No. 138, Original

In the

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

REPLY BRIEF OF THE STATE OF NORTH CAROLINA IN RESPONSE TO CASE MANAGEMENT ORDER NO. 3 REGARDING SCOPE OF PLEADINGS

ROY COOPER
Attorney General
State of North Carolina
Christopher G. Browning, Jr.*
James C. Gulick
J. Allen Jernigan
Marc D. Bernstein
Jennie W. Hauser

North Carolina Department of Justice
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

March 24, 2008 *Counsel of Record

Pursuant to the directive of the Special Master at the conference call of Friday, March 14, 2008 and Case Management Order No. 3, the State of North Carolina submits this reply brief with respect to the scope of the bill of complaint filed by South Carolina.

ARGUMENT

I. South Carolina erroneously asserts that its bill of complaint should be broadly construed.

South Carolina erroneously asserts that its bill of complaint should be broadly construed in determining the scope of the present action. South Carolina's assertion is not supported by the authority that it cites.

In its brief, South Carolina relies upon Supreme Court Rule 17.2. This rule simply provides that in original actions: "The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed." S. Ct. R. 17.2 (emphasis added). Citing Rule 17.2, South Carolina asserts that the "ordinary rules of notice pleading" apply to original actions. (SC Br., p. 3) Rule 17.2, however, was not meant to overturn the Court's longstanding practice of closely scrutinizing bills of complaint in order to determine whether leave to file an original action should be granted. The scope of Rule 17.2 is much more limited than South Carolina urges. Rule 17.2 is limited to the form of pleadings (i.e., how pleadings should physically appear – not the legal effect of those pleadings). By incorporating the Federal Rules of Civil Procedure relating to "form," Supreme Court Rule 17.2 expressly adopts Fed. R. Civ. P. 7(b) (entitled "Form of Motions") with respect to motions and Fed. R. Civ. P. 10 (entitled "Form of Pleadings") with respect to pleadings. The effect of Rule 7(b) is limited. It specifies that motions shall be writing and state the grounds for the motion. Rule 10 is also limited in scope. It specifies the captions for pleadings and other mechanical aspects, such as the numbering of paragraphs and the adoption of material by reference.

Rule 17.2 concerns the mechanics of what pleadings and motions should look like in original actions. Rule 17.2 does not speak to substantive issues, i.e., how those pleadings and motions should be evaluated by the Court. Rule 17.2 simply provides no support for South Carolina's argument that its bill of complaint must be broadly construed.

In its brief, South Carolina, citing *Warth v. Seldin,* 422 U.S. 490 (1975), states that "the ordinary rule of notice pleading applies here, and the Court 'must construe [South Carolina's] complaint in favor of the complaining party' – i.e., South Carolina." (SC Br., p. 3) *Warth*, however, did not involve the construction of a bill of complaint in an original action. In *Warth*, residents of Rochester, New York brought an action under 42 U.S.C. § 1983 against the town of Rochester in order to challenge a specific zoning ordinance. The action was heard in federal district court, appealed to the Second Circuit and reached the United States Supreme Court by way of a petition for writ of certiorari. Although the decision speaks to the standard to be applied in evaluating a motion to dismiss filed in federal district court, the decision in no way addresses the standard that the Supreme Court applies in deciding whether to accept a bill of complaint or the manner in which a bill of complaint should be read.

South Carolina ignores the fact that the magnitude and effect of filing a bill of complaint in the United States Supreme Court against a State is vastly different than the repercussions of the filing of a run-of-the-mill complaint in federal district court. The Court has repeatedly made clear that it closely guards the types of claims that may be brought as an original action. *See, e.g., California v. Texas,* 457 U.S. 164, 168 (1982) ("We have imposed prudential and equitable limitations upon the exercise of our original jurisdiction."). Nevertheless, South Carolina asserts that its bill of complaint must be broadly construed. If this were the case, a litigant could nominally bring an

original action based on one claim and then bring an entirely different claim as long as the second claim could somehow be backward engineered into the first. It would make little sense for the Court to vigorously guard the type of actions that may be filed pursuant to the Court's original jurisdiction, yet, once the action is accepted, allow the action to morph beyond what the Court agreed to hear. That is precisely what South Carolina advocates here. South Carolina brought this action asserting that the harms that it suffered during droughts were caused or exacerbated by interbasin transfers from the Catawba River approved by North Carolina. Now, South Carolina seeks to change its action so as to attack all withdrawal of water in North Carolina (regardless of the existence of drought conditions) involving the Catawba River. To make such a radical change, South Carolina must first receive the blessing of the Court to accept its amended claims.

