No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

CATAWBA RIVER WATER SUPPLY PROJECT
AND
DUKE ENERGY CAROLINAS, LLC,

Intervenors.

Before Special Master Kristin Linsley Myles

INTERVENORS' BRIEF IN OPPOSITION TO PLAINTIFF'S REQUEST TO REVERSE ORDER BIFURCATING PROCEEDINGS

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INTRODUCTION

From the outset, South Carolina has been challenged to define the harm that is being caused by North Carolina. This case began as an attack on North Carolina inter-basin transfers. It appeared then to broaden to encompass all actual water consumption, under normal conditions and in drought. Most recently, it may have evolved yet again into South Carolina asserting supposed oversubscription of the Catawba River by North Carolina in times of low flow. Nearly three years after filing its Complaint, South Carolina's claim of injury remains very uncertain. And South Carolina wants to dive headlong into equitable apportionment before anyone knows if there is even an injury.

But, until now all had agreed that this proceeding should be bifurcated. The Case Management Plan addresses only Phase One. Case Management Order No. 8 provides: "the case management and discovery procedures that the parties already have begun to put in place can and should be used to identify the specific uses and harms of which South Carolina is complaining in order to allow North Carolina and any other party defendants to prepare their defenses." (CMO 8, p. 8). "In the event these proceedings reach Phase Two, the parties shall meet and confer and propose such modifications to this plan as are necessary and mutually agreeable at that time." (CMP, ¶ 4.1 Bifurcated Discovery). The fundamental reason for bifurcation was to define and evaluate South Carolina's claim of injury so that the parties would not have to litigate every aspect of every imaginable basis South Carolina may have for seeking an equitable apportionment. Phase One exists to ensure that the specific uses, harms and defenses thereto are well-known in advance of a potentially avoidable, expensive and lengthy Phase Two.

The division of the case into two Phases promises to narrow substantially the scope of the litigation, saving both time and expense. Absent bifurcation, the party States and Intervenors

will have to conduct discovery and brief the merits of all of South Carolina's potential theories of harm. There is every reason to believe that the Special Master's judgment regarding the harm shown by South Carolina in Phase One will eliminate or at least focus the burden of preparing a second, remedial phase of this case.

Until South Carolina's tactical interests shifted with the Supreme Court's order affirming the Special Master's recommendation that CRWSP and Duke be permitted to intervene, South Carolina had consistently argued for bifurcation. Mr. Frederick put the point quite well at the March 28, 2008 hearing:

> [W]e have been the ones pushing for a narrowing of the issues to be decided in Phase 1 so that we can discreetly pick off what needs to be done to establish the harm, because we think that will inform how you proceed with Phase 2. We have been the movers behind that bifurcated procedure so that we can move expeditiously to ascertain harm, ascertain the scope of the appropriations on the Catawba River to determine its capacity, because that's how we prove our case. We have no interest in engaging in protracted discovery simply to prolong what our people need is a prompt resolution to determine their rights. [Hearing Transcript (180:9-20).]

He also correctly explained that a Phase One before any Phase Two will reduce the number of interested entities that will seek to offer their views in the remedial phase. *Id.* (116:5-9). ("I think there is no doubt that when we get to the remedy phase there will be a lot of players who want to have their say. They can be communicated in various ways. I don't want to predetermine the way we get to that. It's still quite a long ways off.").

South Carolina's view until now – that a ruling on harms in Phase One would produce a more streamlined proceeding in Phase Two – was and still is correct. If South Carolina were to identify specific harms and this Court were to rule that such harms are sufficient to merit continuing this case, the parties will be better able to concentrate discovery on the balancing of the relevant equities as required by Phase Two. By identifying the particular harms suffered by South Carolina, the parties may well be able to negotiate ways to address those harms before

undertaking Phase Two discovery. *See* Steven S. Gensler, *Bifurcation Unbounded*, 75 WASH. L. REV. 705, 706 (2000). South Carolina should first and foremost identify the harms on which it relies; and this case should remain bifurcated for efficient handling thereafter.

LEGAL STANDARD

The Order of appointment of the Special Master grants her authority "to direct subsequent proceedings." (Order in Pending Case, January 15, 2008.) This is consistent with federal district court trial practice. "[T]he district court is given broad discretion in supervising the pretrial phase of litigation . . . ." *United States v. Dang*, 488 F.3d 1135, 1143 (9th Cir. 2007) (quotation omitted) (court evaluated the rights of the parties, the ends of justice and judicial economy). There is no compelling reason for the Special Master to reverse her existing Order bifurcating this proceeding and to begin a new course well into discovery.

