

SOUTH CAROLINA,

Plaintiff,

vs.

No. 138

NORTH CAROLINA,

Defendant.

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TELEPHONIC CONFERENCE

BEFORE SPECIAL MASTER KRISTIN LINSLEY MYLES

Thursday, February 5, 2009

Reported by:

DANA M. FREED

CSR No. 10602

JOB No. 102462

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SOUTH CAROLINA,

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Telephonic Conference before Special  
Master Kristin Linsley Myles, beginning at 11:03 a.m.  
and ending at 11:44 a.m. on Thursday, February 5,  
2009, before DANA M. FREED, Certified Shorthand  
Reporter No. 10602.

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1                   Thursday, February 5, 2009

2                   11:03 a.m. - 11:44 a.m.

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4                   MR. FREDERICK: This is David Frederick for  
5 South Carolina. I have Scott Attaway and Mike Gottlieb  
6 here in Washington.

7                   MR. BROWNING: This is Chris Browning for  
8 North Carolina. With me is Jim Gulick, Jennie Hauser,  
9 and Marc Bernstein.

10                  MR. BANKS: This is Jim Banks for the City of  
11 Charlotte. I will have Michael Boyd on for Charlotte  
12 as well.

13                  MR. SHEEDY: Good afternoon, Special Master  
14 Myles. This is Jim Sheedy. Susan Driscoll is with  
15 me. And I don't know if Tom Goldstein or Troy Cahill  
16 are on the line.

17                  MR. GOLDSTEIN: We are. Thank you.

18                  MS. SEITZ: Hi. This is Virginia Seitz all  
19 by myself for Duke Energy.

20                  MR. COOK: This is Bob Cook in Columbia for  
21 South Carolina.

22                  SPECIAL MASTER MYLES: Is that everybody?  
23 I think so.

24                  Why don't we get started? I don't think we  
25 need a long call today. Why don't I start with

1 Mr. Frederick? What do you think issues we want to  
2 start with today?

3 MR. FREDERICK: Well, Special Master Myles.  
4 I actually hoped that you would say that we could have  
5 a short call today, because I thought that the  
6 meet-and-confer sessions that the parties had with the  
7 intervenors had a lot of fruitful discussion about the  
8 case, and provided information and a very healthy  
9 exchange of information on both sides.

10 And while it did not lead to a definitive  
11 resolution in the sense of articulating the issue for  
12 Phase 1, in the way that one might expect to see at  
13 the end of a case with final briefing and everything,  
14 I think what it accomplished was to allow both sides  
15 to fully ventilate their perspectives on what does  
16 need to be proved.

17 And so from South Carolina's perspective,  
18 although North Carolina does not agree with our  
19 articulation of the issue for Phase 1 and we do not  
20 agree with North Carolina's articulation of the issue  
21 for Phase 1, I think both sides know where each other  
22 is coming from. And as the case develops through  
23 discovery, and presumably through motions for summary  
24 judgment or factual presentations, we each have a very  
25 clear idea of where the other is coming from.

1           And at least from South Carolina's  
2 perspective, there is not an issue for you to resolve  
3 at this time. Because both sides understand their  
4 difference of opinion. They are not differences that  
5 I think are best adjudicated by you in the abstract  
6 without a specific factual context. And that if, in  
7 the event a particular dispute arises over some  
8 discovery question, then a more specific dispute would  
9 be presented to you in a factual context that would  
10 call for your resolution.

11           So, from South Carolina's perspective,  
12 although the meet and confers did not produce  
13 consensus on the statement of the issues, the process  
14 was an important one, it was a valuable one. And we  
15 feel like we have a sense of what -- what the  
16 arguments are that will certainly put us on notice of  
17 some of the theories that North Carolina intends to  
18 prosecute on its defense. And I think North Carolina  
19 has some sense and notice of the arguments that we  
20 will intend to advance. And there will eventually  
21 come to a point where you'll need to decide what the  
22 Court's cases require in terms of proof for  
23 South Carolina. But we don't think that that day is  
24 here yet.

25           SPECIAL MASTER MYLES: Okay. Well, why don't

1 I hear from North Carolina? Who's going to speak on  
2 North Carolina's behalf on that?

3 MR. BROWNING: Your Honor, this is Chris  
4 Browning for North Carolina. I think the exercise  
5 that you asked us to undertake after the last  
6 conference call was extremely helpful. I think it's  
7 clear that we -- there is agreement with respect to  
8 the broad outlines of what should be addressed in  
9 Phase 1 and Phase 2.

