

No. 138, Original

**In the
Supreme Court of the United States**

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant,

CITY OF CHARLOTTE, DUKE ENERGY, LLC.,
CATAWBA RIVER WATER SUPPLY PROJECT

Intervenors.

**REPLY BRIEF OF THE STATE OF
NORTH CAROLINA
REGARDING ISSUES FOR PHASE I**

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Pursuant to the directive of the Special Master at the conference call of Friday, May 23, 2008, the State of North Carolina files this Reply to the Brief of the State of South Carolina Concerning Phase One and Phase Two Issues and Timing (filed by South Carolina on June 16, 2008).

ARGUMENT

In her original brief, South Carolina puts forth several proposals that would provide South Carolina with a substantial advantage during discovery and trial proceedings. Specifically, South Carolina urges the Special Master: 1) to allow South Carolina an extended time period for her experts to prepare their reports, while North Carolina would not be given sufficient time to respond to those expert reports, 2) to preclude the intervenors from participating in Phase I of the proceedings, and 3) to eliminate the determination required by *Colorado v. New Mexico*, 459 U.S. 176, 187-88 (1982) (i.e., whether the benefits of upstream water uses substantially outweigh the demonstrated downstream injury). Each of these

suggestions by South Carolina should be rejected. Additionally, South Carolina's original brief fails to recognize that South Carolina should be required to come forward at an early stage of the litigation with a specific delineation of the harms it seeks to prove in this action. Each of these points is addressed below. This reply brief also responds to several erroneous (but relatively minor) statements made by South Carolina that merit correction.

I. South Carolina's proposal provides South Carolina's experts ample time to prepare their reports, while North Carolina's experts would be forced to respond to those reports within an unrealistic time frame.

South Carolina's proposed schedule for Phase I provides South Carolina with ample time to prepare her expert reports but does not allow the experts retained by North Carolina sufficient time to respond to those reports. Under South Carolina's proposal, her experts would have sixteen months from today to prepare their expert reports (twenty-nine months from the filing of her Bill of Complaint). Under South Carolina's proposal, the experts retained by North Carolina would have only sixty days to respond to the reports prepared by South Carolina's experts.

North Carolina's experts cannot effectively begin to conduct necessary modeling work until North Carolina knows the specific harms that South Carolina intends to put at issue in this case. The experts retained by North Carolina have informed North Carolina's counsel that this modeling work will require nine months to complete. North Carolina should be entitled to have an adequate period of time to rebut the opinions of South Carolina's experts and to conduct her own modeling and analysis once South Carolina comes forward with the basis for her claims. Given that the true nature of South Carolina's claims (and purported harm) cannot be discerned from the four corners of her Bill of Complaint, South Carolina's

proposal runs the risk that North Carolina will be sandbagged and will not have adequate time to respond to the report of South Carolina's experts.

II. South Carolina seeks to circumvent the Special Master's previous order regarding intervention by requesting that the intervenors be precluded from participating in a crucial phase of the proceeding.

South Carolina asserts that the Intervenors' participation in Phase I should be limited to producing documents in response to discovery requests from the States. (S.C. Br. at 15-16) The Special Master, however, did not limit the Intervenors' participation in the case to Phase II proceedings. By order of May 27, 2008, the City of Charlotte (Charlotte) and the Catawba River Water Supply Project (CRWSP) were allowed to intervene in order to defend their own interbasin transfer permits. In that same order, Duke Energy Carolinas, LLC (Duke) was allowed to intervene because South Carolina's complaint puts at issue the Comprehensive Relicensing Agreement (CRA) and Duke's license application pending before the Federal Energy Regulatory Commission (FERC). (Special Master's Order Granting Motions for Leave to Intervene, pp. 10-12) Unquestionably, defense against a claim of injury for which a plaintiff seeks invalidation of a permit includes participation in the discovery process.

Both South Carolina and North Carolina agree that this proceeding should be bifurcated with Phase I focusing on whether South Carolina has suffered injury of significant magnitude caused by North Carolina's consumptive use of the waters of the Catawba River. The nature of the Intervenors' interests would allow each of them to participate in discovery, motions, and arguments during Phase I to the extent each deems participation necessary to protect the interests implicated by South Carolina's lawsuit seeking apportionment of the Catawba River. South Carolina in her complaint has raised the specter of injury related to the interbasin

transfer allowing Charlotte to use up to 33 million gallons per day (mgd) of water from the Catawba River, injury related to the interbasin transfer allowing Union County to use up to 5 mgd of water from the Catawba River, and injury related to Duke's operational releases from the reservoirs within the Catawba Wateree Hydroelectric project, which releases are set by Duke's FERC license of which the CRA is a part. Accordingly, all of the intervenors should be permitted to participate, as they deem necessary, to protect their interests in Phase I. This is exactly what the Special Master's Order allows. South Carolina's divide-and-conquer litigation strategy should be rejected by the Special Master.

