. Memorandum of June 22, 1982 from Commissioner of Bureau of Reclamation to Secretary of Interior, at 5: "States downstream of South Dakota, (Iowa, Nebraska, and Missouri) have expressed opposition to the proposed [ETSI] contract. These States have enjoyed the flood control and navigation benefits of a controlled Missouri River and now wish to continue this benefit. Even though the impact of providing water service to ETSI would be insignificant downstream, the Lower Basin States see the contract as a forerunner of other diversions." It is worth noting that the actions of the downstream States described above by the Bureau of Reclamation with respect to the ETSI contract were taken prior to the lawsuit in *Missouri v. Andrews*.

XII. As a result of the *Missouri v. Andrews* litigation, North Dakota is threatened with injuries of the same nature and severity as those described by South Dakota in paragraphs 10, 19-24 of the Complaint. The decision in *Missouri v. Andrews* necessarily extends to and clouds the rights of North Dakota as a sovereign state in and to the waters of the Missouri River stored for reclamation purposes within its territorial boundaries, namely the waters in Lake Oahe located in North Dakota and the waters in Lake Sakakawea behind Garrison Dam. As described above, North Dakota has issued permits for the use of such water by the several projects. Because of the claims made by Defendant States, North Dakota's ability to enjoy the economic and environmental benefits of present and contemplated projects as well as its ability to protect its own interests and the interests of its citizens in its water resources is critically jeopardized. The actions of the Defendant States have created a present and immediate threat to North Dakota's ability to use or allocate the waters of the Missouri River located within its territorial boundaries that are stored for

reclamation and irrigation purposes behind mainstem dams. Pecuniary damages will not provide adequate remedy for the wrongs of the Defendant States and, indeed, it would be extremely difficult even to ascertain the amount of compensation that would afford adequate relief if such were otherwise possible. Unless restrained, the Defendant States, by their contentions discussed herein, will provoke a multiplicity of judicial proceedings.

XIII. North Dakota therefore requests that this Court address and remedy, in the exercise of its original jurisdiction, the injury effected by the downstream States' claims advanced in *Missouri v. Andrews*, in their brief filed in this original action, in comments submitted on the Southwest Water Pipeline Project, and in other contexts and to address and remedy the additional injury effected by the District Court's ruling in *Missouri v. Andrews* declaring rights, powers and remedies in excess of its jurisdictional authority and in contravention of relevant federal legislation. North Dakota joins with South Dakota in requesting that the sovereign right, power and authority of both States to allocate waters of the Missouri River stored for reclamation and irrigation purposes within each State's territorial boundaries and their entitlement to said waters under the congressional apportionment be quieted by a declaration that confirms and defines such right, power and authority and entitlement.

XIV. The State of North Dakota, like South Dakota, seeks only to establish its right, power and authority over those waters stored in North Dakota for reclamation and irrigation purposes behind mainstem dams on the Missouri River, as apportioned by Congress to it in the Flood Control Act and to secure those rights against the claims of Defendant States of Nebraska, Iowa and Missouri. The State of North Dakota does not seek an adjudication regarding all of the stored waters of the Missouri River System nor does it seek an adjudication of

the natural or base flow of the Missouri River. It does not seek a determination of the rights of Indian tribes, Indian reservations, or Federal establishments in the State of North Dakota. The sole relief it seeks is a determination that under the Flood Control Act, the Reclamation Project Act of 1939 and the Reclamation Act of 1902 (and especially Section 8 thereof) the State of North Dakota has the right, power and authority to control, manage and provide for the use of certain water stored for reclamation and irrigation purposes in North Dakota, subject to the appropriate power and authority of the Bureau of Reclamation and the Corps of Engineers.

XV. There is no controversy between North Dakota and South Dakota about use or allocation of Missouri River waters located within each State's territorial boundaries. North Dakota is authorized to state that South Dakota concurs and supports North Dakota's motion to intervene herein.

WHEREFORE, the State of North Dakota respectfully prays:

1. That process issue herein to all parties as required by law.

2. That, on final hearing hereof, this Court adjudicate and declare, in the nature of a quiet title action, the right, power and authority of North Dakota to use or allocate the waters of the Missouri River located within its territorial boundaries that are stored for reclamation and irrigation purposes behind mainstem dams, such right, power and authority to be exercised in accord with the provisions, intent and history of the controlling federal legislation which includes the Flood Control Act of 1944, the Reclamation Project Act of 1939 and the Reclamation Act of 1902.

