No. 138, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA,

Plaintiff

v.

STATE OF NORTH CAROLINA,

Defendant

OFFICE OF THE SPECIAL MASTER

Order Regarding Structure of Trial and Discovery

November 17, 2010

I. BACKGROUND

The questions presented are whether the trial of this original jurisdiction action should be bifurcated into two liability phases; whether, if not, some other form of bifurcation is warranted; and how discovery should be structured.

South Carolina, the complaining State, seeks an equitable apportionment of the waters of the Catawba River, which flows from North Carolina into South Carolina. It also seeks a decree enjoining North Carolina from authorizing transfers of water from the Catawba inconsistent with the requested apportionment, and declaring that North Carolina's interbasin transfer statute is invalid to the extent that it authorizes transfers from the Catawba in excess of North Carolina's equitable share. North Carolina was the sole named defendant in the action as filed by South Carolina. Thereafter, Duke Energy Carolinas, LLC and the Catawba River Water Supply Product (collectively, "Intervenors") were allowed to intervene as defendants. *See South Carolina* v. *North Carolina*, 130 S. Ct. 854, 867 (2010).

The parties disagree over what form the trial should take. North Carolina and the Intervenors submit that the trial on liability should be divided into two phases: (1) a Phase I, or "mini-trial," to determine whether South Carolina can make a "threshold" showing that it has suffered specific and substantial harms caused by uses in North Carolina, and, (2) if South Carolina does make such a showing, a Phase II, to determine whether the beneficial uses in North Carolina outweigh the uses in South Carolina and, if necessary, to shape a decree. South Carolina, having favored bifurcation initially, now urges a single proceeding on all issues bearing upon entitlement to relief, with a possible separate proceeding to fashion a decree if warranted.

Because both State parties initially favored a bifurcated trial, the concept was memorialized in the initial Case Management Plan, although the contours of the bifurcation were left for another day, to be "set out in a separate order." That "separate order" never materialized, due in part to disagreements over the definition of the relevant phases and in part to other case developments, including the proceedings relating to intervention. The Case Management Plan did state that, despite the plan to bifurcate, discovery would not be limited strictly to matters relevant only to Phase I.

Following the Court's decision on intervention, the issue of the structure of trial arose again, with South Carolina for the first time arguing against any form of bifurcation at the liability stage. This, together with the Special Master's own concerns about whether bifurcation would be the most efficient way to proceed, led to briefing on the issue. A hearing was held on April 23, 2010, in Raleigh, North Carolina, after which the parties submitted additional briefing on alternatives to bifurcation, including phased discovery and the use of summary judgment or summary adjudication to resolve dispositive issues that might obviate or narrow any trial. Following that briefing, on August 20, 2010, the Special Master rendered a telephonic ruling on the issues and indicated that a written Order would follow.

For the reasons set forth below, the parties favoring bifurcation—North Carolina and the two Intervenors—have not met their burden of showing that bifurcation of the liability phase would result in a more efficient adjudication of this controversy. Accordingly, the question of liability will be adjudicated in a single, consolidated proceeding. If South Carolina shows in that proceeding, after consideration of all the evidence, that it is entitled to equitable relief in the form of an order of apportionment, a separate trial will be held on the details of the remedy. With respect to the liability phase, the parties may conduct discovery into all issues deemed to be relevant to that phase. As in all cases, the parties remain free to move for summary judgment on any appropriate issue at any time, including whether South Carolina can make a *prima facie* showing of real and substantial injury so as to warrant relief.

II. ANALYSIS

The principal question on a motion for bifurcation is whether the case can be resolved more efficiently with one trial or two. If, for example, there is a separate and case-dispositive issue that, resolved one way, would obviate a protracted trial on other liability issues, then it makes sense to hold a short trial on the one issue with the expectation that resolution of that issue may be all that is needed. If, by contrast, there is no clear division between the posited "threshold" issue and the issues that would have to be addressed in a second phase of trial, or if it is not clear whether resolution of the "threshold" issue would obviate any of the latter issues, then bifurcation may prolong the ultimate resolution of the case because it may require certain issues to be tried or presented twice.

A. Background Principles Governing Bifurcation

A few background principles that guide bifurcation in the federal district courts are relevant here.[1] Generally speaking, the norm is to decide all issues in a single trial, *see Willemijn Houdstermaatschaapij BV* v. *Apollo Computer, Inc.*, 707 F. Supp. 1429, 1433 (D. Del. 1989), and bifurcation is "the exception, not the rule." *Laitram Corp.* v. *Hewlett-Packard Co.*, 791 F. Supp. 113, 114 (E.D. La. 1992). A party seeking bifurcation must justify departing from the unitary trial model, usually by showing that a bifurcated trial would be more efficient or would avoid prejudice. *See, e.g., Rodin Properties–Shore Mall, N.V.* v. *Cushman & Wakefield of Pa., Inc.*, 49 F. Supp. 2d 709, 721 (D.N.J. 1999); *THK Am., Inc.* v. *NSK Co. Ltd.*, 151 F.R.D. 625, 632 (N.D. Ill. 1993). A common bifurcated structure is to have separate trials on liability and remedy—a division that can create efficiencies because the damages issues may involve different evidence and do not need to be decided unless liability is proven. *Angelo* v. *Armstrong World Indus., Inc.*, 11 F.3d 957, 964 (10th Cir. 1993). Another common practice is to hold a separate trial on punitive damages after the main trial on liability and

[1] Because a proposed bifurcation of trial raises essentially the same procedural and timing considerations in an original case in this Court as it does in cases originating in the federal district courts, cases involving bifurcation under Rule 42(b) of the Federal Rules of Civil Procedure are useful as guides. *See* Supreme Court Rule 17.2.

compensatory damages. *Scheufler* v. *General Host Corp.*, 895 F. Supp. 1411, 1414 (D. Kan. 1995). In that instance, the objective is to avoid prejudice to the defendant that would result from allowing punitive damages evidence—such as evidence of the defendant's net worth—at the liability and compensatory damages stage.

B. The Proposals for Bifurcation and the Court's Prior Equitable Apportionment Precedents

In this case, there has not been a sufficient showing that bifurcation of the liability or entitlement stage of this action will lead to a more efficient resolution of the controversy. This is so for several reasons, principal among them that, despite the parties' initial agreement on the concept of bifurcation—and even on the likely existence of a "threshold" question of South Carolina's injury that could be decided before other issues—the parties never were able to agree on the definition and scope of the two proposed phases. Their differences were not merely semantic, but reflected fundamentally different views as to South Carolina's burden of proof, both in the initial phase and in the action generally. For example, during the period when South Carolina was advocating a bifurcated trial, it offered a very narrow view of the showing it would have to make to survive Phase I—namely, that the water flowing to its side of the border was insufficient to meet its needs, and that uses by North Carolina, viewed in the aggregate, were the cause of that insufficient flow. By contrast, North Carolina contended that any analysis of South Carolina's "threshold" injury showing must include consideration of not only the reduced flow and the aggregate uses by North Carolina, but also numerous additional issues, including whether other factors—such as natural drought conditions or inefficient usage by South Carolina—caused or contributed to South Carolina's injury.[2]

The parties also did not agree on what would happen at the end of Phase I. South Carolina contended that, if it made the initial showing of injury required by Phase I, the only question for Phase II would be the shaping of an appropriate decree, and it would be in that context that the Court would engage in any equitable balancing of the relative values of each State's water uses. In other words, according to South Carolina, the minimal showing called for under its definition of Phase I would entitle it to a decree—the only question then being how the decree would be fashioned in light of the competing equities. North Carolina, by contrast, appeared to view Phase I as merely a "threshold," or jurisdictional, phase through which the parties would pass before proceeding to the merits of the case in Phase II. Under this view, if South Carolina failed to make the

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[2] In much of its briefing, South Carolina has framed the inquiry solely in terms of "but for" causation, arguing that, absent North Carolina's activities, South Carolina no longer would face water shortages. *See* S.C. Phase I Br. (June 16, 2008) at 8; S.C. Phase I Reply Br. (June 23, 2008) at 13. North Carolina employs more of a proximate causation analysis, contending that "[i]f consumption of water in North Carolina alone is not the cause of the alleged injuries in South Carolina, then South Carolina cannot seek to lay these 'harms' at North Carolina's feet." N.C. Phase I Br. (June 16, 2008) at 7. North Carolina suggests several alternative sources of causation, such as drought and self-inflicted injury. *Id.* at 7-8.

"threshold" showing of injury in Phase I, the Court would lack jurisdiction to proceed further. If South Carolina made the requisite Phase I showing, Phase II would involve a more fulsome inquiry into whether an equitable decree was warranted, including by balancing the relative values of water uses by the two States. Only after that broad inquiry resulted in a finding of liability, or entitlement, would the Court proceed to the question posited by South Carolina for Phase II—the shaping of an equitable decree.