10 Mr. Frederick is correct that we do have  
11 differences with respect to the very specific issue to  
12 be resolved in Phase 1, but we also agree with his  
13 statement that it's unnecessary to resolve that  
14 specific difference at this point in time.

15 So we concur with your original assessment  
16 that this probably should be a fairly short phone  
17 call. I think the parties made tremendous progress  
18 following up on your suggestion, the intervenors have  
19 very much been a part of that process and it helped  
20 facilitate progress along those lines. And between  
21 now and our next conference call, I know there's an  
22 awful lot to do, both in terms of document production  
23 as well as issues with respect to briefing on the  
24 intervention.

25 SPECIAL MASTER MYLES: Okay. Let me ask you



1 a couple questions, Mr. Browning, if that's okay. In  
2 Footnote 1 of your attachment, you raise the issue  
3 about the dispute with South Carolina over the need to  
4 provide a statement of particularized harm.

5 MR. BROWNING: Yes, Your Honor.

6 SPECIAL MASTER MYLES: And I wondered now,  
7 does that dispute -- well, let me put it another way.  
8 What I hear you both saying is that you've reached a  
9 point where you agree on some aspects but not all  
10 aspects of the -- what Phase 1 and Phase 2 would  
11 consist of.

12 North Carolina is saying -- and you don't  
13 feel that there's any need at this point in the case  
14 to -- to reach a conclusion on those disputes. We'll  
15 just put those to one side. We recognize the disputes  
16 exist and we will resolve them at some point in time.

17 This dispute over whether there is a need for  
18 more particularity relate to that, or is that a  
19 separate thing that can be resolved in the short term?

20 MR. BROWNING: Your Honor, we look at that as  
21 a separate thing. That what we were trying to do with  
22 South Carolina is to give a broad-brush picture of  
23 what would be in Phase 1 and Phase 2. And I think,  
24 from a very broad perspective, there's probably pretty  
25 close agreement on that in very broad terms. The

1 ultimate question that you will have to resolve at the  
2 conclusion of Phase 1 is something that we'll  
3 obviously might well disagree on the specific  
4 question. You'll be asked to answer at the end of the  
5 day.

6           We look at that as a separate issue with  
7 respect to discovery and the need to identify the  
8 specific harms that South Carolina's complaining  
9 about. As was pointed out in the letters that were  
10 submitted to you, and I think Virginia Seitz' letter  
11 probably was clearest on this point. The parties, we  
12 have spent an awful lot of time discussing the issues,  
13 the various subissues. And the parties really have  
14 not focused on the next step of the discovery  
15 schedule. And I think that probably makes sense in  
16 light of the intervention issues that are pending.

17           Obviously, as we said throughout, this  
18 statement of particularized harm will very much drive  
19 the discovery schedule. But I think that is probably  
20 something that we in South Carolina haven't spent a  
21 great deal of time talking about the specifics or  
22 mechanics of what form or when that would take place,  
23 just because we've been having such long conversations  
24 about the issues to be resolved in Phase 1 and Phase 2.

25           So I don't know if that's responsive to your

1 question, but that's -- in a very broad picture, we  
2 look at this issue of a need for a statement of  
3 particularized harm as an issue that's out there and  
4 that's why it's in the footnote, is to make sure  
5 there's no misunderstanding. I'm not sure it's  
6 necessarily an appropriate thing to try to resolve  
7 today.

8 SPECIAL MASTER MYLES: Okay. Now, you  
9 mention Ms. Seitz's letter, which I read. And you  
10 said she had stated it more directly. That's the  
11 issue of the fact that the intervenor's status is  
12 before the Court right now?

13 MR. BROWNING: Yeah. The phrase that she  
14 used is "The parties do not believe it wise to focus  
15 on scheduling, instead spent their meet-and-confer  
16 time attempting to define the phases." And I think  
17 Mr. Frederick accurately stated that these were  
18 hour-long meetings where we had full and frank  
19 discussions in an effort to go over the various  
20 issues. So I think everyone will certainly represent  
21 to you that the parties have spent a tremendous amount  
22 of time trying to follow up on your request from the  
23 last conference call.