3. That the States of Nebraska, Iowa and Missouri be enjoined from interference with the exercise of the right, power and authority of the State of North Dakota over waters of the

Missouri River stored for reclamation purposes within the State of North Dakota.

And for such other and further relief, general or special, as may be proper.

Respectfully submitted,

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Attorney General
State of North Dakota

ROSELLEN M. SAND
Assistant Attorney General

APPENDIX A

Excerpts Comparing Contract With ANG Coal Gasification Company in North Dakota and Contract With ETSI in South Dakota

SOURCE OF EXCERPTS:

—*Industrial Water Service Contract Between the United States and ANG Coal Gasification Company*, Contract No. 0-07-60-WS057 (United States Department of the Interior, Bureau of Reclamation — Pick-Sloan Missouri Basin Program: executed October 26, 1979)

—*Industrial Water Service Contract Between the United States and ETSI Pipeline Project, A Joint Venture*, Contract No. 2-07-60-WS126 (United States Department of the Interior, Bureau of Reclamation—Pick-Sloan Missouri Basin Program: executed July 2, 1982)

I. Preliminary Statements

A. ANG Contract [North Dakota], Preliminary Statements a, b, c, d, and e

(a) The United States, through its Corps of Engineers, has constructed and is operating the Garrison Dam and Reservoir in North Dakota (said reservoir being hereinafter called Lake Sakakawea) pursuant to Section 9 of the Flood Control Act of December 22, 1944 (58 Stat. 887).

B. ETSI Contract [South Dakota], Preliminary Statements a, b, c, d, and e

(a) The United States, through its Corps of Engineers, has constructed and is operating the Oahe Dam and Reservoir in South Dakota (said reservoir being hereinafter called Lake Oahe) pursuant to Section 9 of the Flood Control Act of December 22, 1944.

(b) The Contractor is planning the construction and operation of a coal gasification plant north of Beulah, North Dakota, and south of Lake Sakakawea. The coal gasification plant will be constructed in two phases each requiring approximately 8,500 acre-feet of water per year. There is immediate need for such a plant because of the declining supplies of natural gas in the United States.

(c) The Contractor has secured the necessary conditional water permit from the State of North Dakota, approving its annual diversion of 17,000 acre-feet of water from Lake Sakakawea. Such water permit is a condition precedent for this contract.

(b) ETSI is planning the construction and operation of a coal slurry pipeline from the Powder River Basin in Wyoming to serve electric utilities in the middle southern states. The Contractor is in need of approximately 20,000 acre-feet of water annually as a coal transportation medium.

(c) ETSI has secured assignment of the necessary conditional water permit from the South Dakota Conservancy District, covering an annual diversion for up to 50,000 acre-feet of water from Lake Oahe. Perfection of this water permit is a condition precedent for this contract. ETSI intends to request an additional water service contract from the United States as plans are developed to utilize the full 50,000 acre-feet of water per year covered in the water permit assigned from the South Dakota Conservancy District.

(d) The Secretary of the Interior, hereinafter called the Secretary, and the Secretary of the Army have agreed that water service to industrial users can be provided out of the mainstem reservoirs of the Missouri River, including Lake Sakakawea. The Secretary, after consultation with the Secretary of the Army, has determined that providing water service to the Contractor for 17,000 acre-feet of water annually will not impair the efficiency of the project for irrigation nor interfere with the operation of the project for flood control and is a beneficial use of water that should take precedence over hydroelectric power generation.

(e) The Bureau of Reclamation, as designated lead agency for the Department of the Interior, has completed studies and filed the Final Environmental Statement (FES 78-1) on the ANG Coal Gasification Project pursuant to the National Environmental Policy Act of 1969 covering the effect on the environment of the construction and oper-

(d) The Secretary of the Interior, hereinafter called the Secretary, and the Secretary of the Army have agreed that water service to industrial users can be provided out of the main stem reservoirs of the Missouri River, including Lake Oahe. The Secretary, after consultation with the Secretary of the Army, has determined that providing water service for industrial water use to ETSI for 20,000 acre-feet of water annually will not impair the efficiency of the project for irrigation, interfere with the operation of the project for flood control, nor adversely affect existing uses of water, and is a beneficial consumptive use of water.