Not only were the parties unable to agree on the definitions of the two trial phases, but neither party's proposed approach to bifurcation—nor any approach suggested by the Court's prior cases—lends itself to a likely division of the liability issues to be tried. The division initially proposed by South Carolina suggested far too narrow a scope for a determination of entitlement to a decree, and a correspondingly truncated view of South Carolina's own burden of proof at trial. As noted above, South Carolina's view was that it need demonstrate only that present or future diversions by North Carolina had resulted, or would result, in less water than is needed for South Carolina's present uses. It offered as precedent for this view the Court's decisions in *Colorado* v. *New Mexico*, 459 U.S. 176 (1982), and *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), in each of which the Court stated that a proposed diversion by the defendant State would meet the plaintiff State's burden of proving injury because the river in question was "fully appropriated." *See Colorado* v. *New Mexico*, 459 U.S. at 187 n.13; *Nebraska* v. *Wyoming*, 325 U.S. at 609-10.

There are at least two significant problems with this approach—particularly as a basis for bifurcating the trial on liability in the present dispute. First, the cases cited by South Carolina have no application here because they involved rivers that were "fully appropriated" within the meaning of the western water law doctrine of prior appropriation—meaning that owners of water rights had title to the entire flow of the river, and thus existing or prospective diversions in the upstream State necessarily would deprive the downstream state of water to which its citizens would have a legal entitlement under state law. *See Colorado* v. *New Mexico*, 459 U.S. at 187 n.13 ("In this case New Mexico has met its burden 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."); *Nebraska* v. *Wyoming*, 325 U.S. at 609 ("[W]e ... know that Colorado appropriators junior to Pathfinder consume about 30,000 acre feet a year and that Pathfinder has never been filled since 1930 and has always been in need of water. This alone negatives the absence of present injury.") By contrast, here the Catawba River is not fully appropriated in any recognized or relevant sense—and indeed, neither North Carolina nor South Carolina even follows the doctrine of prior appropriation. Instead, like other eastern states, they long have followed common law riparian rights principles, under which every owner of riparian property has the right to "reasonable use" of the water for consumptive purposes and recreation, "subject to the limitation that the use may not interfere with the like rights of those above, below, or on the opposite shore." *White's Mill Colony, Inc.* v. *Williams*, 609 S.E.2d 811, 817 (S.C. App. 2005). *See also Mason* v. *Apalache Mills*, 62 S.E. 399, 401 (S.C. 1908); *City of Durham* v. *Eno Cotton Mills*, 54 S.E. 453, 456 (N.C. 1906); *Biddix* v. *Henredon Furniture Indus., Inc.*, 331 S.E.2d 717, 721 (N.C. App. 1985).

Although South Carolina has suggested that the Catawba River is analogous to a fully appropriated river because its flow is sensitive to drought conditions and at times may not be sufficient to meet South Carolina's needs, the analogy is not apt because, unlike in a prior appropriation jurisdiction, there is no pre-determined list of entitlements to water (such as the sum of all recorded downstream appropriations) against which a change to the status quo may be measured. As a result, the inquiry necessarily is more factual, and it cannot be assumed that any diversion in the upstream State necessarily will leave insufficient water in the river to meet downstream needs or otherwise cause injury. In this case, for example, the States make conflicting assertions about the amount of excess water on the Catawba River and its tributaries during periods of low flow. According to North Carolina, "the Catawba River, even during drought, is not fully used." N.C. Bifurcation Reply Br. (Apr. 9, 2010) at 3; *see also* Tr. (Apr. 23, 2010) at 45:17-46:10. South Carolina, while not disputing this claim directly, alleges a number of harms that it claims to have suffered during periods of drought because of low water levels in the Catawba basin. *See* Complaint at App. 38-39.

Nor is there even a specific contested diversion or diversions that could be analyzed against a pre-determined status quo, even if one could be identified. In the Court's "fully appropriated river" cases, and in some of its other equitable apportionment cases, there was a specific proposed or recent diversion by one State that the other State claimed would adversely affect its rights. *See, e.g.*, *Colorado* v. *New Mexico*, 459 U.S. at 178; *Connecticut* v. *Massachusetts*, 282 U.S. 660, 667-68 (1931); *New York* v. *New Jersey*, 256 U.S. 296, 304-05 (1921). Thus, the Court's analysis focused first on the state of the river prior to the proposed diversion, and then on what effect the proposed diversion would have on the water available for the other State or States. Here, there is no one diversion by North Carolina that is the focus of South Carolina's complaint. Rather, South Carolina claims broadly that North Carolina is using more water than is its fair share—a yet-to-be defined baseline the contours of which are undefined by the pleadings or by any readily ascertainable temporal or conceptual limitation, and that are further complicated by the fact that the natural flow of the river long has been altered by the presence of power plants and associated structures on both sides of the border. For this reason, South Carolina's conception of its own injury does not lend itself—indeed, cannot logically lend itself—to any reliance on *Colorado* v. *New Mexico* or *Nebraska v. Wyoming* for the proposition that *any* diversion by North Carolina resulting in a diminution of water available for South Carolina uses necessarily will establish the requisite harm to South Carolina.

Also unwarranted is South Carolina's more general assumption that, upon a showing of substantial injury to its interests caused by diversions or uses in North Carolina, South Carolina necessarily will be entitled to equitable relief—a theory that was implicit in South Carolina's initial position that it would be entitled to proceed directly to a remedy phase, in which a decree would be fashioned, after the narrow Phase I that it conceptualized. The Court frequently has stated that, in order to establish liability in equitable apportionment cases, the complaining State must establish "proof by clear and convincing evidence of some real and substantial injury or damage." *Nebraska*

v. *Wyoming*, 507 U.S. 584, 591 (1993) (internal quotation marks omitted); *accord* *Colorado* v. *New Mexico*, 459 U.S. at 187 n.13; *Connecticut v. Massachusetts*, 282 U.S. at 669; *New York* v. *New Jersey*, 256 U.S. at 309. But the existence of such injury is not alone sufficient to warrant intervention by the Court. Before the Court will exercise its extraordinary powers to enjoin a State's actions, it must also be established that the "countervailing equities" of the defendant State do not "justify the detriment to existing users" in the complaining State. *Colorado* v. *New Mexico*, 459 U.S. at 187. The defendant State may prove by "clear and convincing evidence that the benefits" of its uses or proposed uses of the water at issue "substantially outweigh the harm[s]" alleged by the complaining State—and if it does so, no decree will issue. *Id.*

The decision in *Kansas* v. *Colorado*, 206 U.S. 46 (1907), is instructive. There, Kansas contended that nonriparian arid lands were being irrigated in Colorado, and that under English common law, Kansas was entitled to receive the flows of the Arkansas River as they existed "before any human interference." *Id.* at 85, 98. Colorado, on the other hand, claimed the right of its users under Colorado's appropriative doctrine to take all of the stream flow, without regard to any downstream impact in Kansas. *Id.* at 98. The Supreme Court rejected each of these positions, and instead ruled that the dispute should be resolved based "upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream." *Id.* at 100.

This was the Court's first expression of the doctrine of equitable apportionment with respect to interstate streams. Notably, while the Court found that the "diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas," that alone was not sufficient to warrant intervention. *Id.* at 113-14. Rather, the Court found that when one "compare[d] the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two states *forbids any interference* with the present withdrawal of water in Colorado for purposes of irrigation." *Id.* at 114 (emphasis added). The Court reiterated this point in its later decision in *Colorado* v. *Kansas*, 320 U.S. 383 (1943):

> [In] such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted.

Id. at 393-94. In determining liability, the "question to be decided, in the light of existing conditions in both states, is whether, and to what extent," the upper state's "action injures the lower state and her citizens by depriving them of a *like, or an equally valuable, beneficial use.*" *Id.* (emphasis added).

What these precedents support—contrary to South Carolina's narrow view—is a broad inquiry into both States' consumptive uses, the relative harms purportedly suffered by the complaining State because of the other's conduct, and the beneficial uses claimed by the defendant State, before the Court will exercise its extraordinary power to enjoin one sovereign State to take or refrain from a course of action with respect to that stream at the behest of another State. This broad inquiry much more closely follows North Carolina's conception of the applicable burden of proof, but does not lend itself to the bifurcated structure proposed by North Carolina and the Intervenors—precisely because the inquiry necessarily is broad, encompassing a range of potentially applicable factors bearing upon the existence of injury and the complaining State's entitlement to relief.

This conclusion is confirmed by the fact that in each case in which the Court has expounded upon the relevant burden of proof—and even in those cases in which it declined to enter an equitable decree and dismissed the complaining State's claims for want of a concrete showing of a "real and substantial injury"—it has done so after a full trial on the merits. *See, e.g.*, *Missouri* v. *Illinois*, 200 U.S. 496, 518 (1906); *Connecticut* v. *Massachusetts*, 282 U.S. at 664, 669. In none of these cases did the Court treat the issue as a "threshold" matter in the sense advocated here, so as to warrant an initial trial on the sole question of injury to the complaining State. Indeed, the factors considered by the Court in reaching its conclusions about real and substantial injury have included the very matters that the parties to the present dispute had agreed would be part of Phase II—namely, consideration of relative values of each State's existing and proposed uses and whether the injuries suffered by the complaining State are outweighed by countervailing equities presented by the defendant State. *See, e.g.*, *Missouri* v. *Illinois*, 200 U.S. at 521-26; *Colorado* v. *New Mexico*, 459 U.S. at 187. In some cases the Court did dismiss the Bill of Complaint upon finding that the complaining State had not made the requisite showing of injury, but it did so only after all the evidence on all issues was available for consideration—not as a "threshold" inquiry that would be undertaken before the full range of evidence was heard. *See Missouri* v. *Illinois*, 200 U.S. at 521-26; *New York* v. *New Jersey*, 256 U.S. at 309.

