IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

Before the Special Master
Hon. Kristin L. Myles

REPLY BRIEF OF THE STATE OF SOUTH CAROLINA FAVORING A SINGLE PROCEEDING AND OPPOSING BIFURCATION OF DISCOVERY AND TRIAL

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A. A Single Proceeding Is The Most Efficient Approach Here

In prior equitable apportionment actions, special masters have presented the Court with a single report making recommendations on all aspects of the case. *See* SC Br. at 11-13. That typical and effective practice has permitted the Court to conduct a full review of all issues in dispute and to adopt or depart from the special master's recommendations without the need for further discovery or a new trial, thereby enabling more timely resolution of the serious interstate disputes at issue. The same efficacious approach is warranted here, as it would eliminate the need to call witnesses multiple times, prevent disputes over admissibility of evidence in Phase One, and facilitate settlement efforts by yielding the full information necessary for the parties to evaluate their respective positions. *See id.* at 19-22. Even if a post-trial proceeding were needed to work out the technical details of an equitable apportionment decree, it would not likely require additional discovery or the need to inconvenience fact witnesses.

South Carolina initially proposed departing from the traditional course, if the first phase of litigation were limited to the question whether the available water supply is insufficient to meet the existing needs of water users in South Carolina, an insufficiency that harms those water users. *See* SC Br. at 14-17. North Carolina and intervenors, however, continue erroneously to contend that Phase One should include the further questions whether South Carolina could have obviated those harms itself — by less consumption, more conservation, and use of alternative water supplies in *South Carolina* — without considering whether existing

"consumptive uses in North Carolina" are at all "reasonable." NC Phase One Issues Br. at 7 (June 16, 2008); NC Phase One Issues Reply at 7 (June 23, 2008) (asserting "continuing reasonable use of this interstate river made by North Carolina"); *see* NC Br. at 1 n.1 (adopting those previous arguments); Intervenors' Br. at 6 (same).[1]

Thus, North Carolina and intervenors advocate a Phase One in which their own upstream uses are taken as a given, with no requirement to justify them as equitable, while South Carolina must defend the equities of its demands on the limited water that flows into the State during periods of low flows. North Carolina and intervenors cite no case supporting that inequitable standard, and nothing in the Court's cases requires the downstream State first to prove it is maximizing its use of the available water to show the harm necessary to obtain an equitable apportionment decree. Instead, those precedents require only that South Carolina show harm to existing water users, at which point the Court's precedents require a balancing of the respective benefits of water uses in *both* States to determine the most equitable allocation of a scarce water resource. *See* SC Br. at 15-17.[2]

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[1] North Carolina incorrectly asserts (at 3) that the party States have only "one disagreement," consisting of "whether the harm proven must be a **specific** harm caused by **specific** uses in North Carolina." Intervenors, unlike North Carolina, acknowledge that they have multiple "disputes" with South Carolina — including whether South Carolina should be forced to remedy its own harms by adjusting its own consumption, conservation, or use of alternative water supplies — but intervenors follow North Carolina in adopting that State's previous arguments concerning those disputes. *See* Intervenors' Br. at 6; *see also id.* at 4 (claiming that, in Phase One, expert "modeling and other evidence will also address the effects of conservation on water quality and quantity" in South Carolina).

[2] Even in the equitable apportionment analysis, the Court has not required a downstream State to defend existing uses by showing that they employ state-of-the-art conservation technology. *See Colorado v. New Mexico*, 467 U.S. 310, 320 (1984) ("A State

Nonetheless, if a Phase One were to include claims that South Carolina could obviate the harms it suffers by forcing its citizens to adjust their consumption of the available water, South Carolina must be permitted to contend instead that equity requires North Carolina to limit its own citizens' consumption, so more water flows into South Carolina. That approach is the only one consistent with the Court's precedents, the principle that each State has equality of right to use an interstate river, and the fact that South Carolina's harms can be ameliorated by a combination of more water flowing into the State and more efficient water use within the State. *See id.* at 16 & n.11. An equitable apportionment aims to balance those two ways of remedying harms to a downstream State; that State need not exhaust all intrastate options before the upstream State must justify the equities of its water uses.

