IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

Before the Special Master
Hon. Kristin L. Myles

OPENING BRIEF OF THE STATE OF SOUTH CAROLINA FAVORING A SINGLE PROCEEDING AND OPPOSING BIFURCATION OF DISCOVERY AND TRIAL

DAVID C. FREDERICK
SCOTT H. ANGSTREICH
SCOTT K. ATTAWAY
MICHAEL K. GOTTLIEB
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Special Counsel to the
State of South Carolina

HENRY DARGAN MCMASTER
Attorney General
JOHN W. MCINTOSH
Chief Deputy Attorney General
ROBERT D. COOK
Assistant Deputy Attorney General
Counsel of Record
T. PARKIN HUNTER
Assistant Attorney General
LEIGH CHILDS CANTEY
Assistant Attorney General
ELIZABETH H. SMITH
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970

Counsel for the State of South Carolina

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South Carolina favors the typical course taken in equitable apportionment actions: a single, non-bifurcated proceeding that would frame the issues for the Special Master and the Court, while reducing the inconvenience to private party witnesses and the costs to the parties. A single proceeding will ensure that witnesses — many of whom are private individuals not employed by or affiliated with a party or intervenor — are called only once to testify, during which they can testify about particular water uses, the benefits of that use, and the harms caused by a lack of water. A single discovery period followed by a single trial on all issues will permit the parties to adduce, and the Special Master to hear, all of that evidence at one time. A single proceeding will eliminate disputes about whether evidence is admissible or relevant to the first phase of the case. A single proceeding also will enable the Special Master to present the Supreme Court with a single ruling on all aspects of the dispute, preventing piecemeal review by the Court of discrete issues relevant to resolving the case on the merits. A single proceeding will thus promote prompt resolution of this case, while also facilitating the possibility of settlement, as all parties will have a view of the strengths and weaknesses of each side's case in its entirety. Although a separate proceeding might be necessary to hammer out the details of an equitable apportionment decree, such a proceeding would entail technical issues and likely not necessitate additional discovery or the need to inconvenience fact witnesses for additional testimony.

Notwithstanding that South Carolina initially favored exploring the possibility of bifurcating trial of this case — with a narrow first phase limited to the

question of harms suffered by South Carolina water users from overconsumption in North Carolina — subsequent events have made that initial suggestion untenable, in South Carolina's view. North Carolina and the intervenors consistently have proposed a much broader scope for the first phase entailing issues that (in South Carolina's view) are part of the remedial apportionment phase. The parties' inability to define with precision the scope of the two phases of a bifurcated case has caused South Carolina to conclude that a single proceeding would be the most efficient means of resolving this case.

In contrast, bifurcation on the terms North Carolina and the intervenors have proposed would be inefficient for the Special Master, the Court, the witnesses, and the parties. It also would prejudice South Carolina. South Carolina would have to prepare for and conduct two trials where only one is needed. Moreover, South Carolina would be prejudiced by the delay that bifurcation would bring to final resolution of the case, during which time the significant injury caused by North Carolina's inequitable water uses in times of low flows continues.

Federal Rule of Civil Procedure 42(b) provides guidance to the Special Master's consideration of North Carolina's and the intervenors' request to bifurcate this proceeding. Applying Rule 42(b), federal courts require the proponent of bifurcation to show that the issues to be decided — and the evidence and witnesses relevant to those issues — are separate and distinct; that bifurcation will serve judicial economy; and that bifurcation is necessary to prevent prejudice to one party. North Carolina and the intervenors cannot make that showing here. The

party States have been conducting document discovery and serving subpoenas on numerous third parties to discover facts concerning all aspects of the case. Although the intervenors were not permitted to conduct such discovery while their status was under dispute before the Court, any "catch-up" document discovery required can proceed efficiently, permitting the numerous witnesses with knowledge pertinent to the equitable apportionment analysis to be deposed once. Because North Carolina cannot demonstrate prejudice if its request for bifurcation is denied, there is no countervailing reason to separate this case into two phases.

Accordingly, in light of the significant overlap in issues that North Carolina proposes to segregate artificially into two separate phases for discovery and trial proceedings, and the certainty that bifurcation will lead to duplication of both evidence and witnesses, the Special Master should direct the parties to prepare a case management plan that completes full discovery and a single trial plan to resolve their equitable apportionment dispute.

BACKGROUND

Early in this case, the party States explored bifurcating discovery into two phases to correspond to the Supreme Court's analysis in its equitable apportionment decisions. South Carolina suggested a bifurcation of the proceedings that would limit a Phase One to the question of South Carolina's showing of the injury alleged in the Complaint. *See*, *e.g.*, *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982) ("[A] State seeking to prevent or enjoin a diversion by another State bears the burden of proving that the diversion will cause it real or substantial injury or damage.") (internal quotation marks omitted). Phase Two would have addressed the facts necessary for an equitable apportionment with a weighing of the respective benefits of water uses in each State. *See*, *e.g.*, *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984) (requiring the upstream State "to show, by clear and convincing evidence, that reasonable conservation measures could compensate for some or all of the proposed diversion and that the injury, if any, to [the downstream State] would be outweighed by the benefits to [the upstream State] from the diversion"). *See* Brief of the State of South Carolina Concerning Phase One and Phase Two Issues and Timing at 6-12 (June 16, 2008) ("SC Phases One and Two Issues Br.").[1]

[1] South Carolina also argued that bifurcated discovery would streamline the case because the intervenors had a role only in Phase Two proceedings, based on their limited intervention interests in their own water transfers. *See* SC Phases One and Two Issues Br. at 15-16. The Special Master rejected South Carolina's request to limit the intervenors' participation to what South Carolina viewed as Phase One. *See* First Interim Report of the Special Master at 32-35 (Nov. 25, 2008).

