No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion For Leave To Intervene

REPLY BRIEF IN SUPPORT OF THE MOTION OF THE CATAWBA RIVER WATER SUPPLY PROJECT FOR LEAVE TO INTERVENE

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The Catawba River Water Supply Project ("CRWSP") has "a direct stake" in the equitable apportionment of the Catawba River. *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). South Carolina does not and cannot dispute that any decision by this Court about how much water must cross the North Carolina-South Carolina border "will directly affect the amount of water that CRWSP can withdraw from its intake in South Carolina" for consumption in both North and South Carolina. CRWSP Mot. 8. The amount of CRWSP's withdrawal, in turn, will affect the thousands of citizens in both States who for nearly two decades have relied upon CRWSP to cost-effectively deliver clean, high-quality water for their daily use. Rather than contest this direct, bi-State interest of CRWSP, South Carolina raises a number of other arguments against CRWSP's intervention, which either miss or attempt to deflect CRWSP's interests. None of these arguments has merit.

Contrary to South Carolina's principal assertion, there is no special rule applicable only to equitable apportionment cases that precludes intervention by non-states. *Contra* S.C. Opp. 2-4. South Carolina cites no authority for that proposition beyond the generalized truism that equitable apportionment cases implicate states' sovereign interests. *All* original actions, by their nature, implicate sovereign interests, yet this Court's precedents firmly establish that intervention is permitted in appropriate circumstances. The fact that intervention by a non-state in an equitable apportionment action has not previously occurred (*id.* at 3) is coincidental, not precedental,

and no doubt reflects the fact that there are relatively few such cases and still fewer entities that meet the criteria for intervention as CRWSP does.

This Court's articulation of the intervention standard in equitable apportionment cases presumes that intervention by non-states will be appropriate under the right circumstances. *See, e.g., New Jersey v. New York*, 345 U.S. 369, 373 (1953) (noting that intervention by a non-state is appropriate if the intervenor "show[s] some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state"). Furthermore, this Court applies the same standard for intervention in an original action whether or not equitable apportionment is at issue. *See, e.g., id.* at 374 (water rights case); *Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930) (non-water rights case). And previous cases have permitted both private persons and "non-sovereign entities" to intervene under that standard, even when their states are also litigants. *See, e.g., Texas v. Louisiana*, 426 U.S. 465, 466 (1976) (per curiam) (in a boundary dispute case between Texas and Louisiana, noting that "[t]he city of Port Arthur, Tex., was permitted to intervene for purposes of protecting its interests").

Further, the criteria employed in the equitable apportionment determination reinforce the merit of allowing those who meet the standard to intervene. This Court's decisions placing a heavy emphasis on "the extent of established uses," *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945), take into account not merely the sovereign interests of the states but also the interests of non-states in deciding how to appor-

tion the water from an interstate river. *See, e.g.*, *Colorado v. New Mexico*, 467 U.S. 310, 319-20 (1984) (extensively discussing uses by the Colorado Fuel and Iron Steel Corp. and the Vermejo Conservancy District).[1]

Given that the criteria for intervention apply equally to an equitable apportionment case, the incontrovertible, unique bi-State interests of CRWSP are dispositive. The circumstances justifying intervention exist here because neither South Carolina nor North Carolina represents the bi-State interests of CRWSP. CRWSP is a joint venture by the Lancaster County Water and Sewer District ("LCWSD") in South Carolina and Union County ("UC") in North Carolina.[2] The CRWSP plant withdraws water from the South Carolina side of the Catawba River, a substantial portion of which is piped upstream to UC on the North Carolina side, where it is consumed both within and without the Catawba River Basin, a water use that South Carolina squarely attacks in this case. Both North Carolina and South Carolina have interests antagonistic to parts of this exchange: North Carolina's interest in maximizing its withdrawal from the Catawba River north of the state line directly conflicts with CRWSP's interest in withdraw-

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[1] Because state sovereignty is not a prerequisite to intervention, South Carolina's contention that CRWSP's rights are not "on a par with the sovereign States" (S.C. Opp. 7) is beside the point. What is relevant for this Motion is that CRWSP is a public entity that represents the public interests of citizens from both States, and not the interests of one State exclusively.

[2] South Carolina repeatedly refers to LCWSD and UC as "municipalities." In fact, LCWSD is a South Carolina special purpose district, while UC is a North Carolina county.

ing water in South Carolina; while South Carolina's interest in reserving water for its own citizens' use opposes CRWSP's interest in piping water upstream to North Carolina.