(e) The Bureau of Land Management, as designated lead agency for the Department of the Interior, has completed studies and filed the Final Environmental Statement (FES 81-26) dated July 1981 on the ETSI, Coal Slurry Pipeline Transportation Project pursuant to the National Environmental Policy Act of 1969 covering the effect on the

ation of facilities of the type planned by the Contractor.

environment of the construction and operation of facilities planned by ETSI. The Bureau of Land Management approved the project by record of decision dated January 14, 1982. The Department of the Interior's 1977 Comprehensive Environmental Impact Statement, "Water for Energy—Missouri River Reservoirs" covering the Bureau of Reclamation's overall water marketing and the site-specific final environmental statement prepared by the Bureau of Land Management (81-26), constitute adequate National Environmental Policy Act compliance.

II. Basic Conditions to Water Service

A. ANG Contract [North Dakota], Paragraph 1, Basic Conditions to Water Service Under This Contract

1. (a) A condition precedent for this contract is the water permit (which includes the conditions attached thereto) approved by the North Dakota State Water Commission on February 19-20, 1974.

B. ETSI Contract [South Dakota], Paragraph 1, Basic Conditions to Water Service Under This Contract

1. A condition precedent for this contract is the assignment of the water permit for energy industry use as authorized by Special Session of the South Dakota Legislature on September 24, 1981. This

This contract shall not be construed to extend to any water the diversion of which is not authorized by either North Dakota law or the State water permit. Should this water permit be forfeited or terminated for any cause by the State of North Dakota, this contract shall also be subject to termination. The above-described State water permit attached hereto is incorporated by reference.

contract shall not be construed to extend to any water the diversion of which is not authorized by either South Dakota law or the State water permit. Should this water permit be forfeited or terminated for any cause by the State of South Dakota, this contract shall also be subject to termination. The above-described State water permit attached hereto is incorporated by reference.

(b) Delivery of water to the Contractor pursuant to this contract is dependent upon the issuance and acceptance of a certificate of public convenience and necessity as contemplated by the application in Docket No. CP78-391 *et. al.* with the Federal Energy Regulatory Commission (FERC) on the ANG Coal Gasification Project. Should such a certificate not be issued or accepted, this contract shall be subject to termination.

III. Permits for Construction and Maintenance

A. ANG Contract [North Dakota], Paragraph 3, Permits for Construction and Maintenance

3. The Contractor shall secure from the Corps of Engineers all needed permits for the construction of diversion or pumping facilities on lands under jurisdiction of the Corps, and all permits required under Section 10 of the Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407), or under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 884; 33 U.S.C. 1344), in accordance with applicable regulations of the Secretary of the Army and the Corps of Engineers which may be in effect at the time of grant of an easement, permit, license, or lease: *Provided*, That such instruments will be subject to existing rights and the installation or installations by the Contractor shall be in accordance with plans approved by the Corps of Engineers and the Contracting Officer. It is further recognized that this

B. ETSI Contract [South Dakota], Paragraph 3, Permits for Construction and Maintenance

3. The Contractor shall secure from the Corps of Engineers all needed permits for the construction of diversion or pumping facilities on lands under jurisdiction of the Corps, and all permits required under Section 10 of the Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407), or under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 884; 33 U.S.C. 1344), in accordance with applicable regulations of the Secretary of the Army and the Corps of Engineers which may be in effect at the time of grant of an easement, permit, license, or lease: *Provided*, That such instruments will be subject to existing rights and the installation or installations by the Contractor shall be in accordance with plans approved by the Corps of Engineers and the Contracting Officer. It is further recognized that this

contract or any subsequent instrument in connection therewith does not grant to the Contractor the right of access to the waters of Lake Sakakawea or to the Federal land adjoining for any purpose other than to make annual industrial use of 17,000 acre-feet of water service referred to in this contract.

contract or any subsequent instrument in connection therewith does not grant to the Contractor the right of access to the waters of Lake Oahe or to the Federal land adjoining for any purpose other than to make annual industrial use of 20,000 acre-feet of water service referred to in this contract.