North Carolina and the intervenors opposed South Carolina's approach. They took the position that Phase One should not be limited to whether South Carolina could show that the available water supply is insufficient to meet the existing needs of water users in South Carolina, but also must include the question whether "water shortages [are] caused by consumption in North Carolina," irrespective of "climatic and other factors that contribute to flow reduction in the Catawba River." Brief of the State of North Carolina Regarding Issues for Phase I at 4, 6 (June 16, 2008) ("NC Phase One Issues Br."). Similarly, North Carolina claimed that Phase One must include the question whether harms to South Carolina water users were caused by factors such as "upstream consumption within South Carolina, inadequate conservation measures, or failure to plan for and utilize alternative water supplies or storage opportunities." *Id.* at 7. In South Carolina's view, North Carolina's proposed scope for Phase One was inconsistent with the Supreme Court's equitable apportionment cases regarding the showing that a downstream State must make to demonstrate an entitlement to judicial apportionment of an interstate river, which is distinct from the question of what form that apportionment should take. *See* Reply Brief of the State of South Carolina Concerning Phase One and Phase Two Issues and Timing at 5-15 (June 23, 2008). South Carolina also questioned the efficiency of bifurcating along the lines suggested by North Carolina and the intervenors, because such a division would spark numerous disagreements about what issues would need to be litigated

in one phase versus the other phase and because witnesses would be inconvenienced by needing to be called twice to testify about the issues in the case.

In light of the parties' and the intervenors' disagreement about the content of a Phase One, the Special Master questioned whether bifurcation would serve its intended purpose and "whether bifurcation is even an efficient way to proceed." 12/5/08 Tel. Conf. Tr. at 17:20-24. The Special Master further noted that "the uncertainty over what the phases are has made it apparently difficult to agree on what the dates for the trial schedule are." *Id.* at 22:6-8. At the Special Master's direction, the party States met and conferred in an attempt to resolve their differences about the scope and content of Phases One and Two. Despite substantial effort, the parties were unable to arrive at a shared understanding and submitted individual statements of issues for each phase in their respective progress reports dated February 3, 2009.

Without resolving that issue, the Special Master entered the Case Management Plan ("CMP") currently in place, which provides that, "[i]n the interest of minimizing litigation expense, this matter will be bifurcated as set out in a separate order." CMP § 4.1 ("Bifurcated Discovery") (adopted in Case Management Order No. 9 (Jan. 7, 2009)). With respect to discovery in advance of a final decision on bifurcation, the CMP provides that "the parties will make best efforts to conduct all discovery efficiently, and any party may, for convenience, conduct discovery into matters relevant to Phase Two questions during Phase One." *Id.*

Accordingly, from the outset, document discovery has been directed to both phases. Both States' initial discovery requests, served in mid-2008, were not limited to inquiries relevant to each State's view of Phase One questions.[2] In July 2009, North Carolina began serving subpoenas on South Carolina water users and has served at least 115 such subpoenas to date. Each of those subpoenas contains the same 43 questions, which encompass matters — such as conservation measures, water use policies, and drought management plans — that go to all aspects of this litigation. South Carolina also has served subpoenas on 46 water users in North Carolina, likewise requesting information relevant to all aspects of the case, including: information concerning water withdrawals and wastewater discharges; water quality; interbasin transfers; water supply plans and policies; drought

[2] *See*, *e.g.*, Defendant North Carolina's First Set of Interrogatories and Requests for Production of Documents (July 1, 2008) (Interrogatory No. 6: "Identify and describe with specificity South Carolina's knowledge of consumptive uses of the Catawba River in North Carolina and South Carolina.") (Document Request No. 9: "Produce all documents that support South Carolina's claim that the transfers of water out of the Catawba River that the [North Carolina Environmental Management Commission] has approved and the North Carolina statute has permitted are in excess of North Carolina's equitable share of the Catawba River, as set out in the Bill of Complaint.") (Document Request No. 43: "Produce all documents supporting South Carolina's contention that the Concord and Kannapolis IBT [interbasin transfer] is not necessary to meet future water needs of Concord and Kannapolis.") (Document Request No. 82: "Produce all inventories of any water uses, including consumptive water uses in the Catawba, Yadkin/Pee Dee, or Broad/Congaree River Basins.") (Document Request No. 89: "Produce all records of water supply shortfalls in the Catawba, Yadkin/Pee-Dee, and Broad/Congaree River Basins.") (Document Request No. 106: "Produce all studies of groundwater use in the Catawba, Yadkin/Pee Dee, or Broad/Congaree River Basins.") (Document Request No. 108: "Produce all inventories of water conservation measures and policies for the Catawba, Yadkin/Pee Dee, or Broad/ Congaree River Basins, implemented at both State and local levels.") (Document Request No. 110: "Produce all documents explaining how water conservation measures and policies have been implemented within the Catawba, Yadkin/Pee Dee, or Broad/Congaree River Basins during recent droughts."). Pursuant to CMP § 2.2, South Carolina is not here attaching either State's discovery requests, but would promptly submit them upon request. The same is true for the subpoenas discussed next in the text.

contingency plans; water conservation measures; past, present, and future consumptive uses of water in the Catawba River Basin; and consideration of alternative sources of water other than Catawba River Basin waters.

Given the irreconcilable differences among the party States and the intervenors over how the case could be bifurcated, South Carolina began to question whether bifurcation remained likely to minimize, rather than to increase, litigation expenses. *See* South Carolina's Fourteenth Progress Report at 2-3 (Jan. 26, 2010). In the January 2010 telephone conference, the Special Master noted that, if Phase One required assessing "particular uses by North Carolina" as well as "particular uses by South Carolina," the inquiry would have "some[] overlap with the concept of whether the uses are or are not beneficial," ostensibly a separate, Phase Two inquiry. 1/27/10 Tel. Conf. Tr. at 30:14-25.

