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.

DEFENDANTS' JOINT BRIEF IN OPPOSITION TO RENEWED MOTION FOR LEAVE TO FILE COMPLAINT

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The States of Nebraska, Iowa and Missouri oppose South Dakota's Renewed Motion for Leave to File Complaint. The defendant States received South Dakota's renewed motion Sepember 29, 1986, and file this brief in opposition within sixty days pursuant to Sup. Ct. R. 9.5.

ARGUMENT

South Dakota's chief ground for renewing the motion for leave to file complaint is the Court of Appeals decision in *Missouri v. Andrews,* 787 F.2d 270 (8th Cir. 1986), *rehearing den.* (Slip op. 8th Cir. July 10, 1986). However, there has been no change in circumstances to warrant re-

consideration of South Dakota's motion. This Court denied South Dakota's Motion for Leave to File Complaint on March 31, 1986. The Court of Appeals decision in *Missouri v. Andrews* was rendered on March 13, 1986, and was filed with this Court March 18, 1986, prior to this Court's denial of South Dakota's original motion. (App. 1 to Defendant States' Brief in Opposition to Motion of the State of North Dakota to Intervene). The decision of the Court of Appeals is not a new development justifying reconsideration of South Dakota's motion.

South Dakota's primary argument is that the United States Solicitor General's Office recommended allowing *Missouri v. Andrews* to "run its course," and advised waiting until final resolution of the *Missouri v. Andrews* litigation. (Brief for the United States, pp. 11-12). The United States received an extension of time to December 7, 1986, to petition for certiorari in *Missouri v. Andrews*. Therefore that litigation has not yet "run its course." Contrary to South Dakota's argument, the Solicitor General's recommendation does not provide a basis for South Dakota to file an original action against Nebraska, Iowa and Missouri.

Moreover the Solicitor General's brief shows the lack of merit in South Dakota's complaint. The proposed complaint is based entirely on South Dakota's erroneous belief that the Flood Control Act apportions the waters of

the Missouri River.[1] The Solicitor General recognizes that the Flood Control Act of 1944 does not apportion the waters of the Missouri River between states. (Brief for the United States, p. 9).

South Dakota cites a portion of the Solicitor General's brief which states that the complaint in *Missouri v. Andrews* demonstrates there is a controversy among states. (Renewed Motion, pp. 2-3). While this was the original position taken by South Dakota, it retreated from that position in its reply brief. There South Dakota acknowledged that "*Missouri v. Andrews* is certainly not a suit among states . . ." (South Dakota Reply Brief, p. 5). South Dakota's tactic of lifting sentences from the complaint and citing them wholly out of context simply fails to establish there is a dispute between states. This tactic has been consistently found unmeritorious in *Missouri v. Andrews*. At the very outset of that litigation the Magistrate said, "I do not believe that a fair reading of the complaint includes the issues advanced by South Dakota . . . " (South Dakota App. C-1-15).

The Court of Appeals decision in *Missouri v. Andrews* clearly demonstrates that that case does not create a controversy between the States. That decision simply affirmed the district court's ruling granting partial summary judgment to the plaintiff States of Missouri, Iowa

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[1]The complaint stated:

> South Dakota seeks only to establish its right, power and authority over those waters stored for reclamation and irrigation purposes behind the mainstem dams on the Missouri River in South Dakota, as apportioned by Congress to it in the Flood Control Act and to secure those rights against the claims of Defendant States Nebraska, Iowa and Missouri.

(South Dakota Proposed Complaint, ¶ 25).

and Nebraska on one issue—whether the Secretary of the Interior or the Secretary of the Army was the proper federal entity to execute an industrial water service contract at an Army reservoir under the Flood Control Act of 1944. The resolution of which of two federal agencies has jurisdiction over industrial water marketing at Lake Oahe does not create a justiciable controversy between South Dakota and the States of Missouri, Iowa and Nebraska.

South Dakota seriously mischaracterizes the decision of the Court of Appeals. Its motion states that the decision " . . . [placed] the entire mainstem of the Missouri River under the exclusive control of the Corps of Engineers, and [deprived] the Secretary of the Interior of authority to devote any main-stem Missouri River water to reclamation purposes . . . " (Renewed Motion, p. 4, ¶ 3). The Court of Appeals held only that the Secretary of the Interior lacked authority to market water for *industrial* use from reservoirs concededly under Army control; the Secretary of the Interior's authority to provide for *irrigation* use of Army reservoirs is not affected by the decision. *Missouri v. Andrews,* 787 F.2d at 284, n.20; App. 26-27, n.20, Opposition to North Dakota Motion to Intervene. Nor does the decision affect the mainstem of the Missouri River outside of Army reservoirs.

South Dakota also accuses the Eighth Circuit Court of Appeals of "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." (Renewed Motion, p. 4, ¶ 3). The Court of Appeals specifically stated:

> Our decision in this case does not address the issue of South Dakota's right, as against other states

> and the federal government, to allocate waters within its borders. This issue was not presented to us and South Dakota is not a party to this case.