As a result, the Phase One contemplated by North Carolina — which incorporates issues that properly should be included only in Phase Two — must necessarily encompass a broad range of disputed questions concerning cross-state comparisons of water usage and balancing the equities of those respective uses. The Special Master will be presented with evidence on both sides concerning the costs and relative benefits of water use in each State, to support each side's arguments about the most equitable way to alleviate the harms to South Carolina. As the Special Master already has recognized, insofar as any Phase One requires assessing

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[seeking to displace existing uses in the downstream State] can carry its burden of proof in an equitable apportionment action only with specific evidence about how existing uses might be improved, or with clear evidence that a project is far less efficient than most other projects. Mere assertions about the relative efficiencies of competing projects will not do.").

"particular uses by North Carolina" as well as "particular uses by South Carolina" — as must occur, under the Court's precedents, on the Phase One that North Carolina proposes — there will be "some[] overlap with the [Phase Two] concept of whether the uses are or are not beneficial." 1/27/10 Tel. Conf. Tr. at 30:14-25. Accordingly, the expansive theory of Phase One that North Carolina and intervenors (erroneously) advocate overlaps so significantly with Phase Two that no meaningful or efficient distinction can be made between the two phases.

B. North Carolina's And Intervenors' Other Claims Lack Merit

1. The Precedent North Carolina and Intervenors Cite Does Not Support Bifurcation of an Equitable Apportionment Action

In attempting to square its bifurcation proposal with Court precedent, North Carolina claims that proceedings in *Kansas v. Colorado*, No. 105, Orig., were "more efficient" because that case was bifurcated "into multiple phases" requiring "five separate reports" of the Special Master and four opinions from the Court over 14 years. NC Br. at 4-5. Even aside from the fact that *Kansas v. Colorado* concerned enforcement of an interstate compact, not equitable apportionment, a 14-year proceeding requiring five reports and four opinions is not an example of efficiency to be copied. A single proceeding would make it far more likely that the Court could review the case once on a full record, as in past equitable apportionment actions. In addition, the enforcement action Kansas brought was bifurcated into liability and damages (not harm and apportionment) phases, and the special master there identified *no* concern that the evidence or witnesses on liability and damages would

overlap such that a single proceeding would be preferable.[3] In sum, *Kansas v. Colorado* provides no support for North Carolina's bifurcation proposal.[4]

Intervenors erroneously claim (at 9-10) that the Court "effectively bifurcated" the proceedings before the special master in *Colorado v. New Mexico*. As South Carolina explained (at 12), the special master there conducted a *single proceeding* — not a bifurcated one — by requiring full discovery and holding only one trial. Thus, on remand from the Court's initial opinion, the special master was able to "develop[] additional factual findings" solely "on the basis of the evidence previously received." *Colorado v. New Mexico*, 467 U.S. at 315. *Colorado v. New Mexico* thus *supports* having a single proceeding here. *See* SC Br. at 12.

North Carolina also relies on the general principle set out in the Manual for Complex Litigation that bifurcation can be appropriate "where determination of one issue could wholly eliminate the need to try another complicated or time-consuming issue."[5] But North Carolina omits the remainder of that sentence in the Manual,

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[3] *See* Order re Kansas Motion to Bifurcate Proceedings, *Kansas v. Colorado*, No. 105, Orig. (Jan. 2, 1990), *reproduced in* Appendix to Special Master's Report at 61-63, *Kansas v. Colorado*, No. 105, Orig. (filed July 29, 1994) ("App."), *available at* http://www.supremecourt.gov/SpecMastRpt/ORG105_7291994.pdf. Colorado apparently dropped its objections once the special master held that it could assert its counterclaim and affirmative defenses of laches, estoppel, and unclean hands in the liability phase. *See* App. at 61-62.

[4] The same is true of *Oklahoma v. New Mexico*, No. 109, Orig., on which North Carolina also relies (at 5). That case also concerned enforcement of an interstate compact; was bifurcated between liability and damages phases by agreement of both States; and also had no apparent overlap in evidence or testimony concerning the two phases. *See* Report at 3, *Oklahoma v. New Mexico*, No. 109, Orig. (Oct. 15, 1990), *available at* http://www.supremecourt.gov/SpecMastRpt/ORG%20109%20101590.pdf.

[5] *Manual for Complex Litigation* 616 (Fed. Judicial Ctr., 4th ed. 2004) (discussing bifurcation of patent cases between liability and damages) (*quoted in* NC Br. at 4).

which makes clear that this can be so only "where the need to examine the same witnesses in both phases of the separated trial would be minimal."[6] North Carolina's citation to *Amato v. City of Saratoga Springs*, 170 F.3d 311 (2d Cir. 1999), is likewise unavailing, because in that case it appeared that witness overlap would be minimal,[7] and evidence admissible against different defendants in a second trial would have been inadmissible against — and highly prejudicial to — separate defendants in the first trial. *See id.* at 316.