Missouri v. *Illinois*, for example, was an action by the State of Missouri against the State of Illinois and the Sanitary District of Chicago to restrain the discharge of sewage from Chicago through a manmade channel into the Desplaines River. Missouri claimed that the sewage was flowing from the Desplaines into the Illinois River, and thereafter into the Mississippi River, with negative impacts upon downstream cities, towns, and inhabitants in the State of Missouri. 200 U.S. at 517. The defendants contended that the water being introduced through the sewage disposal plan resulted in purer water than previously was the case, that many towns and cities in Missouri were discharging their sewage into the Missouri and Mississippi Rivers, "and that if there is any trouble the plaintiff must look nearer home for the cause." *Id.* After a trial in which

both sides presented scientific and factual evidence in support of their respective positions, *id.* at 518, the Court concluded that Missouri had not made the requisite showing to warrant intervention by the Court—that is, to warrant an equitable decree restraining the defendants from engaging in the contested discharge. The Court reasoned that before it intervenes in disputes between States, the "case should be of serious magnitude, clearly and fully proved, and the principle applied should be one which the Court is prepared deliberately to maintain against all considerations on the other side." *Id.* at 521. The Court then discussed the evidence bearing upon entitlement to relief, including the discharges by Missouri residents, the competing data on the existence of pollution in the waters of the Mississippi caused by discharges in Illinois, the rates of illness before and after the discharges began, and the scientific data regarding the presence and longevity of bacteria at various points along the river. *Id.* at 522-26. The Court concluded that the evidence as a whole did not satisfy the heightened standard required for equitable relief from the Court. *Id.* at 526.

The Court employed a similar analysis in *Connecticut* v. *Massachusetts*, a case involving a challenge by Connecticut to a planned diversion by Massachusetts. A full trial was conducted on the merits, including issues concerning the alternative water sources available to Massachusetts and the likelihood of certain proposed uses by Connecticut. Although the Court ultimately dismissed the Bill of Complaint on the ground that Connecticut had not offered sufficient evidence of injury to cause the Court to ""exert its extraordinary power to control the conduct of one State at the suit of another," 282 U.S. at 669, it did so only after analyzing the range of evidence adduced during the trial that bore upon that issue. *Id.* at 674. *See also Washington* v. *Oregon*, 297 U.S. 517, 529 (1936); *Colorado* v. *Kansas*, 320 U.S. at 392-394.[3] In short, none of these equitable apportionment cases supports the notion of a "threshold" injury requirement in the sense of an issue that could be severed from other liability issues and tried first.

C. Prior Original Jurisdiction Precedents Involving Bifurcation

North Carolina and the Intervenors have cited a handful of cases in which Special Masters have conducted bifurcated or phased litigation. These cases fall into two categories: (1) interstate water compact disputes in which bifurcation was employed; and (2) equitable apportionment actions that involved multiple stages of litigation, but not bifurcation. Neither category of cases supports isolating the injury requirement into a distinct phase in this case, and, if anything, the cases support a more conventional structure in which liability *and remedy* are bifurcated.

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[3] Of course, this type of disposition—dismissal of the Bill of Complaint—is not analogous to dismissal under, for example, Rule 12(b)(6) of the Federal Rules of Civil Procedure—a type of dismissal that is based on the pleadings, with very little, if any, evidence outside the complaint being considered. Dismissal of a Bill of Complaint in an original matter is simply the Court's way of disposing of the case, even after a full trial, when the complaining State has not shown an entitlement to relief.

1. Compact Cases

North Carolina and the Intervenors cite three cases in which Special Masters bifurcated original jurisdiction disputes arising from interstate water compacts: *Kansas* v. *Colorado*, Orig. No. 105; *Oklahoma* v. *New Mexico*, Orig. No. 109; and *Texas* v. *New Mexico*, Orig. No. 65. But in each of these cases, the Special Master bifurcated the proceeding between a liability phase, to determine whether the defendant State violated the compact, and a remedial phase, to fashion relief. Indeed, in a compact enforcement action, the complaining State need not show injury to establish liability. *See Oklahoma* v. *New Mexico*, 501 U.S 221, 228 (1991). Rather, injury is relevant only to the question of what the remedy for a compact violation will be. *Id.*

In *Oklahoma* v. *New Mexico*, the liability issues were whether a particular provision of the Canadian River Compact that limited New Mexico to 200,000 acre-feet of storage referred to storage capacity or actual water stored, *see* 501 U.S. at 229; whether the phrase "waters originating . . . above Conchas Dam" included water spilled over the dam during a flood, *id.* at 231; and whether water stored in a "desilting pool" for purposes of sediment control should count against New Mexico's storage capacity limit, *id.* at 240. The initial proceeding involved the introduction of evidence regarding the course of compact negotiations between the parties, as well as testimony by witnesses familiar with the customs and practices of reclamation projects in the region. Report of the Special Master (Oct. 15, 1990), *Oklahoma* v. *New Mexico*, Orig. No. 109, at 48-68. But the first phase entailed no factual inquiry into factors such as the extent of harm suffered by downstream States, the valuation of current and future water uses, opportunities for conservation, or the availability of alternative water sources. *See Oklahoma* v. *New Mexico*, 501 U.S. at 228. The Special Master's recommended decree provided that a second phase would be conducted to "determine any injury Texas and Oklahoma may have sustained" as a result of New Mexico's "violation and to recommend appropriate relief." Report of the Special Master (Oct. 15, 1990) at 114.

The same was true in *Texas* v. *New Mexico*, which involved bifurcated litigation arising from the Pecos River Compact. The first phase was devoted to the meaning of a compact provision requiring New Mexico to give Texas "a quantity of water equivalent to that available to Texas under the 1947 condition." 482 U.S. 124, 126-27 (1987). The Special Master received evidence regarding a flawed river routing study that had been used by the drafters of the compact to calculate the flow of the Pecos. *Texas* v. *New Mexico*, 446 U.S. 540, 541-42 (1980) (Stevens, J., dissenting). He thus was able to determine that the phrase "1947 condition" referred to actual river conditions, rather than the erroneous data relied upon in the flawed study. *Id.* at 542. This inquiry, which led the Special Master to conclude that New Mexico had breached the compact, did not entail factual discovery about water usage or require an investigation into whether the complaining State had suffered injury. Those considerations were addressed in later phases of the proceeding, in which the parties introduced evidence of how much water New Mexico had withheld from Texas in violation of the compact. *See Texas* v. *New Mexico*, 482 U.S. at 127.

The third compact case, *Kansas* v. *Colorado*, most resembles this case, but still is inapt. There, Kansas claimed that certain well pumping and reservoir construction activities in Colorado violated the Arkansas River Compact. 514 U.S. 673, 679 (1995). Again, the liability issue was one of compact interpretation, but the relevant compact provision required the complaining State to prove that the defendant State's action had "materially depleted [Arkansas River water] in usable quantity or availability." *Id.* Thus, the liability inquiry, though one of compact interpretation rather than equitable apportionment, involved a factual determination analogous to those involved in an equitable apportionment action. Kansas moved to sever "damages or compensation" from "liability" under the Compact. Report of the Special Master (Jul. 29, 1994), *Kansas* v. *Colorado*, Orig. No. 105, at App. 61. Colorado opposed the motion, arguing that liability and damages were intertwined, and Kansas's proposal would prevent it from introducing, at the first phase of the proceeding, evidence "address[ing] the relationship between water use practices in both states and the economics of those practices." *Id.* at 62. The Special Master ordered bifurcation but assured Colorado that it would be allowed, during the first phase, to "introduc[e] such economic or other evidence or testimony related to . . . its defense on the issue of liability." *Id.* at App. 63. Thus, the first phase of the bifurcated proceeding in *Kansas* v. *Colorado* involved the type of economic and water usage evidence that, in this case, the parties agree would be duplicative of the second phase of the proceeding—undermining the very purpose of bifurcation.

Taken together, these cases support the general proposition that bifurcation has been used in original jurisdiction actions involving interstate compacts, and when it has been used, it has been to divide the liability stage from the remedial stage. But they provide no support for the contention that bifurcation has been used in equitable apportionment actions.

2. Multi-Stage Equitable Apportionment Cases

North Carolina and the Intervenors also cite two equitable apportionment cases that involved multiple hearings, phased discovery, and the Court's interim review of the Special Master's recommendations—namely, *Nebraska* v. *Wyoming*, Orig. Nos. 6 and 108; and *Colorado* v. *New Mexico*, Orig. No. 80. But neither of these cases involved bifurcation at all. Rather, in both, the Special Master addressed the "injury" requirement as part of a single proceeding that also included equitable considerations.