The Special Master then set a briefing schedule to hear the parties' current views on bifurcation, explaining that resolution of the issue "will be driven mostly by what I think is the best result from the standpoint of efficiency and use of judicial resources and moving the case along." *Id.* at 26:11-13. Specifically addressing the issue of witness testimony that might be relevant to both phases of a bifurcated proceeding, the Special Master stated that, "[i]f a person's going to be deposed, . . . the assumption should be that person will be deposed once, not twice or three times." *Id.* at 75:9-19.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure, which "may be taken as guides" in original actions, Sup. Ct. R. 17.2, provide that, "[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third party claims." Fed. R. Civ. P. 42(b). Interpreting Rule 42(b), courts "have cautioned that separation of issues is not the usual course that should be followed, and the issue to be tried must be so distinct and separable from the others that a trial of it alone may be had without injustice." *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1323-24 (5th Cir. 1976) (citation and internal quotation marks omitted).[3]

Courts deciding whether to bifurcate have balanced myriad factors, including judicial economy, convenience to the parties and witnesses, facilitation of settlement, and any prejudice that might be suffered by a party.[4] Summarizing the court rulings applying Rule 42(b), Professors Wright and Miller explain that "[i]t is

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[3] *See, e.g.*, *Kos Pharms., Inc. v. Barr Labs., Inc.*, 218 F.R.D. 387, 391 (S.D.N.Y. 2003) ("[T]he circumstances justifying bifurcation should be particularly compelling and prevail only in exceptional cases."); *Real v. Bunn-O-Matic Corp.*, 195 F.R.D. 618, 620 (N.D. Ill. 2000) ("The piecemeal trial of separate issues in a single lawsuit is not to be the usual course. Bifurcation . . . is the exception, not the rule.") (citation omitted); *Laitram Corp. v. Hewlett-Packard Co.*, 791 F. Supp. 113, 115 (E.D. La. 1992) ("[C]ourts should not order separate trials unless such a disposition is clearly necessary.") (internal quotation marks omitted); Fed. R. Civ. P. 42 advisory committee's note (1966 Amendment) ("separation of issues for trial is not to be routinely ordered").

[4] *See, e.g.*, *THK Am., Inc. v. NSK Co. Ltd.*, 151 F.R.D. 625, 632 (N.D. Ill. 1993) ("Factors to be considered include (1) convenience; (2) prejudice; (3) expedition; (4) economy; (5) whether the issues sought to be tried separately are significantly different; (6) whether they are triable by jury or the court; (7) whether discovery has been directed to a single trial of all issues; (8) whether the evidence required for each issue is substantially different; (9) whether one party would gain some unfair advantage from separate trials; (10) whether a single trial of all issues would create the potential for jury bias or confusion; and (11) whether bifurcation would enhance or reduce the possibility of a pretrial settlement.").

the interest of efficient judicial administration that is to be controlling under the rule, rather than the wishes of the parties." 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2388, at 92-94 (3d ed. 2008) ("Wright & Miller"). "Because a single trial tends to lessen the delay, expense and inconvenience to all parties, the burden rests on the party seeking bifurcation to show that it is proper." *Rodin Properties-Shore Mall, N.V. v. Cushman & Wakefield of Pennsylvania, Inc.*, 49 F. Supp. 2d 709, 721 (D.N.J. 1999) (internal quotation marks omitted); *see Svege v. Mercedes-Benz Credit Corp.*, 329 F. Supp. 2d 283, 285 (D. Conn. 2004) (proponent must demonstrate "substantial benefits" from bifurcation).

Where, as here, "the preliminary and separate trial of an issue will involve extensive proof and substantially the same facts or witnesses as the other issues in the cases, or if any saving in time and expense is wholly speculative, it is likely that a separate trial on that issue will be denied." 9A Wright & Miller § 2388, at 100-03. Thus, courts often have rejected requests to bifurcate where "[a] considerable overlap in testimonial and documentary evidence . . . is likely." *L-3 Communications Corp. v. OSI Sys., Inc.*, 418 F. Supp. 2d 380, 382 (S.D.N.Y. 2005). In such cases, courts have found that "it would be difficult to limit the testimony of witnesses" who might testify in each of the separate trials. *Bloxham v. Mountain West Farm Bureau Mut. Ins. Co.*, 43 F. Supp. 2d 1121, 1129 (D. Mont. 1999).

As shown below, a single proceeding best maximizes the efficient use of scarce public resources for this litigation, and North Carolina and the intervenors cannot meet their burden to justify bifurcation.

ARGUMENT

A. A Single Proceeding Is The Most Efficient Way To Resolve This Case

Although South Carolina initially supported bifurcation, that was based on South Carolina's understanding that Phase One would be limited to a discrete question — whether South Carolina could demonstrate harm to existing water users — implicating a limited set of evidence and witnesses, as to which the intervenors (concerned only about the content of any equitable apportionment decree) would not play a role. North Carolina and the intervenors never agreed to that limited understanding of the content of Phase One. Given the much broader and overlapping conception of Phases One and Two advanced by North Carolina and the intervenors, bifurcation would not efficiently resolve this case. South Carolina proposes that the parties complete discovery and then move to a single trial on all issues related to the equitable apportionment issues presented here. Any additional proceeding to frame the technicalities of a decree can be done without inconveniencing fact witnesses.

1. A Single Proceeding Will Best Serve Judicial Economy

A single proceeding would be most efficient for the parties, their witnesses, the Special Master, and the Justices. In such a proceeding, the parties would take discovery on all issues and try all issues before the Special Master, resulting in a single record to be used for the case. That approach would permit the parties to develop the full factual record, thereby facilitating consideration and analysis of the proper legal standard and how the evidence should be measured against it in each phase of the equitable apportionment analysis. Proceeding in that way, the Court

will get the benefit of the Special Master's recommendations on the entire case and in light of all the evidence, making a remand or new trial less likely even in the event the Court disagrees with any threshold ruling.