III. In the event that South Carolina were successful in showing that she has suffered harm as a result of specific consumptive uses by North Carolina, the Special Master would then be required to determine whether the benefits of upstream water uses substantially outweigh the demonstrated downstream injury.

In her brief, South Carolina assumes that if she is able to show substantial harm in Phase I, then the Court should proceed to engage in an equitable allocation of the Catawba River. *See, e.g.*, S.C.'s Br. at 3 ("If, at the conclusion of Phase One, the Special Master finds that South Carolina has met her burden of proving injury, then Phase Two should commence and will concern the type of equitable apportionment decree that should be entered."). South Carolina, however, ignores a crucial step that is required in equitable allocations.

The Court has made clear that after a State proves that it has suffered substantial harm as a result of consumptive uses of a river by an upstream State, the Court must then proceed to determine whether the benefits of upstream water uses substantially outweigh the demonstrated downstream injury. *Colorado v. New Mexico*, 459 U.S. at 186-88. South Carolina, however, conveniently ignores this step of the analysis that must be conducted by the Special Master.

The Special Master should organize discovery and the trial of this action in two phases. The first phase should address whether South Carolina has suffered harm as a result of specific consumptive uses by North Carolina. The second phase, if needed, should address whether the benefits of upstream water uses substantially outweigh the demonstrated downstream injury. Only if both of these issues are resolved against North Carolina should the Special Master then proceed to consider all relevant factors necessary to conduct an equitable apportionment of the River. *See id.* at 183.

IV. South Carolina should be required to come forward at an early stage of the litigation with a specific delineation of the harms it seeks to prove in this action.

In her complaint, South Carolina identifies a handful of purported harms that it claims to have suffered as a result of interbasin transfers within North Carolina from the Catawba River (e.g., poor water quality in Camden, SC). Because her prayer for relief seeks an “equitable apportionment” of the Catawba River, South Carolina now seeks to put at issue all consumptive uses of the Catawba River. North Carolina, however, cannot effectively defend herself unless she knows what harms South Carolina intends to point to in order to prove her case. Until South Carolina specifically identifies the harms that it has allegedly suffered and the consumptive issues by North Carolina that have caused those harms, North Carolina will not be in a position to have her experts conduct the necessary modeling to rebut those claims.

South Carolina must be required, at an early stage of the proceeding, to identify all harms, with specificity as to type, location, time of occurrence and duration, so as to enable both the Special Master and North Carolina to assess those purported harms. South Carolina’s proposal makes no provision for the early

identification of such harms. North Carolina believes that South Carolina should be ordered to identify all such harms (and the alleged causes of those harms) within nine months. Following the identification of those harms, North Carolina should be given a nine month period to probe the factual basis for the harms identified by South Carolina. If South Carolina is not required to identify her harms, Phase I discovery will take the form of North Carolina hunting for a needle in a haystack while South Carolina holds that needle concealed within her hand.

V. Several statements by South Carolina in her original brief merit correction.

In addition to the four main points set out above, North Carolina is compelled to address several other statements in South Carolina's brief.

- A. South Carolina's assertion that "any diversion necessarily harms" South Carolina would only be true if the Catawba River were already fully appropriated.

South Carolina has asserted in her brief that when flows are inadequate, "any diversion' by the upstream State 'necessarily' harms the downstream State," and cites *Colorado v. New Mexico*, 459 U.S. at 187 n.13 as support for this misplaced proposition. (S.C. Br. at 4, 11) However, that result obtains only where existing uses have fully appropriated the entire flow of the river – a situation that cannot be proven in the present controversy under any forecast of evidence.

In *Colorado v. New Mexico*, the Court was presented with a situation where the waters of an interstate river were fully appropriated, under the doctrine of prior appropriation, by users in the downstream State, New Mexico. The upstream State, Colorado, sought an equitable apportionment of the river even though no use or diversion of the water had ever previously been made in Colorado. The Court granted Colorado's motion for leave to file a bill of complaint and appointed a

Special Master, who recommended to the Court that Colorado be allowed to divert 4,000 acre-feet of water per year. In rejecting the Special Master's recommendation and remanding for further findings, the Court held that New Mexico had met her initial burden of showing substantial injury "since any diversion by Colorado, unless necessarily offset by New Mexico at its own expense, will necessarily reduce the amount of water available to New Mexico users." *Id.*