In 1986, Nebraska alleged that Wyoming was in violation of the Court's 1945 equitable apportionment decree involving the North Platte River. *Nebraska* v. *Wyoming*, 507 U.S. at 589. The ensuing fourteen years of litigation were complex, *see* Report of the Special Master (Oct. 12, 2001), *Nebraska* v. *Wyoming*, Orig. No. 108, at 10-16, but there was no bifurcation of issues. Rather, there was a phase in which the parties conducted discovery and filed summary judgment motions, most of which were denied. *Id.* at 13-14; *Nebraska* v. *Wyoming*, 507 U.S. at 588-90, 603. That was followed by a phase in which the parties sought to amend their pleadings, resulting in another interim report and Supreme Court opinion. Report of the Special Master (Oct. 12, 2001) at 16-17; *Nebraska*

v. *Wyoming*, 515 U.S. 1, 8-9 (1995).[4] Thereafter, the parties proceeded with discovery and plans for a single unified trial, before settling just as the trial was to begin. Report of the Special Master (Oct. 12, 2001) at 23. The single trial would have encompassed both the injury determination and the equitable balancing phase. As the Court recognized, the first two phases had not been occasions for the Special Master to receive evidence and make findings about injury or liability. *See Nebraska* v. *Wyoming*, 515 U.S. at 9, 13-14, 19. Thus, although *Nebraska* v. *Wyoming* may support the conclusion that the parties should have an opportunity to move for summary judgment at the end of discovery, it offers no model for bifurcating an equitable apportionment action.

Colorado v. *New Mexico* is even less supportive of bifurcating "injury" from the remainder of the case. There, the Special Master initially conducted a single proceeding, adjudicating both the question of injury and the balancing of uses of the Vermejo River between the two States. 459 U.S. 176, 180 (1982). The Supreme Court upheld the Special Master's finding that the complaining State, New Mexico, would suffer injury if Colorado were allowed to divert water from the river. *Id.* at 187 n.13. The Court concluded, however, that the Special Master's initial report did "not contain sufficient factual findings to enable us to assess the correctness of the Special Master's application of the principle of equitable apportionment to the facts of this case." *Id.* at 183. The Court remanded the case to the Special Master with instructions to analyze, among other things, existing uses on the river, conservation efforts, availability of substitute sources, and the extent of injuries suffered by New Mexico. *Id.* at 189-90. The Court did not "effectively bifurcate[]" the case, as the Intervenors suggest. The only reason there was a second proceeding before the Special Master was to allow him, "on the basis of the evidence previously received," to "develop[] additional factual findings." *Colorado* v. *New Mexico*, 467 U.S. 310, 315 (1984). Had these findings been made during the first proceeding, the case would not have been remanded.

Like any type of trial, equitable apportionment actions frequently proceed in stages, with multiple opportunities for motion practice. Exceptions to Special Masters' rulings on these motions, in turn, often are heard immediately by the Court, which is why a single equitable apportionment action might produce many Supreme Court opinions. That fact, however, does not support the bifurcation requested here.

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[4] In its 1993 opinion, the Supreme Court held that the case could encompass not just allegations that a party had breached the 1945 decree, but new allegations regarding changed conditions that could lead the Court to modify the decree—that is, it effectively invited the parties to begin a new equitable apportionment proceeding. *Nebraska* v. *Wyoming*, 507 U.S. at 591-92. The States responded by amending their pleadings to include a litany of new allegations of harm, Report of the Special Master (Oct. 12) at 16-17, most of which the special master and the Supreme Court permitted to be aired as part of the litigation, *Nebraska* v. *Wyoming*, 515 U.S. at 9. In the current proceeding, there is no equivalent of these first two phases, because there is no background decree in place regarding the Catawba River.

Once again, what is supported by the Court's prior precedents and the practicalities of the present case is bifurcation of the action into separate liability and remedial phases. Under this more traditional form of bifurcation, the liability phase would include all issues bearing upon whether a decree should issue, including the existence of real and substantial injury and the balancing of equitable considerations bearing upon entitlement to relief. The second phase would occur only if entitlement is established, and would be limited to the shaping of an appropriate decree.

D. Considerations of Judicial Economy

Not only is there no precedent to support the bifurcation proposed here, but as a practical matter, bifurcating the injury inquiry from the rest of the proceedings would not serve the interests of judicial economy. For the reasons discussed above, there is a high probability of overlap between the issues of whether South Carolina has suffered a substantial injury, whether such injury is caused by conduct in North Carolina, and whether North Carolina's equitable uses of the Catawba outweigh South Carolina's uses—as well as the other equitable factors that may bear upon entitlement.

For example, in considering the consumptive uses of South Carolina and North Carolina, drought conditions are undoubtedly relevant to both South Carolina's showing of injury, and the comparison of that injury to North Carolina's uses. *See Nebraska* v. *Wyoming*, 325 U.S. at 620 (Court "must deal with [drought] conditions as they obtain today" rather than permit states to set the quantity of their diversions based in part on average flows in wet years); *see also Wyoming* v. *Colorado*, 259 U.S. 419, 471-72, 478-79 (1922) (calculating available flow in an equitable apportionment case based on what is dependably available even in dry years). South Carolina cannot simply show that it is not receiving as much water as it receives in non-drought conditions, and North Carolina cannot claim that South Carolina's injuries are caused solely by drought conditions if North Carolina has maintained normal consumptive levels and not reduced its own diversions proportionally to the reduction in flow caused by drought.

Nor can it be said that South Carolina's own consumption habits are irrelevant to its showing of injury, such as interbasin transfers, upstream consumption within South Carolina, inadequate conservation measures, or failure to plan for and utilize alternative water supplies or storage opportunities. In *Colorado* v. *Kansas*, 320 U.S. 383 (1943), for example, the Court held that Kansas had not sustained its burden of showing that Colorado had "worked a serious detriment to the substantial interests of Kansas." *Id.* at 399. In so holding, the Court considered evidence that the "acreage under irrigation in western Kansas through existing ditches has steadily increased," that "arid lands in western Kansas are underlaid at shallow depths with great quantities of ground water available for irrigation by pumping at low initial and maintenance cost" and "that farmers who could be served from existing ditches have elected not to take water therefrom but to install pumping systems because of lower cost." *Id.*

Thus, the proposed phases likely would "involve extensive proof and substantially the same facts or witnesses as the other issues in the case[ ]." 9A Wright & Miller, *Federal Practice and Procedure* § 2388 (3d ed., West 2010). When that is the case,

"there is little efficiency to be gained" from bifurcation. *Ortiz* v. *Pearson*, 88 F. Supp. 2d 151, 166 (S.D.N.Y. 2000).

E. Summary Judgment as an Alternative to Bifurcation of Trial or Phased Discovery

As an alternative to bifurcation, the parties remain free to seek summary judgment or other relief at any time prior to trial on issues that could resolve or narrow the scope of the litigation, including whether South Carolina can meet the injury requirement or whether its claims are limited to periods of low flow, drought, or certain portions of the Catawba River. Summary judgment motions have been permitted in prior equitable apportionment proceedings. *See, e.g.*, Report of the Special Master (Apr. 9, 1992), *Nebraska* v. *Wyoming*, Orig. No. 108 at 8-9 (permitting summary judgment motions "on one or more of the issues" following "[a]n intensive period of discovery"; granting summary judgment on two issues and denying rest); *Nebraska* v. *Wyoming*, 507 U.S. at 590 (recommendations adopted in full by the Supreme Court).

Moreover, the parties remain free to bring motions for judgment (*e.g.*, for dismissal of the Bill of Complaint) following trial, akin to a motion for a directed verdict. In prior equitable apportionment cases, parties have filed such motions following full trials on the merits. *See, e.g., Idaho ex rel. Evans* v. *Oregon*, 462 U.S. 1017, 1024, 1029 (1983) (affirming order granting Idaho motion to dismiss Bill of Complaint following trial for lack of injury); *Nebraska* v. *Wyoming*, 325 U.S. at 607-08 (affirming denial of motion to dismiss Bill of Complaint for lack of injury).

With respect to discovery, the parties may take discovery on all matters that they reasonably believe to be relevant to the liability phase of the trial, subject to the right of any party to seek summary judgment at any time on an issue that may be dispositive of the case, or any issue within the case. Of course, reasonable limits may be placed on such discovery through the case management process, or by motion in the case of any dispute over the discoverability of specific materials.

IV. Conclusion

For the reasons stated above, the trial in this action will address all issues of liability, and will not be bifurcated into separate liability phases. If South Carolina demonstrates that it is entitled to an apportionment, a separate trial will be held on the contours of that remedy. The parties may conduct discovery on all potentially relevant issues and may move for summary judgment on any issue at any time prior to trial.

Dated: November 17, 2010

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Special Master

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No. 138, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA,

Plaintiff

v.