24 SPECIAL MASTER MYLES: Okay. That's really  
25 helpful. And then what we're saying is, in terms of

1 the discovery issues, those two probably don't -- we  
2 don't need to set up a plan today to resolve that in  
3 part for the additional reason that she mentioned,  
4 which is that the Supreme Court -- that the resolution  
5 of the intervenor issue will have an effect on  
6 discovery and presumably that may also affect the  
7 timing of the particularity issue.

8 MR. BROWNING: Yes, Your Honor. There's  
9 still an awful lot to be done in terms of document  
10 production. The parties -- once we know about the  
11 intervention, then I think that might be an  
12 appropriate time to come back to deal with a kind  
13 written plan that can be put in place for all the  
14 aspects of discovery in this case.

15 SPECIAL MASTER MYLES: That makes sense to  
16 me. And I have no concerns over that. My only  
17 concern would be if somehow these differences,  
18 regarding the phases or regarding the need for  
19 particularity, were somehow affecting the course of  
20 discovery and slowing things down. But as long as  
21 that's not happening, I don't see any reason not to  
22 wait until that time to sit down and sort of set up  
23 the map going forward. I think we'll have a  
24 resolution fairly soon.

25 MR. BROWNING: Your Honor, from our

1 perspective, we do not view it as having slowed down  
2 discovery. But it will, of course, be the first order  
3 of business once we have the definitive ruling on the  
4 intervention.

5 SPECIAL MASTER MYLES: Right. And, you know,  
6 it will affect -- it will clearly affect expert  
7 discovery, which is one of your main points made back  
8 in, I don't know when it was, July, when we talked  
9 about this at some length about the need for  
10 particularity --

11 MR. BROWNING: Yes, Your Honor.

12 SPECIAL MASTER MYLES: -- in the scope of the  
13 complaint. And we were trying to set deadlines for  
14 expert discovery. And at the same time, we were  
15 acknowledging the need for particularity in order to  
16 give North Carolina the ability to respond in the  
17 level of detail necessary to whatever South Carolina's  
18 contentions were. As long as that's not being  
19 impaired at this point, we don't need to resolve that  
20 now.

21 MR. GULICK: Special Master Myles, this is  
22 Jim Gulick.

23 SPECIAL MASTER MYLES: Yeah.

24 MR. GULICK: Specifically, with respect to  
25 that point, it appears to us that South Carolina needs

1 more time. They, of course, have identified the  
2 extent of the river which they propose to prove harms.

3 SPECIAL MASTER MYLES: Uh-huh.

4 MR. GULICK: We do not, at this stage, know  
5 what the harms are and what the cause of those harms  
6 are beyond interbasin transfers. At some point,  
7 North Carolina's perspective on this is that  
8 South Carolina ought to have the times that it needs  
9 to be able to do that, to identify what those are.  
10 But from North Carolina's perspective, once they have  
11 identified with particularities, what their harms are  
12 and what they intend to prove on that, and what the --  
13 what the sources of the harm among North Carolina's  
14 uses are beyond the interbasin transfers, if that's  
15 still part of their case.

16 We need -- that's when we need to be able to  
17 take that information, complete our factual discovery,  
18 and then, of course -- so to some degree setting what  
19 that schedule is does depend on when those are  
20 articulated. But I don't feel right at the moment,  
21 when there are other things hanging up the schedule,  
22 that it's particularity productive to set what that  
23 time is.

24 SPECIAL MASTER MYLES: Yeah.

25 MR. GULICK: Does that make sense?

1           SPECIAL MASTER MYLES: Yes, it makes perfect  
2 sense. And, in fact, it's totally consistent with  
3 what we've discussed previously, which is, and I  
4 agreed with that sentiment, which is that  
5 South Carolina, you know, will get whatever time it  
6 gets to state what the issues are.

7           There's some, you know, there's some merit to  
8 the conclusion that they should have some of that  
9 information now since they filed the complaint. But  
10 yes, South Carolina needs discovery in order to  
11 develop its theories and further respond to whatever  
12 they are. And yes, North Carolina, whatever such time  
13 as particularity is provided, needs its time to  
14 respond. And I think that has to be done -- the  
15 schedule we set out before, I think, you know, was  
16 actually pretty good to resolve those. Now it all got  
17 kind of thrown out the window. But the concept of the  
18 schedule we talked about at that time I think built in  
19 at the time that you just talked about that  
20 North Carolina needs. And certainly any schedule  
21 we've now put in place will do that as well.