Missouri v. Andrews, 787 F.2d at 277, n.5; App. 9, n.5, Opposition to North Dakota Motion to Intervene. The Court of Appeals expressly rejected the argument that *Missouri v. Andrews* was actually a dispute between states and stated, "... our decision deals solely with the validity of the federal appellants' conduct." *Missouri v. Andrews,* 787 F.2d at 278, n.7; App. 11, n.7, Opposition to North Dakota Motion to Intervene.

Beyond that, it is clear that South Dakota is not seeking review of the decision in *Missouri v. Andrews.* Instead it wants to convert any review of that case into a vehicle for resolution of an ambiguous and unripe issue of "state sovereignty." South Dakota states that, if certiorari were granted, it wishes to be heard "on the issues that ought to be before the Court." (Renewed Motion, p. 6). Further, its motion asserts that "South Dakota believes that the pendency of this original action and the issues it presents should influence the Court's determination of the breadth of the issues to be presented to the Court on any certiorari review of *Missouri v. Andrews.*" (Renewed Motion, p. 5, ¶ 4).

South Dakota has refused to clarify exactly what issues it wants to present. It indicates that it seeks adjudication of "the conflicting claims of South Dakota and the lower basin states[2] to the control of impounded water in federal mainstem reservoirs." The "sole relief" sought in the complaint is a determination that "the State of South Da-

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[2]Kansas, a lower basin State, is not a defendant.

kota 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. The basis of this claim is that the 1944 Flood Control Act "apportioned" the Missouri River—an argument rejected by the United States.[3] In addition, its "quiet title" or "statutory apportionment" action would exclude six of the ten basin States, the United States, and all of the Indian Tribes within the Basin.

South Dakota tacitly admits that it would attempt to expand the record in *Missouri v. Andrews*. Its Renewed Motion states that the issues it would present are "*almost* entirely legal issues" which could be "presented to this Court for decision in the form of a motion for *partial* summary judgment . . . " (Renewed Motion, p. 5, ¶ 4) (emphasis added). The defendant States believe that South Dakota's complaint indeed raises different issues than *Missouri v. Andrews,* and could require discovery and fact finding. Joinder with *Missouri v. Andrews* would delay and complicate that case.

Cissna v. Tennessee, 242 U.S. 195 (1916), does not provide authority to consolidate South Dakota's proposed action with any certiorari review of *Missouri v. Andrews,* and it certainly does not provide authority to grant leave to file South Dakota's proposed original action. In *Cissna,* a state court judgment in a quiet title action concededly

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[3]South Dakota's argument is also erroneous because there is no specific storage allocation in Oahe Reservoir for irrigation and reclamation. South Dakota App. C-3-13. Instead there is multiple use storage at Oahe.

resolved the state boundary question already pending in an original action in this Court. The question before this Court was whether to delay the appeal of the state court proceeding until the original action was resolved. The issues and relevant evidence in the two cases were identical, and the controversy over the location of the state boundaries was clearly a proper matter for the exercise of original jurisdiction. Here South Dakota belatedly attempts to file an original action in order to circumvent the decision of federal courts on a matter appropriately determined in the lower federal courts—whether a federal officer exceeded his statutory authority.

South Dakota's Reply Brief filed October 31, 1985, stated that *Missouri v. Andrews* is relevant to South Dakota's proposed original action " . . . *only* because it provides an example of the Defendant States' theory that no congressional apportionment has occurred and that South Dakota has no right, power and authority over its portion of the Missouri River Waters." (Reply Brief, p. 3). (emphasis added). The defendant States do not agree with South Dakota's characterization of our legal theories. But even if correct, a theoretical disagreement does not establish a case or controversy within this Court's original jurisdiction. *See New Jersey v. Sargent,* 269 U.S. 328 (1926).

South Dakota admitted it is not seeking resolution of the issue decided in *Missouri v. Andrews* (South Dakota Reply Br., p. 5). ETSI's termination of its contract with the South Dakota Conservancy District and its loss of a state permit show that South Dakota is not interested in the relief granted in *Missouri v. Andrews* (See App. A-8, A-9 and A-10, Defendants' Opposition to Motion for

Leave to File Complaint). The fact that South Dakota dislikes certain statements in the complaint in *Missouri v. Andrews* does not establish a justiciable controversy.

Lastly, South Dakota's statement that *Missouri v. Andrews* would decide its "title to and all right, power and authority over her principal natural resource—without ever once having been heard" is clearly in error. (p. 6). The case does not decide South Dakota's "title to" the Missouri River, as pointed out above. And South Dakota has filed briefs on all major issues as *amicus curiae* throughout the *Missouri v. Andrews* litigation. To infer that South Dakota has not been heard in *Missouri v. Andrews,* a case decided on summary judgment, is simply not true.[4]

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[4]South Dakota has no right to seek review of *Missouri v. Andrews* in this Court. By withdrawing its motion to intervene in that action, it waived any arguments that it should be permitted to become a party to that litigation. *See Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 110 (1968).

CONCLUSION

South Dakota's Renewed Motion for Leave to File Complaint should be denied.

Respectfully submitted,

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