STATE OF NORTH CAROLINA,

Defendant

OFFICE OF THE SPECIAL MASTER

Order Regarding Structure of Trial and Discovery

November 17, 2010

I. BACKGROUND

The questions presented are whether the trial of this original jurisdiction action should be bifurcated into two liability phases; whether, if not, some other form of bifurcation is warranted; and how discovery should be structured.

South Carolina, the complaining State, seeks an equitable apportionment of the waters of the Catawba River, which flows from North Carolina into South Carolina. It also seeks a decree enjoining North Carolina from authorizing transfers of water from the Catawba inconsistent with the requested apportionment, and declaring that North Carolina's interbasin transfer statute is invalid to the extent that it authorizes transfers from the Catawba in excess of North Carolina's equitable share. North Carolina was the sole named defendant in the action as filed by South Carolina. Thereafter, Duke Energy Carolinas, LLC and the Catawba River Water Supply Product (collectively, "Intervenors") were allowed to intervene as defendants. *See South Carolina* v. *North Carolina*, 130 S. Ct. 854, 867 (2010).

The parties disagree over what form the trial should take. North Carolina and the Intervenors submit that the trial on liability should be divided into two phases: (1) a Phase I, or "mini-trial," to determine whether South Carolina can make a "threshold" showing that it has suffered specific and substantial harms caused by uses in North Carolina, and, (2) if South Carolina does make such a showing, a Phase II, to determine whether the beneficial uses in North Carolina outweigh the uses in South Carolina and, if necessary, to shape a decree. South Carolina, having favored bifurcation initially, now urges a single proceeding on all issues bearing upon entitlement to relief, with a possible separate proceeding to fashion a decree if warranted.

Because both State parties initially favored a bifurcated trial, the concept was memorialized in the initial Case Management Plan, although the contours of the bifurcation were left for another day, to be "set out in a separate order." That "separate order" never materialized, due in part to disagreements over the definition of the relevant phases and in part to other case developments, including the proceedings relating to intervention. The Case Management Plan did state that, despite the plan to bifurcate, discovery would not be limited strictly to matters relevant only to Phase I.

Following the Court's decision on intervention, the issue of the structure of trial arose again, with South Carolina for the first time arguing against any form of bifurcation at the liability stage. This, together with the Special Master's own concerns about whether bifurcation would be the most efficient way to proceed, led to briefing on the issue. A hearing was held on April 23, 2010, in Raleigh, North Carolina, after which the parties submitted additional briefing on alternatives to bifurcation, including phased discovery and the use of summary judgment or summary adjudication to resolve dispositive issues that might obviate or narrow any trial. Following that briefing, on August 20, 2010, the Special Master rendered a telephonic ruling on the issues and indicated that a written Order would follow.

For the reasons set forth below, the parties favoring bifurcation—North Carolina and the two Intervenors—have not met their burden of showing that bifurcation of the liability phase would result in a more efficient adjudication of this controversy. Accordingly, the question of liability will be adjudicated in a single, consolidated proceeding. If South Carolina shows in that proceeding, after consideration of all the evidence, that it is entitled to equitable relief in the form of an order of apportionment, a separate trial will be held on the details of the remedy. With respect to the liability phase, the parties may conduct discovery into all issues deemed to be relevant to that phase. As in all cases, the parties remain free to move for summary judgment on any appropriate issue at any time, including whether South Carolina can make a *prima facie* showing of real and substantial injury so as to warrant relief.

II. ANALYSIS

The principal question on a motion for bifurcation is whether the case can be resolved more efficiently with one trial or two. If, for example, there is a separate and case-dispositive issue that, resolved one way, would obviate a protracted trial on other liability issues, then it makes sense to hold a short trial on the one issue with the expectation that resolution of that issue may be all that is needed. If, by contrast, there is no clear division between the posited "threshold" issue and the issues that would have to be addressed in a second phase of trial, or if it is not clear whether resolution of the "threshold" issue would obviate any of the latter issues, then bifurcation may prolong the ultimate resolution of the case because it may require certain issues to be tried or presented twice.

A. Background Principles Governing Bifurcation

A few background principles that guide bifurcation in the federal district courts are relevant here.[1] Generally speaking, the norm is to decide all issues in a single trial, *see Willemijn Houdstermaatschaapij BV* v. *Apollo Computer, Inc.*, 707 F. Supp. 1429, 1433 (D. Del. 1989), and bifurcation is "the exception, not the rule." *Laitram Corp.* v. *Hewlett-Packard Co.*, 791 F. Supp. 113, 114 (E.D. La. 1992). A party seeking bifurcation must justify departing from the unitary trial model, usually by showing that a bifurcated trial would be more efficient or would avoid prejudice. *See, e.g., Rodin Properties–Shore Mall, N.V.* v. *Cushman & Wakefield of Pa., Inc.*, 49 F. Supp. 2d 709, 721 (D.N.J. 1999); *THK Am., Inc.* v. *NSK Co. Ltd.*, 151 F.R.D. 625, 632 (N.D. Ill. 1993). A common bifurcated structure is to have separate trials on liability and remedy—a division that can create efficiencies because the damages issues may involve different evidence and do not need to be decided unless liability is proven. *Angelo* v. *Armstrong World Indus., Inc.*, 11 F.3d 957, 964 (10th Cir. 1993). Another common practice is to hold a separate trial on punitive damages after the main trial on liability and

[1] Because a proposed bifurcation of trial raises essentially the same procedural and timing considerations in an original case in this Court as it does in cases originating in the federal district courts, cases involving bifurcation under Rule 42(b) of the Federal Rules of Civil Procedure are useful as guides. *See* Supreme Court Rule 17.2.

compensatory damages. *Scheufler* v. *General Host Corp.*, 895 F. Supp. 1411, 1414 (D. Kan. 1995). In that instance, the objective is to avoid prejudice to the defendant that would result from allowing punitive damages evidence—such as evidence of the defendant's net worth—at the liability and compensatory damages stage.

B. The Proposals for Bifurcation and the Court's Prior Equitable Apportionment Precedents

In this case, there has not been a sufficient showing that bifurcation of the liability or entitlement stage of this action will lead to a more efficient resolution of the controversy. This is so for several reasons, principal among them that, despite the parties' initial agreement on the concept of bifurcation—and even on the likely existence of a "threshold" question of South Carolina's injury that could be decided before other issues—the parties never were able to agree on the definition and scope of the two proposed phases. Their differences were not merely semantic, but reflected fundamentally different views as to South Carolina's burden of proof, both in the initial phase and in the action generally. For example, during the period when South Carolina was advocating a bifurcated trial, it offered a very narrow view of the showing it would have to make to survive Phase I—namely, that the water flowing to its side of the border was insufficient to meet its needs, and that uses by North Carolina, viewed in the aggregate, were the cause of that insufficient flow. By contrast, North Carolina contended that any analysis of South Carolina's "threshold" injury showing must include consideration of not only the reduced flow and the aggregate uses by North Carolina, but also numerous additional issues, including whether other factors—such as natural drought conditions or inefficient usage by South Carolina—caused or contributed to South Carolina's injury.[2]

The parties also did not agree on what would happen at the end of Phase I. South Carolina contended that, if it made the initial showing of injury required by Phase I, the only question for Phase II would be the shaping of an appropriate decree, and it would be in that context that the Court would engage in any equitable balancing of the relative values of each State's water uses. In other words, according to South Carolina, the minimal showing called for under its definition of Phase I would entitle it to a decree—the only question then being how the decree would be fashioned in light of the competing equities. North Carolina, by contrast, appeared to view Phase I as merely a "threshold," or jurisdictional, phase through which the parties would pass before proceeding to the merits of the case in Phase II. Under this view, if South Carolina failed to make the

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[2] In much of its briefing, South Carolina has framed the inquiry solely in terms of "but for" causation, arguing that, absent North Carolina's activities, South Carolina no longer would face water shortages. *See* S.C. Phase I Br. (June 16, 2008) at 8; S.C. Phase I Reply Br. (June 23, 2008) at 13. North Carolina employs more of a proximate causation analysis, contending that "[i]f consumption of water in North Carolina alone is not the cause of the alleged injuries in South Carolina, then South Carolina cannot seek to lay these 'harms' at North Carolina's feet." N.C. Phase I Br. (June 16, 2008) at 7. North Carolina suggests several alternative sources of causation, such as drought and self-inflicted injury. *Id.* at 7-8.

"threshold" showing of injury in Phase I, the Court would lack jurisdiction to proceed further. If South Carolina made the requisite Phase I showing, Phase II would involve a more fulsome inquiry into whether an equitable decree was warranted, including by balancing the relative values of water uses by the two States. Only after that broad inquiry resulted in a finding of liability, or entitlement, would the Court proceed to the question posited by South Carolina for Phase II—the shaping of an equitable decree.