22           I have a third concern, third meaning  
23 South Carolina's needs, North Carolina's needs. The  
24 third concern is the concern to move this case along,  
25 which, to me, that is an independent factor that plays

1 here. It doesn't mean we have to do anything now.  
2 But it does mean that when we get resolution from the  
3 court, at that time we need to put in place a  
4 schedule. Because even if the parties would be happy  
5 to stretch things out for a lengthy period of time,  
6 there's an independent interest on the part of  
7 the Court in bringing the case to resolution.

8 MR. FREDERICK: Special Master Myles, this is  
9 David Frederick. If I could address that point. We  
10 do not have an interest in stretching the case along.  
11 And we -- we would like to move it along. And,  
12 you know, to that end, we've done substantial document  
13 productions to North Carolina already. And  
14 North Carolina, I think, is certainly on notice as to  
15 those particularized harms that are specifically  
16 mentioned in the complaint. And there is no need for  
17 North Carolina to wait to probe what evidence is out  
18 there concerning those complaint allegations.

19 So I think it's important to keep in mind  
20 that, although a river is a complex system, we've  
21 identified certain harms. There is no reason why  
22 North Carolina can't do its discovery as to the harms  
23 that have already been mentioned in the complaint. To  
24 the extent that there is a further elaboration of  
25 harms that will come through the expert process and



1 through, you know, better understanding, a river  
2 system that is suffering and has suffered from  
3 significant drought over the last 18 months, we  
4 understand that that will necessitate some additional  
5 discovery at some later point in time. But we don't  
6 agree with the proposition that North Carolina is not  
7 required during the pendency of this period to  
8 undertake discovery on the things that we've already  
9 mentioned in the complaint as harms. We think there's  
10 no reason why they can't go ahead and do that.

11 MR. GULICK: Special Master Myles, this is  
12 Jim Gulick. We are engaging in that discovery. And I  
13 think I was clear -- I meant to be clear that the  
14 extent to which there are harms, that are something  
15 other than what's in the complaint, and that their  
16 alleged causes of their harms is something other than  
17 interbasin transfers, that's what I was referring to.

18 And I don't desire to extend this, but we do  
19 want to protect our ability to develop facts once we  
20 really know what the full extent of what their  
21 complaint -- South Carolina is complaining about.  
22 That was what I meant to say.

23 SPECIAL MASTER MYLES: Yes. And let me add  
24 one thing, two things. One, first of all, I didn't  
25 mean to discount the efforts that have occurred to

1 date. I think the parties have, based on the letters,  
2 made a lot of progress. And I thought that the  
3 progress coming out of the phases discussion sounds  
4 like it was very productive, both in identifying the  
5 phases but also in terms of identifying issues and  
6 starting the process of focusing on particular issues,  
7 simply as a secondary part of the process of trying to  
8 define the cases. Nor did I discount either the  
9 progress that has been made on discovery, which sounds  
10 like things are moving along.

11 So when I said about even though either party  
12 might want to stretch things out, I wasn't suggesting  
13 that that was happening, I just was suggesting that  
14 there's an independent interest that plays in that's  
15 going to be part of the scheduling that doesn't  
16 necessarily turn on what the parties want.

17 But the point about particularity, I think  
18 you all can continue to work on that. The whole point  
19 of contention interrogatories and devices like that  
20 are to deal with the federal system's use of noticed  
21 pleading which a plaintiff is allowed to do.

22 Then you have how does the defendant defend?  
23 Well, the defendant can serve notice -- I mean,  
24 contention interrogatories and get more detail, or  
25 they can file for a bill of particulars or whatever

1 the modern equivalent is.

2 But the more common device is the  
3 interrogatories. And those are allowed and there is  
4 nothing wrong with them. And the defendant can object  
5 that they're premature and the defendant needs more  
6 discovery. But the judge can make the defendant  
7 respond, as best they can, on the information they  
8 have to date subject to supplementing at some later  
9 time.

10 And if that's a device that would be helpful,  
11 I'd be very supportive of such a device. Because I  
12 think that is the function of that. It's fine to say,  
13 well, until discovery is complete, we won't really  
14 know. They can take discovery on the issues we've  
15 already put in our complaint, some of which are in  
16 there largely, by way of example, anecdotal, but  
17 they're there.

18 But that's not really fair either, because  
19 discovery is a very expensive process. And you can't  
20 just depose a witness on issue A, not knowing that  
21 your adversary is also going to raise issue B that  
22 that witness also is knowledgeable about. It's not  
23 fair to make the other side come back twice to depose  
24 the same folks over again, because we didn't know that  
25 you were going to be pressing this other issue.