ARGUMENT

I. BIFURCATION WILL IMPROVE THE EFFICIENCY OF THIS PROCEEDING.

South Carolina has correctly observed that "[c]onducting the threshold inquiry into injury before weighing the equities and evaluating North Carolina's justifications for any diversions will bring efficiency to the case." South Carolina Brief Concerning Phase I and Phase II Issues and Timing, at 15 (June 16, 2008) ("SC Br."). In Phase One, the parties will focus on whether (a) water uses in North Carolina (b) are causing serious harm in South Carolina. If Phase Two occurs, the parties will then turn to whether the benefits of water uses in North Carolina outweigh the harms caused in South Carolina by such uses. The latter inquiry examines all relevant factors, including:

> Physical and climatic conditions, the consumptive use of water in several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas . . . . [*Colorado v. New Mexico*, 459 U.S. 176, 183

(1982) (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)) (citation omitted).]

Critically, the targeted inquiry provided by Phase One presents the genuine opportunity to conduct the proceedings more efficiently. The parties need not address the benefits of uses in North Carolina, or the benefits that South Carolina would receive if some additional increment of water were to flow across the border, nor the comparative value of those benefits. These areas of inquiry are vast. The Catawba River is and historically has been used in many different ways in North Carolina, and modeling and cataloguing the uses and the benefits of those uses across time, and then setting values for these uses vis-à-vis uses of the water in South Carolina would substantially expand the scope of written discovery, deposition testimony, and the necessary expert analysis and reports. In Phase Two, by contrast, the parties would need to identify and assess the value of alternative sources of water or actions in each State that might affect the equitable apportionment analysis – *e.g.*, additional water storage facilities, additional use of IBTs, additional or different wastewater treatment facilities, and additional conservation efforts. If that inquiry is now collapsed into Phase One and the Special Master were to conclude South Carolina had failed to show uses in North Carolina are causing harm of serious magnitude in South Carolina, the parties and the Court will have engaged in a colossal waste of time.

In general terms, the focus of experts in Phase One will be on modeling the River to determine the quantities of water that are available for use and actually used over time and under varying conditions, the harm caused in South Carolina by diminished water and/or water quality at particular times, and whether these harms were caused by uses in North Carolina. This modeling and other evidence will also address the effects of conservation on water quality and quantity. In Phase Two, the questions are different: additional expert work will be required to assess the benefits of uses of water in both States, to value those benefits for purposes of

comparison, and to address the feasibility of different or additional water storage, treatment and conservation efforts to supplement the States' supplies.

The discovery in Phase One must be done, whether Phase Two occurs or not, so it is not wasted in a bifurcated proceeding. Once Phase One discovery is concluded, the parties may file motions for summary judgment on whether South Carolina has made the required threshold showing that North Carolina's water uses have caused harm of serious magnitude in South Carolina. If the Special Master were to grant a dispositive motion, there would be no need for Phase Two, saving the litigants and the Court substantial time and resources. *Cf. Idaho ex rel. Andrus v. Oregon*, 429 U.S. 163, 164 (1976) (grant of leave to file a bill of complaint is "not a judgment that the bill of complaint, to the extent that permission to file is granted, states a claim upon which relief may be granted").

Even if the Special Master denied a dispositive motion at the end of Phase One, there might be only a few disputed issues of fact which, if resolved favorably for North Carolina in a Phase One trial, would obviate any need for Phase Two. The Special Master will be in a better position to assess the benefit of holding a Phase One trial prior to Phase Two discovery after she receives and resolves Phase One dispositive motions. For this reason, the parties have all thus far agreed that considerations of efficiency and judicial economy overwhelmingly support bifurcation.

II. SOUTH CAROLINA'S OBJECTIONS TO BIFURCATION LACK MERIT.

South Carolina has now changed its position on two grounds: (i) the parties have been unable to agree on the meaning of harm and thus unable to agree on what facts are relevant to Phase One, and (ii) the parties have thus far subpoenaed documents relevant to both Phases, making bifurcation less important as a practical matter. The Special Master should not find either ground persuasive.