IV. Rate and Method of Payment for Water

A. ANG Contract [North Dakota], Paragraph 5(e), Rate and Method of Payment for Water

(e) Nothing in this contract shall be construed to limit the State of North Dakota from assessing fees or charges for water appropriated by the Contractor pursuant to the State water permit referenced in Article 1.

B. ETSI Contract [South Dakota], Paragraph 5(d), Rate and Method of Payment for Water

(d) Nothing in this contract shall be construed to limit the State of South Dakota from assessing fees or charges for water appropriated by the Contractor pursuant to the State water permit referenced in Article 1.

V. Conformance to State Laws and Policies

A. ANG Contract [North Dakota], Paragraph 10, Conformance to State Laws and Policies

10. Nothing contained in this contract shall be construed to abridge, limit, deprive, or interfere with such rights as the State of North Dakota or any agency thereof (especially the State Engineer and the State Water Commission) now have either to the water subject to this contract, or to adopt such policies and enact such other laws as North Dakota deems necessary with respect to subject waters.

B. ETSI Contract [South Dakota], Paragraph 9, Conformance to State Laws and Policies

9. Nothing contained in this contract shall be construed to abridge, limit, deprive, or interfere with such rights as the State of South Dakota or any agency thereof now have either to the water subject to this contract, or to adopt such policies and enact such other laws as South Dakota deems necessary with respect to subject waters.

VI. Water Availability and Shortages

A. ANG Contract [North Dakota], Exhibit A, Standard Contract Article G(2) & (3)

2. The United States shall not be responsible for the maintenance of any particular water level in Lake Sakakawea in order to permit the Contractor to take water therefrom through the facilities which the Contractor in-

B. ETSI Contract [South Dakota], Exhibit A, Standard Contract Article G(2) & (3)

2. The United States shall not be responsible for the maintenance of any particular water level in order to permit the Contractor to take water therefrom through the facilities which the Contractor installs. Payments shall be due

stalls. Payments shall be due and payable as provided in Article 5, irrespective of the Contractor's ability or inability to take water.

3. On account of uncontrollable forces, there may occur in any year a shortage in the total annual quantity of water available for furnishing to the Contractor by the United States pursuant to this contract. In no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage direct or indirect arising from such shortages. In the case of such shortage, an appropriate reduction shall be made in the water service charge for that year.

and payable as provided in Article (5), irrespective of the Contractor [sic] ability or inability to take water.

3. On account of uncontrollable forces, there may occur in any year a shortage in the total annual quantity of water available for furnishing to the Contractor by the United States pursuant to this contract. In no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage direct or indirect arising from such shortages. In the case of such shortage, an appropriate reduction shall be made in the water service charge for that year.

APPENDIX B

Letter of January 22, 1985 from William W. Crews, Governor's Missouri River Basin Coordinator for the Iowa Department of Water, Air and Waste Management to Joseph Marcotte, Regional Director, U.S. Bureau of Reclamation.

**IOWA DEPARTMENT OF WATER, AIR
AND WASTE MANAGEMENT**

January 22, 1985

Mr. Joseph Marcotte
Regional Director, Attention: 150
U.S. Bureau of Reclamation
P.O. Box 2553
Billings, MT 59103

RE: Comments on Draft Environmental Impact Statement for
the Proposed Dunn-Nokota Methanol Project Including
the North Dakota State Southwest Water Pipeline Project

Dear Joe:

On behalf of Governor Branstad, I am submitting the following comments for the State of Iowa on the above referenced EIS.

While the state has numerous specific comments as listed below concerning both the adequacy of the EIS and the authority of the Bureau to enter into the proposed water service contract, the actual proposed uses of Missouri River water as detailed in the draft EIS to meet the in-basin needs of the people and industry of North Dakota is not challenged. The State of Iowa has consistently indicated that it did not oppose upstream states' use of Missouri River water for municipal, industrial or rural water supply needs. We stand ready to work with our upstream neighbors to develop procedures and programs including interstate compacts which will facilitate such uses and avoid future conflicts.

In the meantime, specific water use proposals involving federal reservoirs must comply with existing laws and regulations. It is this requirement which causes the State of Iowa to submit the following comments and concerns with the draft EIS.

1. Why is the Bureau of Reclamation instead of Corps of Engineers planning to execute the Dunn-Nokota (Nokota) water service contract? What is the claimed authority by which the Bureau of Reclamation would execute the water service contract?