1           So somehow that -- that needs to be worked  
2 out in a process of discovery that gives  
3 North Carolina the information it needs as it's  
4 conducting the discovery. I don't think we can say  
5 North Carolina's required to wait until the end. It  
6 may be that North Carolina's required to wait until  
7 the end for a definitive, final, binding statement of  
8 what the issues are.

9           But -- but a good faith effort can be made in  
10 the meantime to give particularity in a way that's  
11 going to avoid duplicative discovery.

12           So I just say that not as a solution, but I'm  
13 offering that as a suggestion for breaking any log  
14 jamb that may exist.

15           MR. FREDERICK: Special Master Myles, this is  
16 David Frederick for South Carolina. We think we  
17 understand your direction. I would just like to say  
18 that in the deposition process, how much information  
19 is elicited often depends on the skill of the  
20 questioner in a deposition. And the interrogatory  
21 process is one facet of discovery but a skillful  
22 questioner in a deposition can elicit far more  
23 information about what the witness knows and what a  
24 party's theories are than an unskillful questioner.

25           And so I would just, you know, put out there

1 that to the extent that the tools that exist under the  
2 federal rules as adopted by the Court are operating  
3 the same way for both parties, that that is, that is  
4 an important part of this process.

5           Having said that, I would like to say further  
6 that during the process of meet and confer that both  
7 sides had, we discovered that there were certain  
8 theories that we would not have thought at all  
9 relevant to the lawsuit that the state of  
10 North Carolina, and if the intervenors are permitted  
11 to stay as parties in the suit, they intend to pursue.

12           And to that extent, we have a clearer idea of  
13 the various theories that they might want to propound  
14 which may or may not be the subjects of motions for  
15 protective order to prohibit them from engaging in  
16 those kinds of investigations, or motions to compel on  
17 their side if we were to resist on the grounds that  
18 some of the theories that they might want to go  
19 forward with are not relevant in our judgment.

20           So we think that there are tools under the  
21 rules that enable both sides to go forward. And we  
22 are committed to moving as expeditiously as possible  
23 toward obtaining the information necessary to get it  
24 to the summary judgment phase.

25           SPECIAL MASTER MYLES: Well, your point

1 raises one suggestion I didn't make before, which is  
2 30(b)(6) depositions, because it's true that a skilled  
3 questioner can elicit other theories that might be out  
4 there. But a better way to do it is to say what, give  
5 us a witness that's knowledgeable about what  
6 South Carolina perceives to be the harm here.

7 MR. FREDERICK: Well, the difficulty with  
8 that, Special Master Myles, is that the harms that are  
9 occurring in South Carolina are occurring with  
10 industries and with localities and in terms of water  
11 quality and water quantity. And there is not a person  
12 in the South Carolina government under the control of  
13 the Attorney General who can speak authoritatively  
14 about, for instance, the amount of money that an  
15 industry is having to pay in order to get additional  
16 water or the number of people that may have been laid  
17 off because various marine terminals weren't able to  
18 operate because the lake was -- various lakes were  
19 down low.

20 And so, unlike a corporate defense context  
21 where a witness could be put forward to be expected to  
22 have knowledge of the relevant operations of the  
23 corporation, an original action doesn't really lend  
24 itself quite so much to that kind of device. And for  
25 that reason, you know, I understand the argument that

1 North Carolina is -- has made with respect to some  
2 aspects of the specificity. But I think that's just  
3 in the nature of the way an equitable apportionment  
4 case gets litigated in a river system that has  
5 suffered from the kinds of drought and diminution of  
6 water supply that the Catawba River has suffered from  
7 over the last decade and a half or so.

8 SPECIAL MASTER MYLES: Well, one thing you  
9 said which is I think that even in the corporate  
10 context, there's many times when there isn't a person  
11 that is knowledgeable within that person's own job  
12 description. So, but you're nonetheless required to  
13 put forward a witness knowledgeable on a topic, on a  
14 claim that you've raised. And so what people do is  
15 they put forward a witness that either made themself  
16 knowledgeable or has become knowledgeable in the  
17 course of the litigation. Sometimes it's even an  
18 attorney who's on the case who was knowledgeable  
19 because he's interviewed all these folks and has  
20 knowledge of what the party's theories are. And that  
21 person is put forward to testify, subject to all sorts  
22 of concerns about privilege.