In its brief, South Carolina also asserts that the Special Master can and should fix any problems with its bill of complaint by granting South Carolina leave to amend. (SC Br., p. 12) In support of this position, South Carolina relies upon the order appointing the Special Master in which the Court stated that the Special Master shall have "authority to fix the time and conditions for the filing of additional pleadings." (Order of Jan. 15, 2008) This language should not be construed as an authorization to allow amendments to the bill of complaint – authority that lies uniquely in the hands of the Court itself. Rather, the language is merely a recognition that if any of the specific pleadings set out in Fed. R. Civ. P. 7(a) (e.g., an answer) needs to be filed,[1] the timing of those pleadings shall be fixed by the Special Master. The Court's order of

[1] Additional answers will, of course, need to be filed if the intervention motions are allowed.

January 15, 2008 was simply not intended as altering the Court's historic role as a gatekeeper when a litigant seeks to bring a new or different claim in an original action.

II. South Carolina's complaint cannot be construed as covering any withdrawals other than interbasin transfers.

A. South Carolina's complaint makes limited allegations.

As pointed out in North Carolina's Brief on the Scope of the Issues, South Carolina's complaint, in both its body and prayer for relief, limits specific allegations of harm to interbasin transfers. (Bill of Compl. ¶¶ 1, 2, 3, 4, 18-29, Prayer for Relief) South Carolina's complaint fails to allege any other wrongful transfers or consumptive water uses by North Carolina. Regardless of South Carolina's assertion that its complaint invoked the federal common law of equitable apportionment, South Carolina's complaint did not allege that any consumptive uses other than interbasin transfers were harming South Carolina.

North Carolina agrees that South Carolina's complaint would allow the Special Master to consider interbasin transfers from the Catawba River explicitly approved by North Carolina, those occurring through "grandfathering," and the *de minimis* transfers authorized by statute; however, there is nothing in South Carolina's complaint that alleges harm of serious magnitude from other specified consumptive uses. South Carolina points to paragraph 24 of its complaint, which paragraph specifies that South Carolina is concerned with "[t]he transfers of water out of the Catawba River that the EMC has approved and the North Carolina statute has permitted." This phrase is the referent for the remaining statements of the paragraph. (Bill of Comp. ¶ 24 ("Such transfers," "Those transfers")) For this reason, South Carolina's reliance on this paragraph cannot support its argument that the complaint is more broad than the language South Carolina chose to use in seeking permission of the Supreme Court to file its case.

B. South Carolina's reliance upon *Colorado v. New Mexico* is misplaced.

In its brief, South Carolina relies on a footnote from *Colorado v. New Mexico*, 459 U.S. 176 (1982), for its assertion that smaller withdrawals and transfers are depleting the Catawba River. (SC Br., p. 5) South Carolina's reliance on the Court's decision for this assertion is, however, misplaced. Moreover, South Carolina's argument is not germane at this time.

In *Colorado v. New Mexico*, the case before the Court was a suit by Colorado to divert water for future uses from the Vermejo River, an interstate river that was fully appropriated by users in New Mexico according to the doctrine of prior appropriation. In reviewing its earlier cases addressing the different inquiries to be made prior to determining an equitable apportionment, the Court discussed New Mexico's burden to show that Colorado's proposed diversion would cause substantial injury to the interests of New Mexico. In this context the Court stated,

> 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.
>
> The burden has therefore shifted to Colorado to establish that a diversion should nevertheless be permitted under the principle of equitable apportionment.

Id. at 188 n.13. South Carolina has not alleged, nor could it, that the Catawba River is fully appropriated. The context of the case demonstrates that South Carolina's citation is inapposite. There a State sought a diversion for future uses of a fully appropriated river, and the Court simply made a statement regarding the necessary harms that the New Mexico users would endure from any diversion that would reduce their existing apportionments.