2. On what theory will the Bureau of Reclamation execute the industrial water service contract (Nokota) but the Corps executes the contracts for municipal and rural needs (N.D. State Southwest Water Pipeline, hereafter referred to as SWP)?

3. Why doesn't section 3.5 (page 3-54) discuss effects of SWP deletions of 11,400 acre-feet (AF) along with Nokota's proposed depletions of 16,800 AF? We object to the EIS in that not only does it fail to address the cumulative impacts of this and other projects, it even fails to address the cumulative impacts of the Nokota and SWP water depletions by segmenting out the municipal and rural water uses from the industrial use.

4. Section 3.5 cites the 1977 Water for Energy EIS (FES 77-43) as concluding that one million AF of reservoir water could be made available for energy use until the year 2035. That EIS was based, we are told, on an Interior February 24, 1975 "water availability determination". That duty was limited to use until the year 2023.

a. What is the basis for the determination that water would be available until the year 2035?

b. What studies support this?

c. What is the margin of error in the projection to the year 2035?

d. Will the Bureau of Reclamation draft the industrial water service contracts to place the risk of error on the "interim" uses for energy?

5. The 1977 EIS evaluated impacts on other uses only to the year 2000 (page 3-36, FES 77-43).

What is the basis for concluding that depletion of one million AF for energy use until the year 2035 would not significantly affect other users? What studies support this?

6. In evaluating cumulative impacts of reservoir depletions for energy use until the year 2035, why limit uses to those commitments made as of September 1983?

7. Even assuming that one million AF of water were available for uses other than those uses considered in the 1975 "water availability determination" and the 1977 EIS, how much of the one million AF would remain available:

a. When Indian water rights claims are subtracted?

b. When the 300,000 AF for Bureau of Reclamation's water marketing program from the Yellowtail (Bighorn)-Boysen Reservoirs are also subtracted? (The Department of the Interior FEIS on Industrial Water Service, Yellowtail (Bighorn)-Boysen Reservoirs, FES 83-44 (August 26, 1983), page 3-21, relies on the one million AF of Missouri River water availability as permitting diversion of 300,000 AF from these tributaries without further analysis of downstream effects on the Missouri River.)

c. Has the Department of Interior limited this marketing program (Yellowtail (Bighorn)-Boysen) to the 300,000 AF figure recommended in the FEIS?

8. On page 3-55, the DEIS states that the 1977 EIS reported that "average hydro-energy production from main-stem dams would *not* be decreased by 5.5 percent annually" The underlined word "not" should be deleted.

9. What will be the economic effect on hydro-power users to the year 2035 of the reduced hydro-energy production? What would be the environmental effects?

10. The DEIS cites an annual average loss of seven to eight days of commercial barge traffic to the year 2000.

a. What would be the effect in the year 2035?

b. Would the lost navigation days be the same every year?

11. What are the economic and environmental costs associated with the reduced navigation seasons projected?

12. The DEIS states also on page 3-55 that water availability studies such as those done for the 1977 EIS recognize depletions for present and projected Indian agricultural uses.

a. What amount of water for projected Indian uses was used for the 1977 EIS?

b. What amount of water depletion from the Missouri River for Indian uses is currently projected for the year 2035?

c. What is the basis used and sources for these projections?

13. The DEIS says that known projections for industrial uses should have no effect on Indian water rights when they are finally adjudicated (page 3-55). What effect will Indian water rights claims have on: (a) the projected availability of one million AF of water to the year 2035? (b) other uses of water, especially when cumulated with the Bureau of Reclamation water marketing from the Missouri River and its tributaries?

14. The Department of Interior is trustee for Indian tribes and also would execute the industrial water marketing contracts under the proposed scenario. What steps will the Department of Interior take: (1) to avoid apparent future conflicts of interest? and (2) to provide that reduction in water availability caused by Indian water rights claims be at the expense of the "interim" energy uses rather than of other uses of Missouri River water?

15. The DEIS states that there have been no significant changes which would change the conclusions in 1977 EIS so no further analysis of impacts from depletions has been done (page 3-55). What analysis was done of the 1977 EIS to determine that its conclusions were reliable or that it adequately addresses the environmental impacts of the depletion of one million AF of water annually to the year 2035? Has BOR considered potential depletions identified to Department of Justice attorneys representing BOR in the ETSI litigation (*State of Missouri, et. al. v. Andrews et. al.*), re: energy needs and future agricultural needs.