23 But you don't have to have the person that  
24 has percipient knowledge on each fact. In large part,  
25 because it's a way of developing sometimes the general

1 framework for a party's theory of the case. So that's  
2 just a slight dissent from what you said.

3 But more generally, I don't think there his  
4 anything unique about an original case that allows one  
5 party, the complaining party, to not be forthcoming in  
6 what its specific theories are. Of both harm to it  
7 and causes of harm by the other state.

8 In the cases that I've read, just in the  
9 course of this case, the pleadings tend to be much  
10 more specific than the pleading South Carolina filed  
11 here. And go on and on and on about -- in detail  
12 about what harm there was and what caused it. Going  
13 all the way back to the beginning of these cases.

14 So I don't think that there's something  
15 special about original cases that allows these issues  
16 to be left open for an extended period of time.

17 MR. FREDERICK: Special Master Myles, we do  
18 take exception to any suggestion that we haven't been  
19 forthcoming.

20 SPECIAL MASTER MYLES: No, I wasn't  
21 suggesting that. Because I have not been involved in  
22 the discovery process. I'm just disagreeing with the  
23 concept that there's something different about  
24 original cases in this particular regard.

25 MR. FREDERICK: Well, if this were a case



1 brought by Bowater against North Carolina, assuming  
2 there was no Eleventh Amendment bar, there would be a  
3 reasonable grounds for a 30(b)(6) witness from Bowater  
4 to testify. And it's quite possible that in the  
5 course of our litigation, that such a person with the  
6 most knowledge from Bowater can testify in a  
7 deposition. The difference is that that person is not  
8 within South Carolina's control, because that's an  
9 independent corporation and it is not part of the  
10 South Carolina government.

11 My only point was that a 30(b)(6) witness is  
12 ordinarily, in my experience, a witness within the  
13 exclusive control of a party to the lawsuit. And we  
14 would have significant issues with having a lawyer who  
15 had developed substantial work product, and who had  
16 not got independent knowledge of the various facets of  
17 the case, of being called to testify about the  
18 lawyer's work product during litigation. That's the  
19 only point I was trying to make.

20 SPECIAL MASTER MYLES: Okay. No, that's  
21 understood. Like I said, I wasn't trying to map out  
22 some sort of strategy that's required. I'm just  
23 reacting to some of the things that you said. Some  
24 people put an expert forward. I mean, people have to  
25 deal with this all the time when you have a case that

1 involves events that occurred a long time ago. And  
2 there is nobody around that can -- that knows or is  
3 with the company anymore. So some people find someone  
4 who used to be with the company to testify. Some  
5 people find an expert to testify, someone they can  
6 examine the documents and testify from that basis.  
7 People come up with all kinds of creative ways to  
8 respond to 30(b)(6) when they don't have a guy sitting  
9 there that was there that knows the fact. That's my  
10 only point.

11 I'm just trying to -- and again, I will stop  
12 trying to make suggestions. I just think there's ways  
13 of getting the particularity, that can be done along  
14 the way, that I would be receptive to if someone  
15 wanted to do them.

16 MR. BROWNING: Your Honor, this is Chris  
17 Browning. If you don't mind me jumping in, and I  
18 apologize for doing so late. But I feel compelled to  
19 go back to Mr. Frederick's statement about how  
20 their -- the claims they'll be bringing will vary or  
21 alter as they obtain additional information from  
22 localities, industries, Bowater, et cetera.

23 And to me, that statement really does  
24 reiterate that, to a certain extent, this is going to  
25 be a moving target and that's our point from the

1     outset that there really needs to be a mechanism, some  
2     way to get our handle around what we're facing.  And  
3     that's why we have been advocating from the outset a  
4     need for some sort of statement of particularized harm  
5     at the appropriate time in this litigation after  
6     South Carolina has gathered the information they need  
7     to, to really identify what they're truly putting at  
8     issue, so that we can then probe that and our experts  
9     can do the appropriate modeling.

10           That being said, however, again, the parties  
11     have spent an awful lot of time talking about the  
12     issues in Phase 1 and Phase 2.  We have been less  
13     focused over the last couple of weeks on the mechanism  
14     or the procedure to set these steps in place with  
15     respect to discovery once the intervention issues are  
16     fully resolved.

17           I would suggest that we probably ought to all  
18     pat ourselves on the back on the process that we made  
19     with regard to the issues, and recognize that this  
20     will be the next most significant issue that we'll  
21     have to deal with at the appropriate time.  How to  
22     come up with the best mechanism so that this case  
23     is -- can be fairly adjudicated for all parties.