The Court's review of a special master's recommendations traditionally has benefited from a full record developed during a single proceeding. In the most recent equitable apportionment case, the special master conducted a single "lengthy trial involving an extensive presentation of evidence." *Colorado v. New Mexico*, 459 U.S. at 180. Although the Court disagreed with the legal reasoning of the special master in that case and remanded for additional factfinding, it noted that additional hearings "may be unnecessary in light of the extensive evidence already presented at trial. Upon remand, the Special Master is free to reaffirm his original recommendation or to make a different recommendation on the basis of the evidence and applicable principles of equitable apportionment." *Id.* at 190 n.14. On remand, the scope of prior discovery and trial obviated the need to adduce or submit new evidence, and the special master was able to "develop[] additional factual findings" solely "on the basis of the evidence previously received." *Colorado v. New Mexico*, 467 U.S. at 315. Other equitable apportionment cases have likewise been conducted as a single proceeding, rather than on the basis of separate trials.[5]

[5] *See Nebraska v. Wyoming*, 325 U.S. 589, 591-657 (1945) (reviewing all of the extensive evidence adduced by the special master in a single phase and issuing an equitable apportionment decree on that basis); Report of the Special Master at 40-212, *New Jersey v. New York*, No. 16, Orig. (Feb. 2, 1931) (extensively analyzing the benefits of water uses in each State and recommending the terms of a decree, which the Court "confirmed" in *New Jersey v. New York*, 283 U.S. 336, 345-46 (1931); *see id.* at 343 (noting the "great mass of evidence")); *Connecticut v. Massachusetts*, 282

A single proceeding here will eliminate disputes about whether a particular fact, witness, or piece of evidence is relevant to Phase One, further streamlining the discovery and pre-trial proceedings. For example, North Carolina has served 115 subpoenas on water users and dischargers in South Carolina, requesting information related to water withdrawals and wastewater discharges; water quality; interbasin transfers; water supply plans and policies (including drought contingency plans); water conservation measures; past, present, and future consumptive uses of water in the Catawba River Basin; and consideration of alternative sources of water other than Catawba River Basin waters. On North Carolina's theory of the case, many of those issues are relevant to Phase One, whereas South Carolina views them as relevant, if at all, only in Phase Two. Thus, bifurcation inevitably would lead to numerous discovery disputes and pre-trial motions in limine that could be avoided by the usual practice of having a single discovery period followed by a single trial. Those issues will be far more efficiently examined and ruled on at the end of discovery in light of a full factual record, as even North Carolina conceded a year ago.[6]

U.S. 660, 664-69 (1931) (summarizing the special master's findings based on a full record, adduced in a single proceeding, that extensively analyzed the harms and benefits of water uses in both States); *Wyoming v. Colorado*, 259 U.S. 419, 456, 471-96 (1922) (same).

[6] The party States and the intervenors previously have agreed that such issues would not benefit from adjudication in the abstract and that it would be more efficient to present disputes to the Special Master in specific factual contexts. *See* South Carolina's Eleventh Progress Report at 1 (Feb. 3, 2009) ("[A] further refinement of topics to be addressed in Phase I should await further factual development and . . . the Special Master need not decide at this time — in the absence of any specific factual presentation or legal context — the relevance of any such sub-issues."); 2/5/09 Tel. Conf. Tr. at 8:10-14

South Carolina initially favored bifurcation based on its view that, under the Court's precedents, South Carolina may meet its threshold burden to show harm by proving that the available water supply is insufficient to meet the existing needs of water users in South Carolina.[7] This is precisely what happened in the two most recent droughts suffered in South Carolina during the Catawba River Basin droughts in 1998-2002 and 2007-2009. *See* SC Phases One and Two Issues Br. at 8-12. A determination of whether South Carolina made that showing is a discrete inquiry, which would not require detailed study of specific water uses in either State, their respective benefits and efficiencies (or lack thereof), but only the aggregate water supply entering South Carolina and the ability of that aggregate supply to meet existing South Carolina needs. Following a successful showing of harm by South Carolina, Phase Two would involve a wide-ranging inquiry into the relative benefits of each State's water uses, conservation measures, alternative

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(Statement of Christopher Browning) ("Mr. Frederick is correct that we do have differences with respect to the very specific issue to be resolved in Phase 1, but we also agree with his statement that it's unnecessary to resolve that specific difference at this point in time.").

[7] Thus, in *Nebraska v. Wyoming*, the Court made clear that the downstream State in an equitable apportionment action may demonstrate the requisite threshold "injury or threat of injury" by showing "the inadequacy of the supply of water to meet all appropriative rights." 325 U.S. at 610; *see id.* ("where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination"); *see also Colorado v. New Mexico*, 459 U.S. at 187 n.13 (finding that New Mexico, the downstream State, had proven injury by clear and convincing evidence "since *any* diversion by Colorado, unless offset by New Mexico at its own expense, will necessarily reduce the amount of water available to New Mexico users"). The Court has found such serious injury and proceeded to an equitable apportionment analysis of the benefits of water uses in both States where the flow of a river is inadequate to support and sustain existing uses at times of low flow, even if the flow at other times of the year is sufficient to do so. *See Nebraska v. Wyoming*, 325 U.S. at 608 ("The evidence supports the finding of the Special Master that the dependable natural flow of the river during the irrigation season has long been over-appropriated. A genuine controversy exists.").

water supplies, and the other factors that the Court has identified as relevant to equitably apportioning an interstate river.[8]

North Carolina and the intervenors, on the other hand, have proposed a much more expansive Phase One inquiry, which would require an evaluation of the benefits and efficiencies of water uses *within* South Carolina, as well as South Carolina's efforts to find alternative sources of water. *See*, *e.g.*, NC Phase One Issues Br. at 6-7 (arguing that South Carolina must show that its harms were not caused by factors such as South Carolina's "interbasin transfers, upstream consumption within South Carolina, inadequate conservation measures, or failure to plan for and utilize alternative water supplies or storage opportunities," "irrespective of *reasonable* consumptive uses in North Carolina") (emphasis added).[9] Even aside from the fact that North Carolina's conception of South Carolina's burden conflicts with Supreme Court precedent on the downstream State's obligation to demonstrate harm in an equitable apportionment action, there is no logical way to assess the equities of various water uses within South Carolina

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[8] The Court has explained that, "in arriving at 'the delicate adjustment of interests which must be made,' we must consider all relevant factors, including:

> 'physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.'"

Colorado v. New Mexico, 459 U.S. at 183 (quoting *Nebraska v. Wyoming*, 325 U.S. at 618) (citation omitted; alteration by the Court).