16. The Bureau's recently completed FEIS on the Yellow-tail (Bighorn)-Boysen Reservoirs marketing program (FES 83-44) reanalyzed water availability from those reservoirs. As a result, that FEIS concluded that 300,000 acre feet annually to the year 2000 was the maximum quantity to be considered (FES 83-44, page 2-1). This compares to 832,000 AF annually from the Bureau of Reclamation's earlier water availability studies and 623,000 AF in option contracts previously executed by the Secretary for energy use (FES 83-44, page 1-1). The reanalysis of earlier Bureau of Reclamation water availability studies at Boysen and Yellowtail clearly resulted in significantly different results.

a. What reanalysis, if any, has been done of the water availability studies underlying the 1977 EIS?

b. How does the reanalysis of the 1977 EIS differ from that done in FES 83-44 for the Yellowtail and Boysen Reservoirs?

c. FES 83-44 reanalyzed previous minimum release criteria and increased the minimum release from 200 cfs to 1,000 cfs during the nonirrigation season and 1,400 cfs during the irrigation season [page 2-5]. The 1977 EIS and 1975 "water availability determination" for the Missouri River used a minimum release of 6,000 cfs (page 3-7, FES 77-43).

i. Has there been a reanalysis of the 6,000 cfs minimum release for the Missouri River?

ii. What would be the effect on fish and wildlife and other users of the Missouri River of a minimum release of 1,000, 1,400, and 6,000 cfs?

d. FES 83-44 also concluded that reservoir operation criteria had changed since the initial study (page 2-5). What reservoir criteria were used for the one million AF projection and have these changed?

e. FES 83-44 utilized the "critical period", that period of time when historic records indicate inflow was the least, as the limiting factor for determining how much water might be available.

i. What is the "critical period" for the Missouri River?

ii. How much water is available for marketing during the critical period on the Missouri River with existing development? With development projected to the year 2035? With projected development and potential Indian rights claims to the year 2035? What studies exist to support answers to these questions?

f. FES 83-44 used new computer models for reservoir operation (page 2-5). What models were used for reservoir operation for the studies used in the 1977 EIS? How do these differ from those currently available?

g. FES 83-44 concluded that energy facilities would require water service at a more or less uniform rate year-round and therefore analyzed the effect on flows on the basis of a uniform diversion rate throughout the year, which it described as a "worst case condition" (page 3-4). The 1977 EIS utilized average annual flow of the Missouri River (page 3-4, FES 77-43).

i. Does the 1977 EIS or the studies on which it is based analyze the effect on flows in a worst case condition either by time of year or by critical period?

ii. What are the effects to the year 2035 of the depletion of one million AF per year in the "worst case condition"?

iii. What are the effects under a worst case analysis as required by 40 CFR 1502.22?

h. FES 83-44 also analyzed impacts of changed flows and reservoir levels on various environmental parameters and constraints on fluctuations in releases (pages 3-6 to 3-21).

i. What similar studies have been done to support the one million AF determination?

ii. What are these impacts and constraints?

i. FES 83-44 focused mainly on the direct effects marketing water would have on rivers and reservoirs rather than on secondary effects, such as mining (page 2-7). The 1977 EIS, on the other hand, contains fewer than twenty pages which even mention the effects of water depletions, primarily focuses on the secondary effects, and limits the area studied to four upstream States.

What is the reason for concluding that the direct effects of water marketing on the Missouri River need not be analyzed at least as extensively as those for the Yellowtail-Boysen water marketing program?

j. FES 83-44 relies on the one million AF of water availability from the Missouri River and the 1977 EIS to avoid discussion of the downstream effects on the Missouri River from depletions caused by the Yellowtail-Boysen water marketing program (page 3-21). The DEIS apparently assumes that one million AF of water is available annually from the Missouri River reservoirs (pages 3-54 to 3-55). Is the Department of Interior's present position that the one million AF includes the Yellowtail-Boysen marketing program or that the Yellowtail-Boysen marketing program is in addition to the one million AF?