Not only were the parties unable to agree on the definitions of the two trial phases, but neither party's proposed approach to bifurcation—nor any approach suggested by the Court's prior cases—lends itself to a likely division of the liability issues to be tried. The division initially proposed by South Carolina suggested far too narrow a scope for a determination of entitlement to a decree, and a correspondingly truncated view of South Carolina's own burden of proof at trial. As noted above, South Carolina's view was that it need demonstrate only that present or future diversions by North Carolina had resulted, or would result, in less water than is needed for South Carolina's present uses. It offered as precedent for this view the Court's decisions in *Colorado* v. *New Mexico*, 459 U.S. 176 (1982), and *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), in each of which the Court stated that a proposed diversion by the defendant State would meet the plaintiff State's burden of proving injury because the river in question was "fully appropriated." *See Colorado* v. *New Mexico*, 459 U.S. at 187 n.13; *Nebraska* v. *Wyoming*, 325 U.S. at 609-10.

There are at least two significant problems with this approach—particularly as a basis for bifurcating the trial on liability in the present dispute. First, the cases cited by South Carolina have no application here because they involved rivers that were "fully appropriated" within the meaning of the western water law doctrine of prior appropriation—meaning that owners of water rights had title to the entire flow of the river, and thus existing or prospective diversions in the upstream State necessarily would deprive the downstream state of water to which its citizens would have a legal entitlement under state law. *See Colorado* v. *New Mexico*, 459 U.S. at 187 n.13 ("In this case New Mexico has met its burden 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."); *Nebraska* v. *Wyoming*, 325 U.S. at 609 ("[W]e ... know that Colorado appropriators junior to Pathfinder consume about 30,000 acre feet a year and that Pathfinder has never been filled since 1930 and has always been in need of water. This alone negatives the absence of present injury.") By contrast, here the Catawba River is not fully appropriated in any recognized or relevant sense—and indeed, neither North Carolina nor South Carolina even follows the doctrine of prior appropriation. Instead, like other eastern states, they long have followed common law riparian rights principles, under which every owner of riparian property has the right to "reasonable use" of the water for consumptive purposes and recreation, "subject to the limitation that the use may not interfere with the like rights of those above, below, or on the opposite shore." *White's Mill Colony, Inc.* v. *Williams*, 609 S.E.2d 811, 817 (S.C. App. 2005). *See also Mason* v. *Apalache Mills*, 62 S.E. 399, 401 (S.C. 1908); *City of Durham* v. *Eno Cotton Mills*, 54 S.E. 453, 456 (N.C. 1906); *Biddix* v. *Henredon Furniture Indus., Inc.*, 331 S.E.2d 717, 721 (N.C. App. 1985).

Although South Carolina has suggested that the Catawba River is analogous to a fully appropriated river because its flow is sensitive to drought conditions and at times may not be sufficient to meet South Carolina's needs, the analogy is not apt because, unlike in a prior appropriation jurisdiction, there is no pre-determined list of entitlements to water (such as the sum of all recorded downstream appropriations) against which a change to the status quo may be measured. As a result, the inquiry necessarily is more factual, and it cannot be assumed that any diversion in the upstream State necessarily will leave insufficient water in the river to meet downstream needs or otherwise cause injury. In this case, for example, the States make conflicting assertions about the amount of excess water on the Catawba River and its tributaries during periods of low flow. According to North Carolina, "the Catawba River, even during drought, is not fully used." N.C. Bifurcation Reply Br. (Apr. 9, 2010) at 3; *see also* Tr. (Apr. 23, 2010) at 45:17-46:10. South Carolina, while not disputing this claim directly, alleges a number of harms that it claims to have suffered during periods of drought because of low water levels in the Catawba basin. *See* Complaint at App. 38-39.

Nor is there even a specific contested diversion or diversions that could be analyzed against a pre-determined status quo, even if one could be identified. In the Court's "fully appropriated river" cases, and in some of its other equitable apportionment cases, there was a specific proposed or recent diversion by one State that the other State claimed would adversely affect its rights. *See, e.g.*, *Colorado* v. *New Mexico*, 459 U.S. at 178; *Connecticut* v. *Massachusetts*, 282 U.S. 660, 667-68 (1931); *New York* v. *New Jersey*, 256 U.S. 296, 304-05 (1921). Thus, the Court's analysis focused first on the state of the river prior to the proposed diversion, and then on what effect the proposed diversion would have on the water available for the other State or States. Here, there is no one diversion by North Carolina that is the focus of South Carolina's complaint. Rather, South Carolina claims broadly that North Carolina is using more water than is its fair share—a yet-to-be defined baseline the contours of which are undefined by the pleadings or by any readily ascertainable temporal or conceptual limitation, and that are further complicated by the fact that the natural flow of the river long has been altered by the presence of power plants and associated structures on both sides of the border. For this reason, South Carolina's conception of its own injury does not lend itself—indeed, cannot logically lend itself—to any reliance on *Colorado* v. *New Mexico* or *Nebraska v. Wyoming* for the proposition that *any* diversion by North Carolina resulting in a diminution of water available for South Carolina uses necessarily will establish the requisite harm to South Carolina.

Also unwarranted is South Carolina's more general assumption that, upon a showing of substantial injury to its interests caused by diversions or uses in North Carolina, South Carolina necessarily will be entitled to equitable relief—a theory that was implicit in South Carolina's initial position that it would be entitled to proceed directly to a remedy phase, in which a decree would be fashioned, after the narrow Phase I that it conceptualized. The Court frequently has stated that, in order to establish liability in equitable apportionment cases, the complaining State must establish "proof by clear and convincing evidence of some real and substantial injury or damage." *Nebraska*

v. *Wyoming*, 507 U.S. 584, 591 (1993) (internal quotation marks omitted); *accord Colorado* v. *New Mexico*, 459 U.S. at 187 n.13; *Connecticut v. Massachusetts*, 282 U.S. at 669; *New York* v. *New Jersey*, 256 U.S. at 309. But the existence of such injury is not alone sufficient to warrant intervention by the Court. Before the Court will exercise its extraordinary powers to enjoin a State's actions, it must also be established that the "countervailing equities" of the defendant State do not "justify the detriment to existing users" in the complaining State. *Colorado* v. *New Mexico*, 459 U.S. at 187. The defendant State may prove by "clear and convincing evidence that the benefits" of its uses or proposed uses of the water at issue "substantially outweigh the harm[s]" alleged by the complaining State—and if it does so, no decree will issue. *Id.*

The decision in *Kansas* v. *Colorado*, 206 U.S. 46 (1907), is instructive. There, Kansas contended that nonriparian arid lands were being irrigated in Colorado, and that under English common law, Kansas was entitled to receive the flows of the Arkansas River as they existed "before any human interference." *Id.* at 85, 98. Colorado, on the other hand, claimed the right of its users under Colorado's appropriative doctrine to take all of the stream flow, without regard to any downstream impact in Kansas. *Id.* at 98. The Supreme Court rejected each of these positions, and instead ruled that the dispute should be resolved based "upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream." *Id.* at 100.

This was the Court's first expression of the doctrine of equitable apportionment with respect to interstate streams. Notably, while the Court found that the "diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas," that alone was not sufficient to warrant intervention. *Id.* at 113-14. Rather, the Court found that when one "compare[d] the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two states *forbids any interference* with the present withdrawal of water in Colorado for purposes of irrigation." *Id.* at 114 (emphasis added). The Court reiterated this point in its later decision in *Colorado* v. *Kansas*, 320 U.S. 383 (1943):

> [In] such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted.

Id. at 393-94. In determining liability, the "question to be decided, in the light of existing conditions in both states, is whether, and to what extent," the upper state's "action injures the lower state and her citizens by depriving them of a *like, or an equally valuable, beneficial use*." *Id.* (emphasis added).

What these precedents support—contrary to South Carolina's narrow view—is a broad inquiry into both States' consumptive uses, the relative harms purportedly suffered by the complaining State because of the other's conduct, and the beneficial uses claimed by the defendant State, before the Court will exercise its extraordinary power to enjoin one sovereign State to take or refrain from a course of action with respect to that stream at the behest of another State. This broad inquiry much more closely follows North Carolina's conception of the applicable burden of proof, but does not lend itself to the bifurcated structure proposed by North Carolina and the Intervenors—precisely because the inquiry necessarily is broad, encompassing a range of potentially applicable factors bearing upon the existence of injury and the complaining State's entitlement to relief.

This conclusion is confirmed by the fact that in each case in which the Court has expounded upon the relevant burden of proof—and even in those cases in which it declined to enter an equitable decree and dismissed the complaining State's claims for want of a concrete showing of a "real and substantial injury"—it has done so after a full trial on the merits. *See, e.g.*, *Missouri* v. *Illinois*, 200 U.S. 496, 518 (1906); *Connecticut* v. *Massachusetts*, 282 U.S. at 664, 669. In none of these cases did the Court treat the issue as a "threshold" matter in the sense advocated here, so as to warrant an initial trial on the sole question of injury to the complaining State. Indeed, the factors considered by the Court in reaching its conclusions about real and substantial injury have included the very matters that the parties to the present dispute had agreed would be part of Phase II—namely, consideration of relative values of each State's existing and proposed uses and whether the injuries suffered by the complaining State are outweighed by countervailing equities presented by the defendant State. *See, e.g.*, *Missouri* v. *Illinois*, 200 U.S. at 521-26; *Colorado* v. *New Mexico*, 459 U.S. at 187. In some cases the Court did dismiss the Bill of Complaint upon finding that the complaining State had not made the requisite showing of injury, but it did so only after all the evidence on all issues was available for consideration—not as a "threshold" inquiry that would be undertaken before the full range of evidence was heard. *See Missouri* v. *Illinois*, 200 U.S. at 521-26; *New York* v. *New Jersey*, 256 U.S. at 309.

