

No. 103 Original

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF SOUTH DAKOTA

Plaintiff,

v.

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

Defendants.

RENEWED MOTION FOR
LEAVE TO FILE COMPLAINT

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The State of South Dakota, appearing herein through the Honorable William Janklow, its Governor, and the Honorable Mark V. Meierhenry, its Attorney General, acting pursuant to the authority and powers vested in them by statute, South Dakota Codified Laws, Section 1-11-1(2) (1980), respectfully renews South Dakota's Motion for Leave to File Complaint and in support thereof states that:

1. On August 16, 1985, the State of South Dakota filed its Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint. On March 4, 1986, the State of North Dakota filed its Motion for Leave to Intervene as Plaintiff and Complaint in Intervention. This Court granted North Dakota's Motion to Intervene but denied without prejudice South Dakota's Motion for Leave to File Complaint on March 31, 1986. ____ U.S. ____, 106 S. Ct. 1487 (1986). For the reasons set forth below, South Dakota must protect its interests by moving to renew its Motion for

Leave to File Complaint in this original action before the time period for seeking certiorari in *Missouri v. Andrews*, 787 F.2d 270 (8th Cir. 1986), has run.¹

2. At the invitation of the Court, ____ U.S. ____, 106 S. Ct. 305 (1985), the Solicitor General expressed the views of the United States in a Brief as Amicus Curiae filed February 26, 1986. At that time, *Missouri v. Andrews*, No. 84-1674-NE, was pending in the Eighth Circuit and the Solicitor General's recommendation was:

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.

Brief for the United States as Amicus Curiae, at 13. Despite this recommendation, the Solicitor General agreed that South Dakota has a justiciable controversy with the States of Nebraska, Iowa and Missouri; he stated that "South Dakota is correct in claiming that the lower basin states' lawsuit [in

¹ South Dakota has submitted this renewed Motion for Leave to File Complaint under the same docket number, No. 103 Original, based on the Clerk's advice. South Dakota believes that practice in an original action in this Court varies in this respect from practice in federal district courts under Rule 41 of the Federal Rules of Civil Procedure, in which a separate new action with a new docket number would have to be filed to renew an action that has been dismissed without prejudice. Through the mechanism of the Motion for Leave to File Complaint a litigant in an original action has access to this Court's docket prior to the time the original Bill of Complaint is formally filed. Thus, a litigant in an original action is in a significantly different position from that of a litigant whose complaint in district court has been dismissed without prejudice. The latter cannot seek further proceedings in the action once the complaint that initiated the action is dismissed. As a practical matter, renewal of the Motion for Leave to File Complaint, using the original docket number, saves all the parties unnecessary expense, for the issues and arguments have already been set forth in the pleadings previously filed.

Missouri v. Andrews] effectively disputes South Dakota's right to use and allocate water within its borders." *Id.* at 10. But he argued that "... 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." *Id.* at 8.

Amplifying his reasoning, the Solicitor General stated further:

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 [Flood Control Act of 1944] 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 [*sic*] for this Court's determination. Accordingly, we suggest that this Court withhold leave to file the complaint until that litigation has run its course.

Id. at 12.

3. The *Missouri v. Andrews* litigation has now run its course in all courts except this one. The United States has been

unsuccessful on all three issues that it raised. The Eighth Circuit, in a two-to-one decision, affirmed the District Court in all respects, placing the entire mainstem of the Missouri River under the exclusive control of the Corps of Engineers, depriving the Secretary of the Interior of authority to devote any mainstem Missouri River water to reclamation purposes, and denying, *de facto*, the right, power and authority of South Dakota, North Dakota and the other Upstream States to allocate waters wholly within their territorial boundaries. *Missouri v. Andrews*, 787 F.2d 270 (8th Cir. 1986). The United States sought rehearing *en banc*, which was denied on a five-to-five vote. See *Missouri v. Andrews*, Order, Slip op. at 2 (8th Cir. July 10, 1986). Judge Bright, who dissented from the panel opinion, did not vote on whether to rehear the case *en banc* because of his senior status.

4. Adopting the suggestion of the Solicitor General, South Dakota seeks renewal of its action at this time. It is necessary to do so to protect the interests of South Dakota during the period of time in which certiorari may be sought in *Missouri v. Andrews*. What the Solicitor General will do next is unclear. He states: "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 present[ed] for this Court's determination." *Brief for the United States, supra*, at 12. The Solicitor General seemingly promised to seek certiorari if the Government lost below and may also have promised to include among the issues presented for review the ownership claims of the upstream states. But the promise is ambiguous and, in all events, unenforceable. Moreover, if no petition for certiorari is filed in *Missouri v. Andrews*, the *only* avenue open to South Dakota for adjudication of "the conflicting claims of South Dakota and the lower basin states to the control of impounded water in federal mainstem reservoirs" would be this original action.

Hence, South Dakota seeks to renew its Motion now with the understanding that the Court may reserve decision on the

renewed Motion until after the Solicitor General has either filed a petition for certiorari or let the time for so doing expire, and perhaps until after this Court has granted or denied any such petition for certiorari. South Dakota believes that the pendency of this original action and the issues it presents should influence this Court's determination of the breadth of the issues to be presented to the Court on any certiorari review of *Missouri v. Andrews*. In addition, South Dakota believes that, in the interest of judicial economy, this Court should have available the option of consolidating *Missouri v. Andrews* with this original action when the Court is considering any petition for certiorari that it receives.

The issues presented in South Dakota's Complaint in this original action are almost entirely legal issues and thus can be presented to this Court for decision in the form of a motion for partial summary judgment without any of the preliminary factfinding proceedings ordinarily conducted by a special master. As stated in South Dakota's Complaint in No. 103, "The sole relief [South Dakota] 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 South Dakota has the right, power and authority to control, manage and provide for the use of certain water stored for reclamation and irrigation purposes behind mainstem dams in South Dakota, subject to the appropriate power and authority of the Bureau and the Corps." *Complaint*, at 11-12. Consequently, if this Court accepts jurisdiction in this original action, it can readily consolidate this action with *Missouri v. Andrews* without delaying or significantly complicating its consideration of *Missouri v. Andrews*.

This Court has previously consolidated a case within its appellate jurisdiction with an original action when the disputes in each case arose out of the same events and involved similar issues and when a decision in the appellate jurisdiction case could have influenced the rights of a party to the original

jurisdiction case. *See Cissna v. Tennessee*, 242 U.S. 195, 198 (1916).

5. Even if certiorari is applied for and granted, South Dakota's vital interests in her natural resources cannot be vindicated unless that State is before this Court. The United States cannot represent those interests fully and fairly, for it has competing interests it must serve—interests that compete with those of the state and intramural interests that compete with each other. Thus to safeguard her interests, South Dakota requests the opportunity to be heard, by brief and where appropriate oral argument, on the issues that ought to be before the Court and on how those issues ought to be resolved. If *Missouri v. Andrews*, as decided by the Eighth Circuit, is the law of the Missouri River, South Dakota has lost title to and all right, power and authority over her principal natural resource—without ever once having been heard.

WHEREFORE, South Dakota prays that its Renewed Motion For Leave to File Complaint in *South Dakota v. Nebraska, Iowa and Missouri*, No. 103 Orig., be granted and that the case be consolidated with *Missouri v. Andrews* if certiorari is granted in the latter case.

Dated: September , 1986.

Respectfully submitted,

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Governor

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