Here, by contrast, the fact witnesses that South Carolina intends to call have knowledge of facts concerning *both* harms to South Carolina as a result of recent droughts in 1998-2002 and 2007-2009 *and* benefits to South Carolina that accrue from its water uses. *See* SC Br. at 20-21. Moreover, fact witnesses concerning North Carolina's water uses likewise will need to be called in the Phase One that North Carolina contemplates, as well as Phase Two, so that South Carolina can rebut North Carolina's claims that South Carolina must remedy its harms by altering existing uses in South Carolina. Thus, in a bifurcated case, numerous witnesses likewise would be inconvenienced by having to testify at two depositions

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[6] *Id.* at 616-17 (citing case *denying* bifurcation because it would result in duplicative testimony); *see also* 8 James Wm. Moore et al., *Moore's Federal Practice* § 42.20[6][a] (3d ed. 2006) (bifurcation appropriate only where "the issue may reasonably be separated from the remainder of the case") (*quoted in* NC Br. at 4); SC Br. at 9-10 (discussing case law).

[7] The district court's opinion makes this clear. *See Amato v. City of Saratoga Springs*, 972 F. Supp. 120, 124 (N.D.N.Y. 1997) ("bifurcation appropriate where plaintiff's *Monell* claims would require extensive evidence concerning the City's policies on the use of force that [was] largely irrelevant to plaintiff's claims against the individual defendants") (internal quotation marks omitted, alteration in original), *aff'd in part, vacated in part on other grounds, and remanded*, 170 F.3d 311 (2d Cir. 1999).

and two trials. As courts have held, a more than minimal overlap in evidence and witnesses seriously hampers judicial efficiency just as it inconveniences witnesses, thus favoring a single proceeding here. *See* SC Br. at 9-10, 21 n.17 (citing cases).

2. North Carolina's Litany of Supposed Phase Two Issues Fails To Satisfy Its Burden To Show That Bifurcation Is Justified Here

North Carolina describes (at 6-17) eight specific categories of issues that supposedly would fall solely within the Phase Two it envisions and that it claims will make Phase Two efforts "at least ten times greater" than in the Phase One it envisions (NC Br. at 17). In fact, all but one of those issues properly belong within the scope of the Phase One that North Carolina envisions. As explained above, to the extent North Carolina and intervenors — based on an erroneous view of the law of equitable apportionment — may seek to rebut South Carolina's showing of harm by claiming that South Carolina could remedy those harms by altering its users' consumption of the limited water that flows into the State during periods of drought and low flows, South Carolina must be able to respond by showing that it would be more equitable to remedy those harms by requiring North Carolina to reduce its citizens' uses, so that more water flows into South Carolina. These competing arguments plainly implicate North Carolina uses and require comparison of the equities of uses in the two States. The other issue is not properly part of this case at all. Therefore, none of these issues, separately or together, satisfies North Carolina's burden to show that this is the "exceptional case[]" in which the

"circumstances justifying bifurcation [are] particularly compelling." *Kos Pharms., Inc. v. Barr Labs., Inc.*, 218 F.R.D. 387, 391 (S.D.N.Y. 2003).

a. Seven of the eight issues would have to be part of the Phase One that North Carolina and intervenors envision

All but one of the eight issues that North Carolina identifies as Phase Two issues in fact would be a part of a proper conception of the Phase One envisioned by North Carolina, because they concern consideration of the equities of existing water uses in both States.

North Carolina claims, with respect to six of those seven issues (as they are numbered in its brief), that (1) valuation of established water uses in each State, (3-4) identification and valuation of alternative water sources in both States, (5) analysis of water usage in North Carolina that allegedly benefits South Carolina, (7) conservation measures in each State, and (8) analysis of North Carolina's historical and projected water uses, will occur only in Phase Two. *See* NC Br. at 7-8, 15-16. However, if North Carolina and intervenors were permitted to claim, in a bifurcated proceeding along the lines they envision, that South Carolina's threshold burden in Phase One will be to show that its harms cannot be mitigated by changes to consumption, use of alternative supplies, or improved conservation measures *within South Carolina*, then South Carolina likewise would be permitted to respond that equity instead requires such changes *in North Carolina*. Thus, even in a Phase One as (erroneously) envisioned by North Carolina and intervenors, the full panoply of facts pertaining to a weighing of the equities of

each State's options to alter its consumption (NC issues 1 & 8), use alternative water supplies (NC issues 3 & 4), and improve conservation measures (NC issue 7) will be in play. The same is true of the analysis of water uses near the boundary (NC issue 5), where consumption in one State allegedly benefits the other State.[8]