[9] North Carolina has similarly claimed that South Carolina's burden is to demonstrate injury divorced from "climatic and other factors that contribute to flow reduction in the Catawba River." NC Phase One Issues Br. at 6.

independent of those occurring in North Carolina.[10] Water is fungible, and water available to downstream users depends on the actions of *all* upstream users, whether located in North Carolina or South Carolina, as well as climate and other factors affecting the river as a whole.

Once North Carolina begins to argue — on its (erroneous) conception of South Carolina's burden to show harm — that South Carolina could alleviate harm to downstream South Carolina users if upstream South Carolina users took less water, it will be open to South Carolina to respond by showing that reduced usage by North Carolina users would be the more equitable means to prevent that harm.[11] At that point, the Special Master and the Court will be weighing the various factors relevant to determining *how* to apportion the river equitably, so that there will be no separate "Phase Two" analysis left to undertake.

Thus, in a consolidated trial proceeding here, South Carolina will put on a showing that, in times of low water inflows to the Catawba River Basin, particularly during times of drought, there simply is not enough water in the basin to supply all existing demands from South Carolina users. That significant lack of

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[10] Indeed, in *Colorado v. New Mexico*, *after* finding that the downstream State had met its burden to show injury, the Court remanded to the special master in that case for more factfinding and equitable apportionment analysis of the reasonableness and utility of water uses, as well as conservation measures, in *both* States. *See* 459 U.S. at 189-90.

[11] Any other approach would assume, without justification, that North Carolina's current consumption is equitable, while placing the burden on South Carolina to show that its own uses are equitable as a prerequisite to showing harm from the water available to South Carolina as a result of a combination of North Carolina's consumption, climate, and other factors affecting the total volume of water available to users of this interstate river. Such an approach would disfavor the downstream State in every equitable apportionment case, contrary to the fundamental principle that each State has an "equality of right" to the waters of an interstate river. *Connecticut v. Massachusetts*, 282 U.S. at 671.

water harms those users and therefore the State, and on South Carolina's understanding meets the threshold harm standard articulated by the Court in multiple equitable apportionment cases. As part of that showing, South Carolina will identify and quantify the harms suffered by South Carolina users, both in the past and projected into the future, based on fact witnesses and expert testimony concerning hydrology, scientific, and economic analyses.

Having shown that harm, the question then becomes, as between the two States' relative uses, how the waters ought to be apportioned when there is not enough for the users in each State. As to that inquiry, for example, South Carolina will put on a showing that North Carolina's rapidly increasing demands for water (including but not limited to interbasin transfers) have exacerbated the natural conditions that exist in the basin.[12] Both sides also will put on evidence concerning the relative benefits of water uses in each State, including but not limited to the length of time those uses have been in effect. South Carolina believes the evidence will show that North Carolina's rapidly increasing uses have had, and will continue to have, the effect of inequitably appropriating waters that should be available to South Carolina, for both longstanding uses and reasonable future economic growth, which cannot occur if the supply of water for businesses and residents is highly uncertain.

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[12] For example, North Carolina's Department of Environment and Natural Resources has found that population growth in North Carolina counties located entirely or partially within the Catawba River Basin increased by 21.3% between 1990 and 2000, and projects a further increase of 30.4% between 2000 and 2020. *See* Catawba River Basinwide Water Quality Plan at 15 (Sept. 2004), *available at* http://h2o.enr.state.nc.us/basinwide/documents/CTBCompleteDocument.pdf.

The numerous disagreements between the party States and the intervenors over which issues are properly in Phase One or Two of that equitable apportionment analysis, and how they should be applied to the facts adduced at trial, should be resolved by the Special Master on the basis of a full factual record. If necessary, the party States and the intervenors could then translate the Special Master's legal and factual rulings into a decree, which the Special Master could adopt or revise to best conform to her rulings. The Special Master could then submit her recommended legal and factual rulings, and proposed decree, to the Court for a single review based on a full record. Even if the Court were to decide certain legal issues differently, it would have the opportunity to apply its legal rulings to a full factual record, thus significantly lessening the likelihood of a remand for further trial proceedings. For these reasons, a single proceeding will better serve judicial economy. *See*, *e.g.*, *Willemijn Houdstermaatschaapij BV v. Apollo Computer Inc.*, 707 F. Supp. 1429, 1435 (D. Del. 1989) (denying bifurcation where "it appears inevitable that, if the motion to bifurcate were granted, both the discovery process and the . . . trial would be repeatedly delayed by disputes regarding the discoverability or admissibility of evidence"); *Maxwell Chase Techs., L.L.C. v. KMB Produce, Inc.*, 79 F. Supp. 2d 1364, 1374 (N.D. Ga. 1999) (denying bifurcation because the difficulty in segregating relevant evidence made "the bifurcation of discovery . . . likely to lead to an increase in discovery disputes between the Parties and even greater delay in the resolution of the issues before the Court"); *Brown v. United States*, 179 F.R.D. 101, 107 (W.D.N.Y. 1998) (denying motion for bifurcation

because it "will only serve to create potential relevancy disputes engendering further unnecessary delay").

2. A Single Proceeding Is the Appropriate Course Given the Substantial Overlap of Evidence and Witnesses

It is now clear that a substantial overlap exists between facts and witnesses potentially relevant to the issues of South Carolina's injury and the Court's equitable apportionment analysis. Numerous potential witnesses, and the accompanying document discovery from them, will be relevant to both Phases One and Two under the view of bifurcation espoused by North Carolina and the intervenors. Under those circumstances, a single proceeding would be the most efficient way to proceed.

In demonstrating its entitlement to an equitable apportionment, South Carolina will proffer testimony from, for example, public water supplies, industries, local businesses, and recreational users in both States. Such witnesses presumably would be deposed and many would be called to testify as to harms they have experienced from water shortages, the benefits that accrue from their Catawba River water usage, the conservation efforts they have undertaken, and the alternatives that exist for their water needs. Such testimony is most efficiently obtained in one set of document requests (as already have been issued) and one deposition that can explore the widest range of relevant testimony on the issues presented in the case. South Carolina already has begun both its harm and equitable apportionment discovery by serving 46 subpoenas on water users in North

Carolina. South Carolina intends to depose a number of North Carolina water users on uses, harms, and benefits — issues potentially relevant to the entire case.