It is plainly wrong for South Carolina to contend that it can or will represent CRWSP's interests in withdrawing, treating, and transferring water to UC for consumption in North Carolina, the uninterrupted continuation of which enables the operational economies of scale that both joint venturers, LCWSD and UC, are able to pass through to their ratepayers. South Carolina has made clear that it vehemently opposes CRWSP's facilitation of UC's consumption in North Carolina by inter-basin transfer. For its part, North Carolina does not oppose CRWSP's intervention, no doubt because it recognizes CRWSP's uniquely regional interests, which it does not suggest it can adequately represent. South Carolina's transparent motivation in opposing intervention is to keep CRWSP out of the case while it secures a ruling that binds CRWSP.

This antagonism is not hypothetical. South Carolina specifically cites UC's inter-basin transfer of water from CRWSP as an inequitable use (S.C. Compl. ¶ 21), despite the fact that the transfer occurs through a joint venture in which LCWSD, a South Carolina resident, also has a substantial interest, and despite the fact that South Carolina previously authorized the transfer (N.C. Answer ¶ 21). On the other side, North Carolina has expressed a clear intent to preserve as many of its existing withdrawals as it can (N.C. Answer ¶ 4), even though one of its counties, UC, depends upon CRWSP's intake in South Carolina.

Thus, South Carolina is simply incorrect when it asserts that the joint owners of CRWSP "compete, within their respective States, for allocation of water *from* each State." S.C. Opp. 4. Instead, CRWSP's joint owners compete against *both* States for the right to use the Catawba River. It will be too late for CRWSP to defend its interests adequately if it must first wait for North Carolina and South Carolina to resolve their own dispute. There is every reason to believe that, by that time, both CRWSP's intake from South Carolina and its transfer to North Carolina will have been substantially (and, given each state's antagonism, detrimentally) decided.

South Carolina contends that CRWSP's intervention would "open up the floodgates for numerous others to argue for intervention as well" (S.C. Opp. 7) because "hundreds – if not thousands – of entities in both States depend on the Catawba River, including numerous municipalities" (*id.* at 6). In fact, none of these other entities straddles the North Carolina-South Carolina border as CRWSP does, nor do any of them engage in the unusual upstream (including inter-basin) transfers that set CRWSP at odds with both States.[3]

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[3] Putative intervenor Duke Energy is a hydro-electric utility, not a publicly owned treatment works, and as such does not engage in the same cross-border and inter-basin transfers that CRWSP does. Because CRWSP is jointly owned by North Carolina and South Carolina entities, inherent in CRWSP's use of the Catawba River is its cross-border and inter-basin transfers to UC and to areas outside of the Catawba River basin. CRWSP is also distinct from Duke Energy because, being publicly owned, CRWSP is unquestionably the "proper party" to represent the public interests of its joint owners and their citizens.

South Carolina also misapprehends CRWSP's unique status in asserting that the "floodgates" will open because CRWSP's intervention may later spur the intervention of LCWSD and UC. S.C. Opp. 7. Although the further intervention of LCWSD and UC would hardly paralyze the Court (*see supra* note 3 (citing original actions where this Court allowed at least three intervenors)), that hypothetical prospect will not come to pass because CRWSP represents both of their interests in this litigation; to the extent that there are any disputes, LCWSD and UC can resolve them *within* the governing structure set up by CRWSP.

Finally, South Carolina argues that CRWSP should be content to serve as *amicus curiae* and not as an intervenor. S.C. Opp. 8. But as a mere *amicus*, CRWSP would be unable to ensure that the factual record reflects its novel bi-State interests, which reside between the States and not exclusively in any one State. Furthermore, because both States oppose CRWSP's existing use of the Catawba River, neither will have an interest in using "third-party discovery" (S.C. Opp. 8) or any other means to advance and secure CRWSP's position before the Special Master.

Cf. S.C. Opp. to Duke Mot. 4-5. In any event, even assuming that CRWSP's and Duke Energy's multi-state interests can be compared, their dual intervention will not disrupt the orderly disposition of this matter. *See, e.g.*, *Maryland v. Louisiana*, 451 U.S. at 745 n.21 (allowing 17 private pipeline companies to intervene); *Arizona v. California*, 460 U.S. 605, 613-14 (1983) (allowing five Indian tribes to intervene); *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (allowing "[n]umerous [private] parties" to intervene).

CONCLUSION

For the foregoing reasons, as well as the reasons stated in its original Motion and Brief in Support, CRWSP respectfully asks this Court for leave to intervene in this original action.[4]

Respectfully Submitted,

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[4] In response to footnote 1 of South Carolina's Opposition, CRWSP has confirmed with Wilson-Epes Printing that they properly filed and served the Motion to Intervene. Any delay was attributable to the U.S. mail. In addition, South Carolina was advised in advance of CRWSP's intention to move to intervene, and the Motion was, of course, noted on the Court's docket.