17. The DEIS states that no changes have occurred since the 1977 EIS and therefore includes no further analysis of impacts from depletions which would be caused if water were made available to the Nokota Company (page 3-55). Yet, the 1977 EIS specifically states that it is not intended to fulfill the requirements of NEPA for any specific development and that site-specific EIS's will be prepared prior to decisions on water deliveries to industrial sites and water use locations (page 1-4). Similarly, in the Yellowtail-Boysen FEIS, it is stated that decisions on specific water service contracts will consider "the specific impacts as well as any cumulative impacts on prior contracts" (page 2-1).

Given these disclaimers, on what basis can the 1977 programmatic EIS be used to avoid analysis of the impacts from depletions which would be caused by the proposed contract with the Nokota Company?

18. The DEIS states, "Reversion [of waters provided for energy use] to agriculture in 2035 would depend on priority and needs at that time" (page 3-54).

a. What analysis (legal, economic, and otherwise) supports the assumption that water delivery to capital-intensive industries can be stopped in the year 2035?

b. Isn't this inconsistent with Bureau of Reclamation's practice of placing a right of renewal clause in water service contracts, as it did in the ETSI contract?

19. The DEIS (page 3-56) states that the SWP Project requires 11,400 AF of water annually for municipal uses, that there is no storage allocation in Garrison Reservoir for municipal water, and that the Corps can allocate 15% of total storage capacity or 50,000 AF, whichever is less without Congressional approval.

a. What is the total storage capacity of the Garrison Reservoir?

b. What is the total storage capacity required for a firm yield of 50,000 AF?

c. How much storage capacity would remain available for reallocation by the Corps after the SWP project?

d. There is also no allocation at Garrison for industrial or energy use. On what basis are municipal uses limited by the Water Supply Act regulations cited but industrial uses are not?

e. Would the Nokota and the SWP diversions together fit within the reallocation authority?

f. What potential competing uses of this 15% of storage or 50,000 AF might be precluded if the waters are allocated to these projects?

20. Although the analysis of cumulative effects assumes that contracts for up to one million AF can be performed until the year 2035, the discussion of impacts and water use are apparently limited to current conditions rather than projections

to the year 2035. For example, at page 3-55, it is stated that the navigation season depth requirement would minimize "any effects on diversion for *current* agriculture, municipalities, and water management districts". Also on page 3-55, it is stated, "There has been no significant changes in *existing* or *authorized* water use . . . or hydrologic events which would change the conclusions regarding impacts described in the 1977 FEIS."

N.E.P.A. requires analysis of the cumulative impacts of reasonably foreseeable withdrawals and the impacts on reasonably foreseeable uses. The DEIS should be revised to analyze impacts under reasonably foreseeable conditions and not just under current conditions.

21. The 77 EIS did not analyze the cumulative and secondary impacts of withdrawals on uses in the four downstream states including but not limited to impacts on fish and wildlife resources and habitat, oxbow lakes, ice jams, alluvial aquifers, degradation and aggradation of the river bed, navigation, recreation, irrigation and hydropower production. We think these impacts and others should be analyzed in this EIS, or the BOR should cease reliance upon the 77 EIS and in conjunction with the COE and the basin states conduct a new programmatic EIS on water availability.

22. In addition, the draft EIS fails to adequately consider the following:

a. The future competition for uses of water within the Missouri River Basin;

b. The direct impacts of the withdrawal of water from the Garrison Reservoir, and the program and policy of which that withdrawal is a part, including the impacts upon alternative uses of water, competing uses of water, cumulative impacts, priorities of use, such as superimposing of Nokota and SWP as a firm priority of use above all downstream uses; and other water rights;

c. The impacts of the Nokota and SWP withdrawals of water and of the Department of Interior's water marketing program and policies on fish and wildlife and other environmental resources downstream from Garrison Reservoir;

d. The impacts of the Nokota and SWP withdrawals of water and of the Department of Interior's water marketing program and policies on navigation, hydropower production, irrigation, agricultural production, and other uses of water downstream from Garrison;

e. The impacts of the Nokota and SWP project on downstream biota, fish and wildlife and on downstream water uses arising from the discharge of pollutants and potential hazardous wastes by the project.