Missouri v. *Illinois*, for example, was an action by the State of Missouri against the State of Illinois and the Sanitary District of Chicago to restrain the discharge of sewage from Chicago through a manmade channel into the Desplaines River. Missouri claimed that the sewage was flowing from the Desplaines into the Illinois River, and thereafter into the Mississippi River, with negative impacts upon downstream cities, towns, and inhabitants in the State of Missouri. 200 U.S. at 517. The defendants contended that the water being introduced through the sewage disposal plan resulted in purer water than previously was the case, that many towns and cities in Missouri were discharging their sewage into the Missouri and Mississippi Rivers, "and that if there is any trouble the plaintiff must look nearer home for the cause." *Id.* After a trial in which

both sides presented scientific and factual evidence in support of their respective positions, *id.* at 518, the Court concluded that Missouri had not made the requisite showing to warrant intervention by the Court—that is, to warrant an equitable decree restraining the defendants from engaging in the contested discharge. The Court reasoned that before it intervenes in disputes between States, the "case should be of serious magnitude, clearly and fully proved, and the principle applied should be one which the Court is prepared deliberately to maintain against all considerations on the other side." *Id.* at 521. The Court then discussed the evidence bearing upon entitlement to relief, including the discharges by Missouri residents, the competing data on the existence of pollution in the waters of the Mississippi caused by discharges in Illinois, the rates of illness before and after the discharges began, and the scientific data regarding the presence and longevity of bacteria at various points along the river. *Id.* at 522-26. The Court concluded that the evidence as a whole did not satisfy the heightened standard required for equitable relief from the Court. *Id.* at 526.

The Court employed a similar analysis in *Connecticut* v. *Massachusetts*, a case involving a challenge by Connecticut to a planned diversion by Massachusetts. A full trial was conducted on the merits, including issues concerning the alternative water sources available to Massachusetts and the likelihood of certain proposed uses by Connecticut. Although the Court ultimately dismissed the Bill of Complaint on the ground that Connecticut had not offered sufficient evidence of injury to cause the Court to ""exert its extraordinary power to control the conduct of one State at the suit of another," 282 U.S. at 669, it did so only after analyzing the range of evidence adduced during the trial that bore upon that issue. *Id.* at 674. *See also Washington* v. *Oregon*, 297 U.S. 517, 529 (1936); *Colorado* v. *Kansas*, 320 U.S. at 392-394.[3] In short, none of these equitable apportionment cases supports the notion of a "threshold" injury requirement in the sense of an issue that could be severed from other liability issues and tried first.

C. Prior Original Jurisdiction Precedents Involving Bifurcation

North Carolina and the Intervenors have cited a handful of cases in which Special Masters have conducted bifurcated or phased litigation. These cases fall into two categories: (1) interstate water compact disputes in which bifurcation was employed; and (2) equitable apportionment actions that involved multiple stages of litigation, but not bifurcation. Neither category of cases supports isolating the injury requirement into a distinct phase in this case, and, if anything, the cases support a more conventional structure in which liability *and remedy* are bifurcated.

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[3] Of course, this type of disposition—dismissal of the Bill of Complaint—is not analogous to dismissal under, for example, Rule 12(b)(6) of the Federal Rules of Civil Procedure—a type of dismissal that is based on the pleadings, with very little, if any, evidence outside the complaint being considered. Dismissal of a Bill of Complaint in an original matter is simply the Court's way of disposing of the case, even after a full trial, when the complaining State has not shown an entitlement to relief.

1. Compact Cases

North Carolina and the Intervenors cite three cases in which Special Masters bifurcated original jurisdiction disputes arising from interstate water compacts: *Kansas* v. *Colorado*, Orig. No. 105; *Oklahoma* v. *New Mexico*, Orig. No. 109; and *Texas* v. *New Mexico*, Orig. No. 65. But in each of these cases, the Special Master bifurcated the proceeding between a liability phase, to determine whether the defendant State violated the compact, and a remedial phase, to fashion relief. Indeed, in a compact enforcement action, the complaining State need not show injury to establish liability. *See Oklahoma* v. *New Mexico*, 501 U.S 221, 228 (1991). Rather, injury is relevant only to the question of what the remedy for a compact violation will be. *Id.*

In *Oklahoma* v. *New Mexico*, the liability issues were whether a particular provision of the Canadian River Compact that limited New Mexico to 200,000 acre-feet of storage referred to storage capacity or actual water stored, *see* 501 U.S. at 229; whether the phrase "waters originating . . . above Conchas Dam" included water spilled over the dam during a flood, *id.* at 231; and whether water stored in a "desilting pool" for purposes of sediment control should count against New Mexico's storage capacity limit, *id.* at 240. The initial proceeding involved the introduction of evidence regarding the course of compact negotiations between the parties, as well as testimony by witnesses familiar with the customs and practices of reclamation projects in the region. Report of the Special Master (Oct. 15, 1990), *Oklahoma* v. *New Mexico*, Orig. No. 109, at 48-68. But the first phase entailed no factual inquiry into factors such as the extent of harm suffered by downstream States, the valuation of current and future water uses, opportunities for conservation, or the availability of alternative water sources. *See Oklahoma* v. *New Mexico*, 501 U.S. at 228. The Special Master's recommended decree provided that a second phase would be conducted to "determine any injury Texas and Oklahoma may have sustained" as a result of New Mexico's "violation and to recommend appropriate relief." Report of the Special Master (Oct. 15, 1990) at 114.

The same was true in *Texas* v. *New Mexico*, which involved bifurcated litigation arising from the Pecos River Compact. The first phase was devoted to the meaning of a compact provision requiring New Mexico to give Texas "a quantity of water equivalent to that available to Texas under the 1947 condition." 482 U.S. 124, 126-27 (1987). The Special Master received evidence regarding a flawed river routing study that had been used by the drafters of the compact to calculate the flow of the Pecos. *Texas* v. *New Mexico*, 446 U.S. 540, 541-42 (1980) (Stevens, J., dissenting). He thus was able to determine that the phrase "1947 condition" referred to actual river conditions, rather than the erroneous data relied upon in the flawed study. *Id.* at 542. This inquiry, which led the Special Master to conclude that New Mexico had breached the compact, did not entail factual discovery about water usage or require an investigation into whether the complaining State had suffered injury. Those considerations were addressed in later phases of the proceeding, in which the parties introduced evidence of how much water New Mexico had withheld from Texas in violation of the compact. *See Texas* v. *New Mexico*, 482 U.S. at 127.

The third compact case, *Kansas* v. *Colorado*, most resembles this case, but still is inapt. There, Kansas claimed that certain well pumping and reservoir construction activities in Colorado violated the Arkansas River Compact. 514 U.S. 673, 679 (1995). Again, the liability issue was one of compact interpretation, but the relevant compact provision required the complaining State to prove that the defendant State's action had "materially depleted [Arkansas River water] in usable quantity or availability." *Id.* Thus, the liability inquiry, though one of compact interpretation rather than equitable apportionment, involved a factual determination analogous to those involved in an equitable apportionment action. Kansas moved to sever "damages or compensation" from "liability" under the Compact. Report of the Special Master (Jul. 29, 1994), *Kansas* v. *Colorado*, Orig. No. 105, at App. 61. Colorado opposed the motion, arguing that liability and damages were intertwined, and Kansas's proposal would prevent it from introducing, at the first phase of the proceeding, evidence "address[ing] the relationship between water use practices in both states and the economics of those practices." *Id.* at 62. The Special Master ordered bifurcation but assured Colorado that it would be allowed, during the first phase, to "introduc[e] such economic or other evidence or testimony related to . . . its defense on the issue of liability." *Id.* at App. 63. Thus, the first phase of the bifurcated proceeding in *Kansas* v. *Colorado* involved the type of economic and water usage evidence that, in this case, the parties agree would be duplicative of the second phase of the proceeding—undermining the very purpose of bifurcation.

Taken together, these cases support the general proposition that bifurcation has been used in original jurisdiction actions involving interstate compacts, and when it has been used, it has been to divide the liability stage from the remedial stage. But they provide no support for the contention that bifurcation has been used in equitable apportionment actions.

2. Multi-Stage Equitable Apportionment Cases

North Carolina and the Intervenors also cite two equitable apportionment cases that involved multiple hearings, phased discovery, and the Court's interim review of the Special Master's recommendations—namely, *Nebraska* v. *Wyoming*, Orig. Nos. 6 and 108; and *Colorado* v. *New Mexico*, Orig. No. 80. But neither of these cases involved bifurcation at all. Rather, in both, the Special Master addressed the "injury" requirement as part of a single proceeding that also included equitable considerations.