In the conception of the phases articulated by North Carolina, significant inefficiencies would obtain. North Carolina can be expected to proffer evidence and witnesses concerning North Carolina uses relevant to its theory of the case, whether in contending in Phase One that their uses did not cause harm to South Carolina or in claiming in Phase Two that the benefits of those uses outweigh the benefits of uses in South Carolina. Many of the same witnesses would need to be called twice. The effect of such duplication would be to prolong greatly the proceedings before the Court, to require significant inconvenience to witnesses through duplicative testimony, and to create artificial distinctions that confuse rather than clarify the issues.

The attached affidavits are representative of the fact witnesses South Carolina intends to call and illustrate the burdensome and unnecessary duplication that would occur if this case were tried in two proceedings. Each of these witnesses has knowledge of facts concerning harms during the recent droughts in 1998-2002 and 2007-2009 to their business enterprises[13] or to South Carolina's interests generally.[14] Each of these witnesses also has knowledge of the benefits to South Carolina that accrue from those water uses, conservation efforts, and/or whether

[13] *See* Ex. 1, ¶ 5 (Affidavit of Dale Herendeen of Bowater Incorporated); Ex. 2, ¶ 3 (Affidavit of Jeff Hall of Lake Wylie Marina, Inc.).

[14] *See* Ex. 3, ¶ 4 (Affidavit of Donna Lisenby, former Catawba Riverkeeper).

any alternative water supplies exist for those uses.[15] And each is a very busy professional with work and family duties, for whom it would be excessively burdensome to appear for two depositions and two trials; accordingly, each has expressed a strong preference to have their testimony limited to appearance at one deposition and one trial.[16]

Because testimony from many of the same witnesses will bear on the issues of injury, benefit, consumptive use, and conservation in both States, there will be significant overlap in document discovery, deposition testimony, and trial testimony. A single proceeding would allow for the witnesses — many of whom, as evidenced by the numerous subpoenas served by both States and the affidavits attached here, will be private persons unaffiliated with a party — to be deposed only once and to be called to testify at trial only once. A single proceeding also is likely to facilitate a narrowing of the issues that need to be resolved at trial, because each State would become aware of the relative strengths and weaknesses of the other side's position. A single proceeding would therefore be the most efficient way to adjudicate this case.[17]

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[15] *See* Ex. 1, ¶ 6; Ex. 2, ¶ 4; Ex. 3, ¶ 5.

[16] *See* Ex. 1, ¶¶ 7-9; Ex. 2, ¶¶ 5-7; Ex. 3, ¶¶ 6-8.

[17] *See*, *e.g.*, *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1301 (11th Cir. 2001) (affirming denial of bifurcation where district court concluded that "bifurcation would not significantly increase judicial efficiency," because "[t]here is clearly substantial overlap in the issues, facts, evidence, and witnesses") (internal quotation marks omitted); *Epstein v. Kalvin-Miller Int'l, Inc.*, 121 F. Supp. 2d 742, 750 (S.D.N.Y. 2000) (denying bifurcation in part because "bifurcation could have an adverse effect on judicial economy, as it would unnecessarily require plaintiff to testify on two separate occasions").

3. A Single Proceeding Would Facilitate Settlement Efforts

It is well established that full discovery "can facilitate settlement discussions," because it "assists each party in evaluating essential elements of the matters in issue and in assessing the risks associated with an adverse decision in the action." *Johns Hopkins Univ. v. CellPro*, 160 F.R.D. 30, 35 (D. Del. 1995).[18] Accordingly, courts have held that a single proceeding that facilitates fruitful settlement discussions is preferable to bifurcated proceedings.[19]

In this case, as well, a single proceeding would aid settlement efforts, which require each party's full understanding of the relevant discoverable facts. Permitting document, deposition, and expert discovery to proceed as to all issues in the case promotes the parties' analysis and evaluation of the full scope of equitable factors at issue, thereby assisting meaningful settlement discussions.

4. North Carolina and the Intervenors Will Not Be Prejudiced by a Single Proceeding

North Carolina and the intervenors cannot demonstrate prejudice from a single proceeding. All discovery except document and interrogatory discovery by

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[18] *See also*, *e.g.*, *F&G Scrolling Mouse, L.L.C. v. IBM Corp.*, 190 F.R.D. 385, 392 (M.D.N.C. 1999) ("[D]iscovery assists each party in evaluating essential elements of the matters in issue and in assessing the risks associated with an adverse decision and, consequently, can facilitate settlement discussions. Where discovery is stayed, the parties may be deprived of this information.") (footnote omitted).

[19] *See*, *e.g.*, *Rodin Properties-Shore Mall*, 49 F. Supp. 2d at 721-22 (denying motion for bifurcation in part because "the Court must consider the effect on settlement that bifurcation would have"); *Light v. Allstate Ins. Co.*, 182 F.R.D. 210, 213 (S.D. W. Va. 1998) (declining to bifurcate upon finding that "swift judicial resolution" of the case, convenience, and incentive to settle prior to trial tipped the balance, in light of overlapping evidence); *United States v. New Castle County,* 116 F.R.D. 19, 28 (D. Del. 1987) (denying bifurcation in part because "separate trials would hinder rather than facilitate efforts to settle this litigation").

the party States has been stayed while the Court resolved the question of which entities may intervene in the case, and in the meantime the party States have conducted document discovery and served subpoenas directed to discovery of facts concerning all aspects of the case. To the extent catch-up document discovery is needed, it can now be accommodated, which will facilitate the conduct of single depositions of the numerous witnesses that will have knowledge pertinent to each phase of the equitable apportionment analysis.