24           SPECIAL MASTER MYLES:  I agree with that.  
25     That's a good statement.  I mean, I think ultimately

1 that -- at least in the normal adversary process, the  
2 burden would be, at this point, probably on  
3 North Carolina to initiate, to undertake research on  
4 what the best device would be, to initiate that  
5 device, see how it flies. But we can have discussions  
6 about it.

7 But I mean, I think ultimately the impetus  
8 for seeking particularity in whatever form you want to  
9 do it, would come from North Carolina as the  
10 initiating party and then we can -- maybe you can do  
11 it. Maybe we don't need to involve me at all.  
12 Otherwise, as I said, I'd be receptive to that.

13 I think I put that at the end of my order on  
14 scope, because I thought North Carolina had a lot of,  
15 a lot of merit to what was being said. It's just that  
16 wasn't a good device, as it turned out. But there's  
17 other devices that, even narrowing the scope of the  
18 complaint by reading it wasn't a good device, just for  
19 the reasons I said. But there's other devices that  
20 can serve that exact same function and that ought to  
21 be used.

22 MR. FREDERICK: And certainly when the  
23 depositions are taken, and I presume that both states  
24 will have representatives at the depositions, to the  
25 extent that the deponents describe the various

1 conditions that they have had to endure as a result of  
2 the drought and the lowering levels in the Catawba  
3 River, that certainly is going to put everybody on  
4 notice about what the evidence is going to be to show  
5 harm.

6 SPECIAL MASTER MYLES: Yes, but, you know, I  
7 guess, just to say it a different way. There's  
8 devices that can input it a little bit more directly  
9 than that and that can and should be used, in my  
10 opinion. And that I would be receptive to any such  
11 devices and/or motions to compel made on the basis of  
12 such devices, for example, contention interrogatories.

13 And it must be the case that South Carolina  
14 interviewed some of those people and has information  
15 that it can provide through interrogatory responses  
16 that would be at least a preliminary statement of  
17 particularized harm that could be done subject to  
18 being -- subject to being supplemented if this  
19 additional information comes out.

20 So I don't disagree with you that information  
21 that is relevant to this topic would come out of the  
22 depositions. But I don't think there's any -- any  
23 rule that I know of that precludes North Carolina from  
24 finding out what it can now. And I would not be  
25 receptive to blanket objections that such an inquiry

1 is premature.

2 MR. BROWNING: Your Honor, just so there is  
3 no misunderstanding, we did serve interrogatories at  
4 the very outset of when we could under your case  
5 management order. And that was the very response we  
6 received from South Carolina.

7 SPECIAL MASTER MYLES: Okay. Well, if that's  
8 the response you're getting, then you should determine  
9 when is an appropriate time, after the intervention,  
10 or whenever you perceive it to be appropriate from the  
11 strategy of your case, to tee that issue up if you  
12 can't resolve it on the basis of what we said today.

13 MR. BROWNING: Thank you, Your Honor. That's  
14 extremely helpful.

15 SPECIAL MASTER MYLES: Okay. What else did  
16 we have for today? Anything? I have got to look back  
17 through the letters. But these were the main topics,  
18 I think.

19 MR. BROWNING: I think, from North Carolina's  
20 perspective, the only other item on our list would be  
21 setting the next conference call.

22 SPECIAL MASTER MYLES: We don't have one?  
23 That's unusual.

24 MR. BROWNING: We have the March.

25 SPECIAL MASTER MYLES: The next one. Setting

1 one for April.

2 MR. BROWNING: Exactly. Sorry, Your Honor.

3 SPECIAL MASTER MYLES: No, that's fine.

4 How about you, South Carolina?

5 Mr. Frederick?

6 MR. FREDERICK: Well, let's see, March 12th.

7 I would propose that we do something the week of the

8 13th. Perhaps Thursday, April 16th.

9 SPECIAL MASTER MYLES: That's open for me.

10 Anybody else does that work for?

11 MS. SEITZ: That's fine with Duke. This is

12 Virginia Seitz for Duke.

13 SPECIAL MASTER MYLES: Do you want to say

14 2:00, 2 o'clock your time?

15 MR. FREDERICK: Yes, that would be fine with

16 South Carolina.

17 MR. BANKS: This is Jim Banks. That would be

18 fine for the City of Charlotte.