By asserting this proposition in the current case, South Carolina fails to recognize that the holding is not applicable to the facts of the current case. First, in the present case South Carolina (the downstream State) seeks to force limits on the continuing reasonable use of this interstate river made by North Carolina (the upstream State). Moreover, this holding from the case is particularly limited by the water rights regime shared by both Colorado and New Mexico, that of prior appropriation. Due to this water rights regime and because the water of the river was fully appropriated by the downstream user (New Mexico), any attempt by Colorado to divert water from the river would necessarily have reduced the amount of water available to users in New Mexico. Under such a regime, the equation of "diversion equals harm" could be correct if the water were fully appropriated prior to the proposed diversion. In any other situation, diversion would not necessarily equal harm. For this reason, the Special Master should not apply this holding in the manner suggested by South Carolina.

B. South Carolina reads too much into the Court's decision to grant South Carolina leave to file a Bill of Complaint.

South Carolina is fundamentally wrong in her position that the Supreme Court has "necessarily ruled" that the harms alleged in South Carolina's complaint satisfy the Court's injury requirement. (S.C.'s Br. at 6, 12) The Court has simply ruled that this case is significant enough to grant original jurisdiction. In the area

of disputes between States involving water rights, rarely has the Court denied original jurisdiction. Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of its Original Jurisdiction Docket Since 1961*, 45 Me. L. Rev. 185, 199 (1993). South Carolina simply reads too much into the Court's decision to grant South Carolina leave to file a Bill of Complaint. South Carolina must prove, by "clear and convincing evidence," that actions by North Carolina have caused injury to South Carolina "of a serious magnitude." See, e.g., *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Idaho v. Oregon*, 462 U.S. 1017, 1027 (1983); *Colorado v. Kansas*, 320 U.S. 383, 398 (1943); *Connecticut v. Massachusetts*, 282 U.S. 660, 666-67 (1931). If South Carolina fails to carry her initial burden of demonstrating substantial injury, the action must be dismissed. *Colorado v. Kansas*, 320 U.S. at 391-92. The Court's order allowing South Carolina leave to file has little to no bearing on whether South Carolina can make such a showing.

- C. South Carolina improperly insinuates that North Carolina intends to delay the proceedings so that it may "continue[] its inequitable use of the Catawba River."

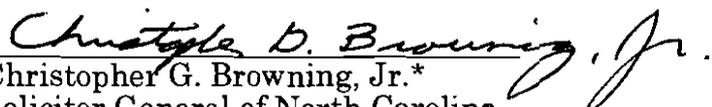
South Carolina improperly implies that North Carolina is seeking to delay discovery and the trial of this proceeding so that North Carolina may "continue[] its inequitable overuse of the Catawba River" while this action is ongoing. See S.C. Br. at 17. South Carolina's rhetoric is simply uncalled for. North Carolina has not delayed and will not delay these proceedings. Moreover, North Carolina fully anticipates that at the end of the day, South Carolina's claims will be proven to be entirely without merit. The Special Master, however, should not structure discovery and trial proceedings in a way that would deprive North Carolina of adequate time to prepare her defense. This is particularly true given South Carolina's vague and ambiguous pleadings and the open-ended nature of the claims she intends to assert.

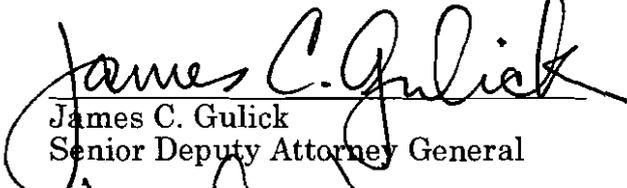
CONCLUSION

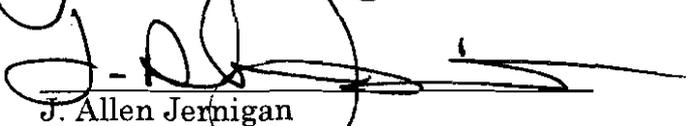
The Special Master should adopt North Carolina's proposal regarding Phase I. South Carolina should be given nine months to specifically identify her purported harms. North Carolina should be given nine months to then probe those purported harms. Following South Carolina's submission of expert reports, North Carolina should have a nine month period to conduct the necessary modeling and analysis to respond to those reports.

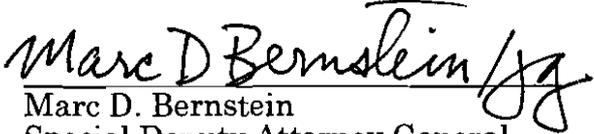
Respectfully submitted, this the 23th day of June, 2008.

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