North Carolina has suggested that it may claim prejudice from non-bifurcation because it is conceivable that North Carolina could prevail in Phase One, thus obviating the need to conduct discovery and a trial on Phase Two issues. That mere possibility — which is present in nearly every case subject to bifurcation — is insufficient to demonstrate prejudice here, where the evidence in any proposed Phases One and Two would overlap so substantially and where North Carolina has taken the position that much of the evidence to be adduced is relevant to Phase One in any event. *See Svege*, 329 F. Supp. 2d at 285 (denying bifurcation and explaining: "[I]t suffices to say that Defendants projected savings are by no means guaranteed. And if there is a verdict against Defendants of liability, bifurcating liability and damages will likely end up being more inefficient than presenting all issues and all evidence to the jury at one time.") (citation and internal quotation marks omitted); *H.B. Fuller Co. v. National Starch & Chem. Corp.*, 595 F. Supp. 622, 625 (D. Del. 1984) (denying bifurcation where it would "unduly extend the final

disposition of this case to [plaintiff's] prejudice," regardless whether "a separate trial on a dispositive issue might save some time and energy").[20]

B. Bifurcation Is Not Justified Here

1. North Carolina and the Intervenors Cannot Meet Their Burden To Show That Bifurcation Is Justified

Bifurcation would be detrimental to judicial economy. North Carolina's view of Phase One is that it includes numerous issues concerning the equities of South Carolina's water uses; likewise, North Carolina envisions a far more robust role than does South Carolina in analyzing North Carolina water uses in Phase One. *See supra* pp. 4-5. Thus, on North Carolina's legal theory, the factual record to be developed in Phase One is sufficiently large that any savings flowing from bifurcation will be of only minimal value. In addition, given the Special Master's previous ruling that the intervenors may participate at each phase of the case, bifurcation will not streamline Phase One by limiting the number of participants at that stage.

The inefficiency of requiring the same witnesses to appear at two different trials counsels against bifurcation. The witnesses themselves — many of whom are not affiliated with a party — would be burdened by multiple appearances, as well as

[20] Courts have based a finding of prejudice to the defendant on a concern *not* present here — that a jury will become confused in the face of particularly complex litigation. *See*, *e.g.*, *Union Carbide Corp. v Montell N.V.*, 28 F. Supp. 2d 833, 837 (S.D.N.Y. 1998); *Willemijn Houdstermaatschaapij*, 707 F. Supp. at 1435 ("The burden of showing a significant risk of confusion . . . is more difficult to meet where, as here, the case is to be tried without a jury."). Because the Court, assisted by the Special Master, will be the factfinder, no such risk of confusion can exist.

additional discovery issued following a decision in Phase One. As one court explained in rejecting bifurcation under similar circumstances:

> Extending the adjudication into two or more proceedings necessarily implicates additional discovery; more pretrial disputes and motion practice; . . . deposing or recalling some of the same witnesses; and potentially engendering new rounds of trial and post-trial motions and appeals. The inconveniences, inefficiencies and harms inherent in these probable consequences — to the parties and third parties, to the courts, and to the prompt administration of justice — weigh against separation of trials and suggest that, for those probable adverse effects to be overcome, the circumstances justifying bifurcation should be particularly compelling and prevail only in exceptional cases.

Kos Pharms., 218 F.R.D. at 390-91. Here, as well, North Carolina cannot demonstrate any "compelling" reason why bifurcation should be ordered. *Id.*

2. Bifurcation Would Prejudice South Carolina

South Carolina would be prejudiced if the case were bifurcated. The party States initially agreed to explore bifurcation of the Court's adjudication of their dispute "[i]n the interest of minimizing litigation expense." CMP § 4.1. Subsequent circumstances make clear that bifurcation will no longer serve that interest. Rather, bifurcation will increase the litigation burdens borne by South Carolina in duplicating discovery efforts and preparing for two separate trials, to say nothing of the imposition placed on expert and third-party witnesses. It also will delay substantially the final resolution of this matter, as two trials — and, presumably, at least two reviews by the Supreme Court — are conducted.

In such cases, courts have denied bifurcation because "the delays, inconvenience and additional litigation costs attendant to bifurcation . . . would be more prejudicial to" the plaintiff. *Kos Pharms.*, 218 F.R.D. at 393. Indeed,

"prejudice under these circumstances may simply amount to unfair delay of the final disposition of the matter," as would occur if this case were bifurcated. *Willemijn Houdstermaatschaapij,* 707 F. Supp. at 1435; *see id.* (denying bifurcation and explaining that "[p]erhaps the most important consideration for a court ruling on a motion to bifurcate is whether separate trials would unduly prejudice the non-moving party"); *Spectra-Physics Lasers, Inc. v. Uniphase Corp.*, 144 F.R.D. 99, 101 (N.D. Cal. 1992) ("[H]olding two trials, as opposed to one, will inevitably cause delay in resolution of the instant case. Since [defendant] has failed to make a convincing argument otherwise, the court finds that [plaintiff] will be prejudiced by the bifurcation.").[21]

Maintaining bifurcated discovery and separate trials further delays the already prolonged and costly proceedings, which would unnecessarily drain South Carolina's public funds. In the meantime, South Carolina would continue to endure injury to its water supplies and prejudice to its water users in the Catawba River Basin while this litigation continues.

CONCLUSION

South Carolina respectfully submits that the Special Master should order discovery and trial to proceed without bifurcation. The Special Master also should order the parties to meet and confer, on that basis, to propose revisions to the existing Case Management Plan.

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[21] Indeed, "even if bifurcation might somehow promote judicial economy, courts should not order separate trials when bifurcation would result in unnecessary delay, additional expense, or some other form of prejudice." *Fuji Mach. Mfg. Co. v. Hover-Davis, Inc.*, 982 F. Supp. 923, 924 (W.D.N.Y. 1997) (internal quotation marks omitted).

