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.

MEMORANDUM OF SOUTH DAKOTA IN RESPONSE TO BRIEF OF THE UNITED STATES

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TABLE OF AUTHORITIES

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ARGUMENT

A RULING FROM THE EIGHTH CIRCUIT IN *MISSOURI v. ANDREWS* WILL NOT DISSIPATE SOUTH DAKOTA'S AND NORTH DAKOTA'S IMPETUS FOR BRINGING THIS ORIGINAL ACTION

In the Brief filed February 26, 1986 the Solicitor General, on behalf of the United States, agreed that South Dakota has a justiciable controversy with the Defendant States, but suggested that the Court delay action on South Dakota's Motion for leave to file an original bill of complaint against the States of Nebraska, Iowa and Missouri, until the Eighth Circuit ruled in *Missouri v. Andrews,* No. 84-1674-NE.

South Dakota respectfully suggests that such delay will not achieve the result of resolving the present dispute as the United

States believes. South Dakota is authorized to state that North Dakota joins in this suggestion. Even if the Federal Defendants in *Missouri v. Andrews* win on all three issues before the Eighth Circuit—(1) standing of the Downstream States to sue; (2) absence of an indispensable party, *viz.* South Dakota; and (3) the authority of the Secretary of Interior over the waters of Lake Oahe—South Dakota and North Dakota will not have received the relief they seek in this original action, and their impetus for filing an original action will not dissipate.

South Dakota and North Dakota assert that the Flood Control Act of 1944 (FCA) made a congressional apportionment to those States of the waters of the Missouri River stored for reclamation purposes within their respective boundaries behind mainstem dams. *Missouri v. Andrews* cannot decide that question because it is not before the Eighth Circuit. The view of the Solicitor General that no such apportionment was made by Congress does not dispose of the issue. Instead, it merely demonstrates that none of the parties to *Missouri v. Andrews* are advancing South Dakota's and North Dakota's theory by which they hold their right to allocate waters of the Missouri River.

The issues in *Missouri v. Andrews* on which the Federal Defendants hope to prevail in the Eighth Circuit are subsidiary to the issue presented in this litigation: Did Congress confirm in the FCA the right, power and authority of each of the Upstream States to control, allocate and regulate the waters of the River stored for reclamation purposes in mainstem reservoirs within the territorial boundaries of the respective Upstream States without interference from the Downstream States? *Missouri v. Andrews* can decide the division of authority between the Secretary of Interior and the Corps of Engineers under federal law, but it cannot decide the authority of the States among themselves and the relation of the States to the Federal Government, because the States are not there and could not be under the law.

Even if the Federal Defendants prevail on the procedural issues of standing and lack of an indispensable party, their

victory on those issues will only block one phase of the Downstream States' scheme to interfere with the Upstream States' exercise of their water rights, and perhaps only temporarily if the Downstream States then seek certiorari to bring those issues before this Court. Such a victory for the Federal Defendants on these procedural issues is only superficially favorable to South Dakota; it would not, as a practical matter, remove the cloud that the Downstream States have placed on South Dakota's and North Dakota's exercise of their water rights.

Prospective users of water stored in Missouri River reservoirs in South Dakota and North Dakota would not invest millions of dollars in projects to put such water to beneficial use on hollow assurances found in a procedural ruling favorable to the Federal Defendants from the Eighth Circuit in *Missouri v. Andrews.* Such prospective water users could not be certain that the Downstream States, or private parties sharing their interests, would not contrive a way in an administrative proceeding or court action to circumvent any ruling from the Eighth Circuit in *Missouri v. Andrews* and interfere with such upstream diversions.

To a commercial investor contemplating use of Missouri River water, the cloud will also still remain even if the Eighth Circuit's ruling in *Missouri v. Andrews* resolves the division of authority between the Secretary of Interior and the Corps of Engineers under federal law because the Eighth Circuit cannot decide the authority of the States among themselves and the relation of the States to the Federal Government in allocating such waters. The Downstream States made several claims in *Missouri v. Andrews* that effectively challenge South Dakota's right to allocate Missouri River waters, which the District Court did not resolve in its ruling and which will remain alive even if the Eighth Circuit rules in favor of the Federal Defendants on the substantive issue of the division of authority between the federal agencies. *See Complaint* in *Missouri v. Andrews* (Counts Three, Four and Five — paragraphs 74-92), *reprinted in South Dakota Appendix to Motion for Leave to File Com-*

plaint, Appendix A, at A-29 to A-32. Consequently, a victory for the Federal Defendants in *Missouri v. Andrews* would be only a Pyrrhic victory for South Dakota and North Dakota and would not dispose of the *raison d'etre* of this original action: removing the cloud that the Downstream States have placed on the Upstream States' exercise of their water rights.

Since the interests of North Dakota and South Dakota cannot be adjudicated in *Missouri v. Andrews* and since this Court alone can protect those interests, delaying decision on the two pending motions would deny legal process to the two States. The Solicitor General agrees that "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." *Brief for the United States as Amicus Curiae,* at 10. If South Dakota, and now North Dakota, are correct in that claim, then this Court ought to move forward to adjudicate the claim.

Dated: March , 1986.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER

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