With respect to its issue (2), North Carolina claims that bifurcation will avoid the need to delay proceedings until after 2010 census data become available in March 2011. But the current and expected populations in North Carolina and South Carolina are relevant to showing the harms South Carolina has suffered and can be expected to suffer in the future — indeed, further population growth in both States will only exacerbate those harms, absent apportionment. Thus, a more reasonable solution is to proceed with a single proceeding and, if necessary, delay any expert reports that may depend on the 2010 census data until they become available.

b. The effects of interbasin transfers on other river basins is not part of this case

With respect to its issue (6), North Carolina states (at 15-16) that it intends to argue that its interbasin transfers provide benefits to South Carolina users in the

[8] In any case, both States are currently conducting discovery on water usage in South Carolina and North Carolina. *See*, *e.g.*, http://www.ncwater.org/ (North Carolina Division of Water Resources' listings of historical and future North Carolina water uses). North Carolina's claim (at 12-13) that water provided to South Carolina commuters must be counted as a benefit to South Carolina also ignores the fact that South Carolina workers in turn benefit North Carolina businesses. Likewise, determination of water consumption near the boundary, for example by the Town of Rock Hill, SC, *see* NC Br. at 13-14, should be a relatively simple matter because each locale keeps track of its water use, as does Duke Energy and its consultant, HDR, Inc.

Yadkin-Pee Dee River Basin that outweigh the harms to South Carolina users in the Catawba River Basin. Claims about interstate rivers and river basins other than the Catawba, however, are not properly part of this case. Indeed, if the upstream State in such a case were permitted to expand the litigation to include additional interstate rivers and water basins other than the one that forms the gravamen of the complaint, all equitable apportionment actions would be at risk of being expanded exponentially and becoming unmanageable.[9]

Where South Carolina has issued interbasin transfer permits, it has protected the interests of its citizens in the Catawba River Basin by requiring that those transfers be reduced or even ceased in times of lowered flows, as the interbasin transfer permit to the entities that comprise intervenor CRWSP makes clear.[10] That is South Carolina's prerogative — not North Carolina's. North Carolina seeks to draw a different balance among South Carolina users by defending its withdrawals from the Catawba River on the ground that those withdrawals help South Carolina users in other basins more than they harm South Carolina users in the Catawba River Basin. But the distribution of water among South Carolina users is an *intra*state matter for South Carolina to decide; it is not a matter within the Court's original jurisdiction in an equitable apportionment

[9] North Carolina served discovery on issues related to other river basins, to which South Carolina long-ago objected on this ground. *See* SC Br. at 7 n.2.

[10] *See* South Carolina Water Resources Commission, Class I Interbasin Transfer Permit at 5, Permit No. 29 WS01 S02 (May 8, 1989) ("Permittee must decrease or cease the withdrawal from the Catawba River so as not to cause the instantaneous flow to be less than 1,200 cfs [cubic feet per second].").

action. *See South Carolina v. North Carolina*, 130 S. Ct. 854, 871 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part).

The sole case that North Carolina cites to support its effort to expand the scope of this proceeding does not support its claim. In the portion of *Kansas v. Colorado*, 206 U.S. 46 (1907), that North Carolina quotes (at 16), the Court was not creating a standard for use in equitably apportioning a river. Instead, it was explaining why it was holding that the dispute should be resolved "upon the basis of equality of rights" between the States and rejecting both Colorado's claim that, as the upstream State, "it has a right to appropriate all the waters" and "the extreme doctrine of the common law of England," which would preclude Colorado from using any river water "for the purposes of irrigation." 206 U.S. at 98, 100. Nor did the Court, in resolving the dispute, suggest that Colorado's use of river water for irrigation was justified because of any benefits the irrigation conferred on Kansas. On the contrary, the Court simply found that, while Colorado's use "ha[d] worked some detriment to . . . Kansas," that harm was small compared to "the great benefit [the use] ha[d] obviously resulted to . . . Colorado." *Id.* at 113-14; *see id.* at 117-18.