23. This draft EIS and the 1977 "Water for Energy" EIS did not contain an adequate analysis of the precedential effect of this proposed Water Service Contract. Specifically, neither EIS examined the question whether this project would set legal or factual precedent for future withdrawals and the impacts of such withdrawals were not adequately analyzed;

24. Neither this draft EIS nor the 1977 "Water for Energy" EIS contained an adequate analysis of the effects of the program and policy of the Department of the Interior, of which this proposed Water Service Contract is an example and a part, to market and divert up to one million acre-feet of water from the main stem Missouri River reservoirs for industrial purposes.

25. The 1977 "Water for Energy" EIS upon which this draft EIS relies did not adequately address:

a. The impacts of water diversions from the Missouri River main-stem reservoirs;

b. The demand for water within the Missouri River Basin to the year 2035.

26. The 1977 "Water for Energy" EIS upon which this draft EIS relies did not contain sufficient analysis to support its conclusion that between one and three million acre-feet of water will be available for marketing from the Missouri River until the year 2035.

27. We feel the federal BOR has violated NEPA and applicable regulations and abused its discretion in its use of the 1977 EIS to substitute for analysis of the impacts of this proposed project and its marketing program and policy, given its failure to analyze, evaluate, or update the 1977 EIS and given the limitations and inadequacies of that EIS, including:

- a. The 1977 EIS does not include an inventory of reasonably foreseeable competing uses of Missouri River water during the period of this proposed Water Service Contract and any renewal period;

- b. The 1977 EIS does not contain an adequate explanation or discussion of the possible cumulative effects of this proposed withdrawal or the water marketing program and policy and other reasonably foreseeable withdrawals upon the water resources of the Missouri River and the entities and activities that depend upon those water resources;

- c. The 1977 EIS specifically stated that it was not a planning document and that a site-specific EIS should be prepared prior to decisions on water deliveries to industrial sites and water use locations;

- d. The 1977 EIS, although stating that Indian water rights claims ranged from diversion from 7.5 million acre-feet to all water passing by or through the reservations, expressly did not quantify those claims or their cumulative impact on water availability;

- e. The 1977 EIS did not attempt to quantify state claims to water flow or use;

f. The 1977 EIS contained no worst case analysis concerning precipitation and water availability and no discussion or analysis of the effects of diversions during the "critical period" or periods of limited water availability and extended dry climatic conditions;

g. The 1977 EIS contained no analysis of impacts of minimum releases but simply assumes minimum release rates are adequate without explanation or analysis;

h. The scope of the 1977 EIS was limited to consideration of environmental impacts on a project area which included only the Upper Missouri Basin and excluded most of the State of Nebraska and all of the States of Kansas, Missouri and Iowa, downstream states along the Missouri and Mississippi Rivers;

i. The 1977 EIS excluded downstream states and Indian tribes from the list of affected parties whose comments were sought;

j. The 1977 EIS was prepared by its drafters as a hypothetical study of the impacts of potential energy development on the environment in the project area and not as a detailed statement of the environmental impacts of water withdrawal of the marketing program and policy on downstream states and users;

k. The 1977 EIS simply assumed the validity of an internal memorandum on water availability prepared by the Bureau of Reclamation in 1975 that was not prepared in procedural or substantive compliance with NEPA, is inadequate and inaccurate with respect to future water availability, and could not be used to substitute for an EIS;

l. The 1977 EIS did not evaluate the significance of the impacts noted in that EIS;

m. The 1977 EIS failed to consider at all other impacts of water withdrawals;

n. The 1977 EIS relied on earlier obsolete studies and did not independently update, explain and analyze those studies;

o. The 1977 EIS did not provide information sufficient to allow the decision-maker to reasonably weigh the significance of the environmental impacts noted;

p. The 1977 EIS erroneously limited its consideration of the impacts of water withdrawal on agricultural uses to effects on irrigation projects originally contemplated as specific units in the Pick Sloan plan;

q. The 1977 EIS inadequately analyzed alternatives to the proposed water marketing program;

r. The 1977 EIS did not evaluate significant trends and issues, including the export of water from the Basin, deviation from authorized project purposes, use of water for transportation, and incentives for the sale of water.

I appreciate this opportunity to provide these comments and look forward to the Bureau's responses to our comments, concerns, and questions.

Best regards,

OFFICE OF THE EXECUTIVE
DIRECTOR

William W. Crews
Governor's Missouri River Basin
Coordinator