19 MR. SHEEDY: This is Jim Sheedy for CRWSP.

20 And that's fine with us, too.

21 MR. BROWNING: Your Honor, that would be fine

22 with North Carolina as well.

23 SPECIAL MASTER MYLES: Okay. I think

24 Ms. Seitz, you said that day was good. Did I hear you

25 saying the time worked also?

1 MS. SEITZ: This is Virginia Seitz. Yes.

2 SPECIAL MASTER MYLES: Okay. I think that's  
3 everybody then.

4 One quick update from my end. Oh, and I just  
5 wanted to make sure there's no other issues. I hadn't  
6 really asked the intervenors whether they had other  
7 issues. But I assume not because I read the letter.  
8 Are there any other issues?

9 Okay. I have one only administrative change  
10 that's occurred on my end, or personnel change I guess  
11 is a better way of putting it. Amy Tovar, who was my  
12 law clerk/associate on this case moved to Washington  
13 D.C. You may see her around the Washington Circuit.  
14 Her husband got a job with the Solicitor General's  
15 Office in new administration, so she's going to be  
16 doing that. She's also about to have her first baby.  
17 So she's not going to be my law clerk anymore,  
18 unfortunately.

19 So I have talked to one other person who may  
20 join and take her place, a person I've worked with a  
21 great deal at the law firm. It would be another  
22 associate at my law firm. But I haven't quite come to  
23 a final conclusion on that. And I don't think it's  
24 really necessary now because of the -- you know, we're  
25 sort of in a holding period anyway. So at least from



1 my perspective, not from your perspective, but -- so  
2 I'll let you know when that occurs, what this person's  
3 billing rate will be.

4 As sort of consistent with my law firm's  
5 general policy, we don't, we don't, we try not to bill  
6 for getting a replacement person up to speed just  
7 because that's always perceived to be sort of our  
8 issue, not the client's issue. And even though this  
9 isn't a client relationship, I think the same  
10 principle applies. I won't be billing for getting the  
11 new person up to speed, but only for those things that  
12 are actually advancing the issue at hand. But I'll  
13 keep you advised on that. I just wanted to let you  
14 all know.

15 MR. GULICK: Special Master Myles, this is  
16 Jim Gulick. If she's on the line, we certainly wish  
17 her the best.

18 SPECIAL MASTER MYLES: No, she's not,  
19 unfortunately. She asked if she should be on the  
20 call. And I said, just because of the nature of the  
21 issues and everything, I didn't think it was  
22 necessary. But she has a lot of things to get ready  
23 for, so I will pass that on to her. I'm sure she  
24 would appreciate hearing that.

25 MR. FREDERICK: Same thing goes for all the

1 rest us, I'm sure.

2 SPECIAL MASTER MYLES: Great. Well, she'll  
3 definitely be happy to hear that. I think she a  
4 little bit has mixed feelings about the move. And  
5 it's hard to pick up when you're about to have your  
6 first baby and pick up and move across the country,  
7 so.... But it's exciting at the same time, so....  
8 She'll be -- she'll appreciate that. She's enjoyed  
9 the contact she's had with all of you.

10 I think her favorite part of the case was  
11 when everyone stood when she entered the courtroom in  
12 Richmond. I don't think she'll ever forget that.  
13 Anyway, great. I think we're done for today.

14 MR. FREDERICK: Thank you.

15 MR. BROWNING: Thank you.

16 MR. GULICK: Thank you.

17 MR. SHEEDY: Thank you very much.

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1 I, the undersigned, a Certified Shorthand  
2 Reporter of the State of California, do hereby  
3 certify:

4 That the foregoing proceedings were taken  
5 before me at the time and place herein set forth; that  
6 any witnesses in the foregoing proceedings, prior to  
7 testifying, were duly sworn; that a record of the  
8 proceedings was made by me using machine shorthand  
9 which was thereafter transcribed under my direction;  
10 that the foregoing transcript is a true record of the  
11 testimony given.

12 Further, that if the foregoing pertains to  
13 the original transcript of a deposition in a Federal  
14 Case, before completion of the proceedings, review of  
15 the transcript [ ] was [ ] was not requested.

16 I further certify that I am neither  
17 financially interested in the action nor a relative or  
18 employee of any attorney or party to this action.

19 IN WITNESS WHEREOF, I have this date  
20 subscribed my name.

21

22 Dated:

23

24

25

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DANA FREED  
CSR No. 10602