Respectfully submitted,

DAVID C. FREDERICK
SCOTT H. ANGSTREICH
SCOTT K. ATTAWAY
MICHAEL K. GOTTLIEB
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Special Counsel to the
State of South Carolina

HENRY DARGAN McMASTER
Attorney General
JOHN W. McINTOSH
Chief Deputy Attorney General
ROBERT D. COOK
Assistant Deputy Attorney General
Counsel of Record
T. PARKIN HUNTER
Assistant Attorney General
LEIGH CHILDS CANTEY
Assistant Attorney General
ELIZABETH H. SMITH
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970

Counsel for the State of South Carolina

March 12, 2010

EXHIBIT 1

OPENING BRIEF OF THE STATE OF SOUTH CAROLINA FAVORING A SINGLE PROCEEDING AND OPPOSING BIFURCATION OF DISCOVERY AND TRIAL

March 12, 2010

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 138, ORIGINAL

STATE OF SOUTH CAROLINA
Plaintiff.

v.

STATE OF NORTH CAROLINA,
Defendant.

Before the Special Master
Hon. Kristin L. Myles

Affidavit of Mr. Dale Herendeen

I, Dale Herendeen, declare as follows:

1. I am the same Dale Herendeen who signed the Affidavit of Mr. Dale Herendeen on May 30, 2007, submitted with South Carolina's Complaint in this matter.

2. I am employed by Bowater Incorporated ("Bowater").

3. Since May 2001, I have been the environmental Manager of Bowater's Catawba Operation located on the Catawba River, Town of Catawba, York County, South Carolina.

4. The Catawba Plant was established in 1957 and employs approximately 1,000 employees.

5. As stated in my previous affidavit, I have knowledge of facts concerning harms to Bowater during the drought of 1998-2002. I also have knowledge of facts concerning further harms to Bowater during the recent drought of 2007-2009.

6. I further have knowledge of facts concerning the benefits to South Carolina that accrue from Bowater's Catawba River water usage. I

also have knowledge of Bowater's conservation efforts and any alternatives that might exist for Bowater's water needs.

7. I understand that the Special Master is considering whether to conduct discovery and trial in two separate phases, such that I potentially could be called to testify in both phase one and phase two of the case. I understand that this could result in my being called potentially to testify a total of four times, in two depositions and two trials.

8. I am very busy on a daily basis in my work and family life. Being called to testify multiple times would be an enormous inconvenience to me, my family, and my employer.

9. I would strongly prefer to have my testimony limited, at the most, to one deposition and one appearance at trial.

10. This concludes my affidavit.

March 9, 2010

Dale Herendeen

EXHIBIT 2

OPENING BRIEF OF THE STATE OF SOUTH CAROLINA FAVORING A SINGLE PROCEEDING AND OPPOSING BIFURCATION OF DISCOVERY AND TRIAL

March 12, 2010

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 138, ORIGINAL

STATE OF SOUTH CAROLINA
Plaintiff.

v.

STATE OF NORTH CAROLINA,
Defendant.

Before the Special Master
Hon. Kristin L. Myles

Affidavit of Mr. Jeff Hall

I, Jeff Hall, declare as follows:

1. I am the President of Lake Wylie Marina, Inc., which has operated continuously as a family owned business since 1975.

2. Lake Wylie Marina employee, Laron A. Bunch, Jr., signed an affidavit dated May 30, 2007, and submitted with South Carolina's Complaint in this matter.

3. I am familiar with the harms suffered by Lake Wylie Marina during the droughts of 1998-2002 and 2007-2009. I also am familiar with the harms suffered by customers of Lake Wylie Marina and recreational users of Lake Wylie generally.

4. I further have knowledge of facts concerning the benefits to South Carolina that accrue from Lake Wylie Marina. I also have knowledge of the benefits to South Carolina recreational users of Lake Wylie.

5. I understand that the Special Master is considering whether to conduct discovery and trial in two separate phases, such that I potentially could be called to testify in both phase one and phase two of the case. I

understand that this could result in my being called potentially to testify a total offoux times, in two depositions and two trials.

6. I am very busy on a daily basis in my work and family life. Being called to testify multiple times would be an enormOLlS inconvenience to me, my family, and my business.

7. **I** would strongly prefer to have my testimony limited, at the most, to one deposition and one appearance at trial.

8. This concludes my affidavit.

March 10, 2010

Jeff Hall

EXHIBIT 3

OPENING BRIEF OF THE STATE OF SOUTH CAROLINA FAVORING A SINGLE PROCEEDING AND OPPOSING BIFURCATION OF DISCOVERY AND TRIAL

March 12, 2010

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 138, ORIGINAL

STATE OF SOUTH CAROLINA
Plaintiff.

v.

STATE OF NORTH CAROLINA,
Defendant.

Before the Special Master
Hon. Kristin L. Myles

Affidavit of Ms. Donna Lisenby

I, Donna Lisenby, declare as follows:

1. I am the same Donna Lisenby who signed the Affidavit of Ms. Donna Lisenby dated May 30, 2007, submitted with South Carolina's Complaint in this matter.

2. From 1998 until April 2008, I was the Catawba Riverkeeper and the Executive Director of the nonprofit Catawba Riverkeeper Foundation, Inc.

3. Since April 2008, I have been the Upper Watauga Riverkeeper.

4. As stated in my previous affidavit, I have knowledge of facts concerning harms to the waters and water users in South Carolina during the drought of 1998-2002. I also have knowledge of facts concerning further harms to the waters and water users in South Carolina during the recent drought of 2007-2009.

5. I further have knowledge of facts concerning the benefits to South Carolina and its water users that accrue from the waters of the Catawba River. I also have knowledge of conservation efforts and alternative water supplies in South Carolina.

6. I understand that the Special Master is considering whether to conduct discovery and trial in two separate phases, such that I potentially could be called to testify in both phase one and phase two of the case. I understand that this could result in my being called potentially to testify a total of four times, in two depositions and two trials.

7. I am very busy on a daily basis in my work and family life. Being called to testify multiple times would be an enormous inconvenience to me, my family, and my employer.

8. I would strongly prefer to have my testimony limited, at the most, to one deposition and one appearance at trial.

9. This concludes my affidavit.

March 9, 2010

Donna Lisenby