A. Regardless Of The Definition Of Harm, Bifurcated Discovery Is Beneficial.

North and South Carolina have some disputes about how the Supreme Court evaluates causes of harm at Phase One of an equitable apportionment case. *Compare* North Carolina Brief Regarding Issues for Phase I, June 16, 2008 ("NC Br.") at 3-8 *with* South Carolina Reply Brief Concerning Phase I and Phase II Issues and Timing (June 23, 2008), at 15 ("SC Reply Br.") at 5-15. These disputes would have no substantial effect on discovery. Perhaps most significantly, the States may disagree about how to factor low flow or drought into the analysis of South Carolina's injury. SC Reply Br. at 8-9. This disagreement, however, will not substantially expand Phase One discovery. Neither State believes that low flow or drought is irrelevant to causation; they disagree only about how to factor low flow and drought into the analysis. The question remains whether South Carolina's harm is attributable to North Carolina uses or, in whole or in part, to low flow or a drought. This dispute is no reason to jettison the numerous benefits of bifurcation.

There are types of discovery Duke and CRWSP would undertake in Phase Two that they would not pursue in Phase One. In Phase One, South Carolina may seek to demonstrate that particular uses of the River in North Carolina by Duke result in injury in South Carolina or that Duke's control of the flow of the River during times of low flow or drought causes harm in South Carolina. But in Phase One, South Carolina need not obtain evidence or depose witnesses about the benefits of Duke's water use and control in North Carolina (or South Carolina), and such evidence relating to Duke's power generation, recreational areas, cultural preservation, reservoir control and release, *inter alia*, would be substantial. Even more significantly, the parties need not attempt to quantify the benefits of Duke's activities in North and South Carolina in order to compare those benefits until Phase Two.

In Phase One, South Carolina will be asked to show that the portion of CRWSP's withdrawal and transfer that goes to North Carolina for consumption, including by inter-basin transfer, harms or injures South Carolina. Consequently, South Carolina will be asked to demonstrate how CRWSP's withdrawal and transfer downstream of the State line is causing an injury to upstream users and uses of the River to the State line. Also, South Carolina will have to disclose how CRWSP's withdrawal and transfer harms users and uses of the River downstream from CRWSP's intake to the confluence of the Wateree and Santee Rivers. If South Carolina succeeds in its Phase One showing, then, in Phase Two, the focus will shift, for example, to the rate benefit to South Carolina users from CRWSP's withdrawal and transfer to Union County; to Union County's consumption by inter-basin transfer which increases flow into South Carolina in the Yadkin-Pee Dee Basin; and to the effect on the Yadkin-Pee Dee Basin in South Carolina if Union County were to withdraw water from that Basin instead of relying in part upon inter-basin transfer from the Catawba River. None of these complex factual considerations would be necessary until Phase Two. It is also confusing, inefficient and avoidably expensive for CRWSP to have to prepare for the range of its possible unique treatment as a bi-state entity under an equitable apportionment decree before there has been any proof that South Carolina has been harmed by North Carolina sufficiently to justify such a decree.

There is no need for the Special Master to decide at this stage of the case what are the precise contours of the burden in Phase One. Instead, under either State's view, it is efficient and appropriate for the litigation to continue to proceed in Phases. In none of these scenarios would there be Phase One discovery of the benefits of uses in North Carolina, the benefits of uses in South Carolina, or the comparison of the benefits of uses in the States. As noted above, this discovery would be massive; so it should not be undertaken until South Carolina has

demonstrated, clearly and convincingly, its harm from water uses in North Carolina. The parties should not have to prepare for the range of possible treatment under an equitable apportionment decree before there has been any proof that South Carolina has been harmed by North Carolina enough to justify a decree.

B. Phase Two Discovery During Phase One Does Not Undermine Bifurcation.

Section 4.1 of the Case Management Plan provides: "[n]otwithstanding the bifurcated nature of these proceedings, the parties will make best efforts to conduct all discovery efficiently, and any party may, for convenience, conduct discovery into matters relevant to Phase Two questions during Phase One." From this, South Carolina appears to conclude that there is little benefit from bifurcation, but that is incorrect. For entities with small quantities of documentary evidence and oral testimony about both Phases, it is sensible for a party to serve a single subpoena and to depose any witnesses on all relevant topics in a single day. The CMO allows the parties to do so.