In 1986, Nebraska alleged that Wyoming was in violation of the Court's 1945 equitable apportionment decree involving the North Platte River. *Nebraska* v. *Wyoming*, 507 U.S. at 589. The ensuing fourteen years of litigation were complex, *see* Report of the Special Master (Oct. 12, 2001), *Nebraska* v. *Wyoming*, Orig. No. 108, at 10-16, but there was no bifurcation of issues. Rather, there was a phase in which the parties conducted discovery and filed summary judgment motions, most of which were denied. *Id.* at 13-14; *Nebraska* v. *Wyoming*, 507 U.S. at 588-90, 603. That was followed by a phase in which the parties sought to amend their pleadings, resulting in another interim report and Supreme Court opinion. Report of the Special Master (Oct. 12, 2001) at 16-17; *Nebraska*

v. *Wyoming*, 515 U.S. 1, 8-9 (1995).[4] Thereafter, the parties proceeded with discovery and plans for a single unified trial, before settling just as the trial was to begin. Report of the Special Master (Oct. 12, 2001) at 23. The single trial would have encompassed both the injury determination and the equitable balancing phase. As the Court recognized, the first two phases had not been occasions for the Special Master to receive evidence and make findings about injury or liability. *See Nebraska* v. *Wyoming*, 515 U.S. at 9, 13-14, 19. Thus, although *Nebraska* v. *Wyoming* may support the conclusion that the parties should have an opportunity to move for summary judgment at the end of discovery, it offers no model for bifurcating an equitable apportionment action.

Colorado v. *New Mexico* is even less supportive of bifurcating "injury" from the remainder of the case. There, the Special Master initially conducted a single proceeding, adjudicating both the question of injury and the balancing of uses of the Vermejo River between the two States. 459 U.S. 176, 180 (1982). The Supreme Court upheld the Special Master's finding that the complaining State, New Mexico, would suffer injury if Colorado were allowed to divert water from the river. *Id.* at 187 n.13. The Court concluded, however, that the Special Master's initial report did "not contain sufficient factual findings to enable us to assess the correctness of the Special Master's application of the principle of equitable apportionment to the facts of this case." *Id.* at 183. The Court remanded the case to the Special Master with instructions to analyze, among other things, existing uses on the river, conservation efforts, availability of substitute sources, and the extent of injuries suffered by New Mexico. *Id.* at 189-90. The Court did not "effectively bifurcate[]" the case, as the Intervenors suggest. The only reason there was a second proceeding before the Special Master was to allow him, "on the basis of the evidence previously received," to "develop[] additional factual findings." *Colorado* v. *New Mexico*, 467 U.S. 310, 315 (1984). Had these findings been made during the first proceeding, the case would not have been remanded.

Like any type of trial, equitable apportionment actions frequently proceed in stages, with multiple opportunities for motion practice. Exceptions to Special Masters' rulings on these motions, in turn, often are heard immediately by the Court, which is why a single equitable apportionment action might produce many Supreme Court opinions. That fact, however, does not support the bifurcation requested here.

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[4] In its 1993 opinion, the Supreme Court held that the case could encompass not just allegations that a party had breached the 1945 decree, but new allegations regarding changed conditions that could lead the Court to modify the decree—that is, it effectively invited the parties to begin a new equitable apportionment proceeding. *Nebraska* v. *Wyoming*, 507 U.S. at 591-92. The States responded by amending their pleadings to include a litany of new allegations of harm, Report of the Special Master (Oct. 12) at 16-17, most of which the special master and the Supreme Court permitted to be aired as part of the litigation, *Nebraska* v. *Wyoming*, 515 U.S. at 9. In the current proceeding, there is no equivalent of these first two phases, because there is no background decree in place regarding the Catawba River.

Once again, what is supported by the Court's prior precedents and the practicalities of the present case is bifurcation of the action into separate liability and remedial phases. Under this more traditional form of bifurcation, the liability phase would include all issues bearing upon whether a decree should issue, including the existence of real and substantial injury and the balancing of equitable considerations bearing upon entitlement to relief. The second phase would occur only if entitlement is established, and would be limited to the shaping of an appropriate decree.

D. Considerations of Judicial Economy

Not only is there no precedent to support the bifurcation proposed here, but as a practical matter, bifurcating the injury inquiry from the rest of the proceedings would not serve the interests of judicial economy. For the reasons discussed above, there is a high probability of overlap between the issues of whether South Carolina has suffered a substantial injury, whether such injury is caused by conduct in North Carolina, and whether North Carolina's equitable uses of the Catawba outweigh South Carolina's uses—as well as the other equitable factors that may bear upon entitlement.

For example, in considering the consumptive uses of South Carolina and North Carolina, drought conditions are undoubtedly relevant to both South Carolina's showing of injury, and the comparison of that injury to North Carolina's uses. *See Nebraska* v. *Wyoming*, 325 U.S. at 620 (Court "must deal with [drought] conditions as they obtain today" rather than permit states to set the quantity of their diversions based in part on average flows in wet years); *see also Wyoming* v. *Colorado*, 259 U.S. 419, 471-72, 478-79 (1922) (calculating available flow in an equitable apportionment case based on what is dependably available even in dry years). South Carolina cannot simply show that it is not receiving as much water as it receives in non-drought conditions, and North Carolina cannot claim that South Carolina's injuries are caused solely by drought conditions if North Carolina has maintained normal consumptive levels and not reduced its own diversions proportionally to the reduction in flow caused by drought.

Nor can it be said that South Carolina's own consumption habits are irrelevant to its showing of injury, such as interbasin transfers, upstream consumption within South Carolina, inadequate conservation measures, or failure to plan for and utilize alternative water supplies or storage opportunities. In *Colorado* v. *Kansas*, 320 U.S. 383 (1943), for example, the Court held that Kansas had not sustained its burden of showing that Colorado had "worked a serious detriment to the substantial interests of Kansas." *Id.* at 399. In so holding, the Court considered evidence that the "acreage under irrigation in western Kansas through existing ditches has steadily increased," that "arid lands in western Kansas are underlaid at shallow depths with great quantities of ground water available for irrigation by pumping at low initial and maintenance cost" and "that farmers who could be served from existing ditches have elected not to take water therefrom but to install pumping systems because of lower cost." *Id.*

Thus, the proposed phases likely would "involve extensive proof and substantially the same facts or witnesses as the other issues in the case[ ]." 9A Wright & Miller, *Federal Practice and Procedure* § 2388 (3d ed., West 2010). When that is the case,

"there is little efficiency to be gained" from bifurcation. *Ortiz* v. *Pearson*, 88 F. Supp. 2d 151, 166 (S.D.N.Y. 2000).

E. Summary Judgment as an Alternative to Bifurcation of Trial or Phased Discovery

As an alternative to bifurcation, the parties remain free to seek summary judgment or other relief at any time prior to trial on issues that could resolve or narrow the scope of the litigation, including whether South Carolina can meet the injury requirement or whether its claims are limited to periods of low flow, drought, or certain portions of the Catawba River. Summary judgment motions have been permitted in prior equitable apportionment proceedings. *See, e.g.*, Report of the Special Master (Apr. 9, 1992), *Nebraska* v. *Wyoming*, Orig. No. 108 at 8-9 (permitting summary judgment motions "on one or more of the issues" following "[a]n intensive period of discovery"; granting summary judgment on two issues and denying rest); *Nebraska* v. *Wyoming*, 507 U.S. at 590 (recommendations adopted in full by the Supreme Court).

Moreover, the parties remain free to bring motions for judgment (*e.g.*, for dismissal of the Bill of Complaint) following trial, akin to a motion for a directed verdict. In prior equitable apportionment cases, parties have filed such motions following full trials on the merits. *See, e.g., Idaho ex rel. Evans* v. *Oregon*, 462 U.S. 1017, 1024, 1029 (1983) (affirming order granting Idaho motion to dismiss Bill of Complaint following trial for lack of injury); *Nebraska* v. *Wyoming*, 325 U.S. at 607-08 (affirming denial of motion to dismiss Bill of Complaint for lack of injury).

With respect to discovery, the parties may take discovery on all matters that they reasonably believe to be relevant to the liability phase of the trial, subject to the right of any party to seek summary judgment at any time on an issue that may be dispositive of the case, or any issue within the case. Of course, reasonable limits may be placed on such discovery through the case management process, or by motion in the case of any dispute over the discoverability of specific materials.

IV. Conclusion

For the reasons stated above, the trial in this action will address all issues of liability, and will not be bifurcated into separate liability phases. If South Carolina demonstrates that it is entitled to an apportionment, a separate trial will be held on the contours of that remedy. The parties may conduct discovery on all potentially relevant issues and may move for summary judgment on any issue at any time prior to trial.

Dated: November 17, 2010

Kristin Linsley Myles
Special Master

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