Additionally, the quoted language from *Colorado v. New Mexico* concerns the burden of proof in an equitable apportionment action. The decision is not germane to

the question of the scope of the allegations contained in South Carolina's bill of complaint. Considerations that the Court must ultimately entertain in apportioning the river, if apportionment is appropriate, are not relevant to the questions of (1) the scope of South Carolina's allegations of harm in its complaint; and (2) whether South Carolina can make its threshold showing that it has suffered, or will imminently suffer, harm of serious magnitude as a result of North Carolina's alleged actions.

III. South Carolina has admitted that during most time periods there is plenty of water in the river for everyone.

South Carolina lists the specific harms that it claims to have suffered at the hands of North Carolina in a single paragraph – Paragraph 17 of the bill of complaint. This paragraph is expressly limited to harms that have occurred during times of "drought." (Bill of Compl. ¶ 17) Moreover, elsewhere in its filings with the Court, South Carolina readily admits that in the absence of drought there is plenty of water in the Catawba River for everyone. (Br. in Supp. of Mot. for Leave to File Bill of Compl., app. 14)

Faced with these express admissions in its original filings, South Carolina attempts to backpedal by asserting that Paragraph 19 of its bill of complaint references "natural fluctuations in the flow of the Catawba River." (SC Br., p. 9) In making this argument, South Carolina completely ignores the fact that the Catawba River is one of the most highly dammed rivers in the country. Minor fluctuations in the "natural" daily flow of the river are effectively irrelevant given the fact that eleven different reservoirs regulate the flow of the Catawba River. Rather, what South Carolina has put at issue in its bill of complaint is a claim that there is not sufficient water in the basin during times of drought. South Carolina should not be permitted to go beyond what has been put at issue by its pleading.

IV. South Carolina cannot reasonably assert that the alleged harm that it suffers extends from the North Carolina/South Carolina border to the Atlantic Ocean.

South Carolina contends that it is not required to identify for the Special Master or for North Carolina the geographical extent of the harm that South Carolina has alleged in its complaint. Moreover, South Carolina asserts that "it is simply too early to say that the harms from North Carolina's overuse of the Catawba River cannot extend beyond [the point where the Catawba River Basin joins the Congaree River Basin to form the Santee River Basin.]" (SC Br., p. 10) Contrary to South Carolina's contentions, it is in the best interest of both parties to understand the geographical extent of South Carolina's allegations of harm in order to propose to the Special Master a reasonable schedule for meaningful discovery. Certainly, a case of limited geographical scope would require less discovery, not to mention involve less complication and a lower cost of modeling, than a case where the geography in issue begins in the mountains of North Carolina and the harms that are supposedly alleged continue to the Atlantic Ocean.

To counter North Carolina's statement that the allegations of harm in the complaint were limited to the upper portion of the Catawba/Wateree River Basin, the only specific argument South Carolina offers is an assertion that paragraphs 9 and 10 of its complaint show that the harms identified are not limited to a particular segment of the "Catawba/Wateree River Basin." (SC Br., p. 10) Paragraphs 9 and 10 of the complaint do not support an argument that South Carolina alleged harms from the South Carolina border to the Atlantic Ocean. South Carolina's specific allegations regarding the harm caused by North Carolina's interbasin transfers from the Catawba River are set out in South Carolina's complaint paragraph 17, and the alleged harms occurred in locations above the discharge from Lake Wateree. Therefore, South

Carolina has failed to allege that it has suffered, or is threatened imminently with, harm occurring below this point. In a bifurcated proceeding, it would be reasonable to limit discovery in the initial phase of the proceeding to the geographic area of the harms specifically alleged in South Carolina's complaint.

CONCLUSION

For the reasons set out in this reply brief and in North Carolina's opening brief, the bill of complaint should be viewed as limited to interbasin transfers from the Catawba River during times of drought. Additionally, the Special Master should hold that the bill of complaint does not include harm below Lake Wateree.

Respectfully submitted.

ROY COOPER
NORTH CAROLINA ATTORNEY GENERAL

Christopher G. Browning, Jr.*
Solicitor General of North Carolina

James C. Gulick
Senior Deputy Attorney General

J. Allen Jernigan
Special Deputy Attorney General

Marc D. Bernstein
Special Deputy Attorney General

Jennie W. Hauser
Assistant Attorney General

NORTH CAROLINA DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, NC 27609-0629
Phone: (919) 716-6900
Fax: (919) 716-6763

Counsel for the State of North Carolina

*Counsel of Record

March 24, 2008