Critically, however, with respect to entities with substantial information and a number of potential witnesses who may testify about independent subject matters in Phases One and Two – especially North and South Carolina, and Duke – it makes good sense to first gather evidence that relates to Phase One and determine whether South Carolina can make its threshold showing before requiring the parties to undertake the separate, massive task of discovery and proof with respect to Phase Two issues. In addition, as noted, much of the expert evidence and analysis that is necessary to Phase Two is independent of Phase One.

III. EQUITABLE APPORTIONMENT LAW SUPPORTS BIFURCATION.

The state seeking apportionment bears the initial burden and must demonstrate by "clear and convincing evidence" that the defendant state's use of water has caused injury "of serious magnitude" to the plaintiff state. *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (quotation

omitted); *Nebraska v. Wyoming*, 507 U.S. 584, 591 (1993). *See also Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982); *Colorado v. Kansas*, 320 U.S. 383, 391-92 (1943). If the plaintiff state carries its burden, the defendant state may show that the benefits of its water uses outweigh the plaintiff state's injuries. *See Colorado v. New Mexico*, 459 U.S. at 186-88; *Kansas v. Colorado*, 206 U.S. 46, 100-01 (1907).

The Supreme Court's original jurisdiction is exercised in only the "most serious of circumstances," *Nebraska v. Wyoming*, 515 U.S. at 8. The Court does "not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude." *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931). Thus, in such an action, the plaintiff State's burden "is much greater than that imposed upon a complainant in an ordinary suit between private parties." *New York v. New Jersey*, 256 U.S. 296, 309 (1921). And, the Court has often declined to conduct an equitable apportionment analysis when the complaining state fails to produce sufficient evidence that the defendant state's water use is causing "real or substantial injury or damage." *Colorado v. New Mexico*, 459 U.S. at 187 n.13 (quotation omitted). *See*, *e.g.*, *Washington v. Oregon*, 297 U.S. 517 (1936) (dismissing complaint because Washington failed to show that Oregon's water uses were preventing any use in Washington); *id.* at 526 (Oregon's groundwater use did not "materially lessen the quantity of water available for use within the State of Washington".).

The Supreme Court effectively bifurcated an apportionment case based on the allocation of burdens of proof in *Colorado v. New Mexico*.[1] Initially, the Court held that New Mexico had

[1] *See also Texas* v. *New Mexico*, 462 U.S. 554 (1983), where Texas filed an original action against New Mexico, alleging that New Mexico breached its water delivery obligation under the Pecos River Compact. With stated exceptions, the Compact imposed upon New Mexico, the upstream State, an obligation not to deplete the state line flow below that available to Texas under the "1947 condition," making New Mexico's "obligation" dependent on the meaning of the Compact term "1947 condition." Because "resolution of [the meaning of 1947 condition], before protracted and costly river studies are undertaken, will promote judicial economy by substantial savings in both time and cost," the litigation was bifurcated between a first stage in which the Special Master determined three groups of

satisfied the threshold requirement of proving substantial injury by clear and convincing evidence. 459 U.S. at 187 n.13. It then remanded the case to its Special Master to find facts and weigh the equities on several questions including whether and "the extent to which reasonable conservation measures by existing users can offset the reduction in supply due to diversion [by the defendant state], and whether the benefits to the [defendant] state seeking the diversion substantially outweigh the harm to existing uses in another state." *Id.* at 190.

The Court thus treats the plaintiff state's initial burden as serving a significant gate-keeping function, ensuring that the Court's "extraordinary power to control the conduct of one State at the suit of another" is exercised only where serious injury may otherwise occur. The party States, Intervenors and the Court should not now abandon in mid-stream their recognition of the importance of the gate-keeping function in this case.

CONCLUSION

The Special Master should not reverse her decision that this matter should be bifurcated into phases that reflect the Supreme Court's allocation of burdens in equitable apportionment cases.

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issues, including the meaning of the term "1947 condition," and subsequent stages that determined whether New Mexico was in compliance with its obligation. *See* Report of the Special Master, *Texas v. New Mexico*, No. 65, Orig. (October 15, 1979) at 1 (justification of bifurcating issues); Report of the Special Master, *Texas v. New Mexico*, No. 109, Orig. (October 18, 1982) at 8 (bifurcating the meaning of "1947 condition" would permit "compact administration"); Report of the Special Master, *Texas v. New Mexico,* No. 109, Orig. (February 27, 1984) at 2-3 (final issue to be decided was whether New Mexico was in compliance with the Compact).

Respectfully submitted,

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