In addition, North Carolina misreads the Court's statement, which did not discuss the type of comparison across river basins that North Carolina seeks to present. Instead, the Court was simply discussing the possibility that "percolation of water in the soil" through irrigation in Colorado might eventually result in more fertile soil in Kansas. *Id.* at 101. That soil might be outside "the flow of the Arkansas in its channel" and, therefore, "not in the Arkansas valley" (a term that

appears to be far narrower than a river basin). *Id.*; *see id.* at 115 (explaining that "the more abundant the subsurface water the further it will reach in its percolations on either side [of the river channel]"). Even in that limited context, the Court discussed the narrow possibility of the upstream State benefiting only by the disputed withdrawal "and in no other way," whereas the benefit to the downstream State from the withdrawal is "as great as that which would inure" from leaving the water in the river. *Id.* at 100-01. In sum, the Court did not sanction a wide-ranging inquiry into any alleged benefits of interbasin transfers on other basins.

3. North Carolina Fails To Demonstrate Any Prejudice

North Carolina asserts (at 17-19) that it would be prejudiced absent bifurcation. Each of its assertions lacks merit.

First, North Carolina claims that a single proceeding would cause the time spent working on the existing Case Management Plan ("CMP") to be lost, yet it identifies only one part of the CMP that would have to be amended — "limitations on the length of depositions." NC Br. at 18. Agreement on that issue should take very little additional time. Moreover, the CMP purposely left open many issues to be resolved later precisely because the details of any bifurcation had yet to be worked out, such as the status of intervenor discovery, the time for close of discovery, and service of expert reports. *See* CMP ¶¶ 1, 4, 5.

Second, North Carolina claims (at 18) that it would be prejudiced by having to respond to Phase Two document requests from South Carolina, as well as by having to conduct its own Phase Two discovery. But both were always a possibility

— the CMP permitted, but did not require, the parties to conduct Phase Two discovery whenever they found it convenient. *See* CMP ¶ 4.1; NC Br. at 2 n.2. Thus, the CMP presently contemplates that North Carolina will be subject to additional Phase Two discovery requests from South Carolina regardless of whether bifurcation is ordered. North Carolina likewise has been free to conduct its own Phase Two discovery as it sees fit; indeed, North Carolina acknowledges that it has long been engaged in Phase Two discovery "to the extent that it is convenient and efficient to both the parties and to the entities from whom discovery has been sought." NC Br. at 5 n.3.

C. South Carolina's Proof Will Meet The Court's Threshold Harm Standard

North Carolina (at 19) and intervenors (at 2-3) assert that bifurcation is warranted because South Carolina had not identified with specificity the harms alleged in its Complaint. South Carolina recently responded to North Carolina's first set of contention interrogatories, dated February 23, 2010.[11] In those responses, South Carolina provided a detailed and lengthy statement of the harms on which it plans to rely, subject to supplementation as discovery and South Carolina's investigation proceeds. That report is more than sufficient to permit North Carolina and intervenors to conduct discovery on those harms.

[11] *See* South Carolina's Responses to North Carolina's First Set of Contention Interrogatories (Apr. 2, 2010); *see also* South Carolina's Supplemental Responses to North Carolina's First Set of Interrogatories (Apr. 2, 2010).

South Carolina will demonstrate the requisite threshold injury or threat of injury by showing the inadequacy of the supply of water to meet all existing uses in South Carolina, because the river is overappropriated in times of low flows. In addition, North Carolina's interbasin transfers exacerbate the harms caused by low flows, and thus themselves harm South Carolina. Accordingly, South Carolina will show, through factual evidence and witness testimony, that this harm is manifested through injury to industrial and commercial users, water utilities, and water-based recreational users and businesses as low water levels, exacerbated by interbasin transfers, make recreation both unsafe and unappealing. South Carolina's experts will quantify the significant direct economic harms those South Carolina water users in the Catawba River Basin have suffered as a result of low flows in the river, which are expected to be in the tens of millions of dollars, plus the secondary harms in the regional economy flowing from those primary harms.[12]

Based on that past history and expert hydrological modeling of the anticipated future conditions in the river, South Carolina will likewise quantify the range of expected future harms in the absence of an apportionment that provides greater quantities of water to South Carolina during periods of drought and low flows. South Carolina's hydrological modeling also will incorporate the recent historical drought of record from 2007-2009, which occurred subsequent to the model results that Duke submitted with its FERC application. The modeling that

[12] *Cf.* NC Br. at 14-15 (noting relevance of "secondary economic benefits").

Duke submitted to FERC predicted that Stage 3 (of 4) of the Low Inflow Protocol would be experienced in only four months over the coming 51-year period. In fact, Stage 3 was experienced for 15 months between October 2007 and January 2009 — a nearly four-fold increase over the projections in Duke's FERC application.[13]

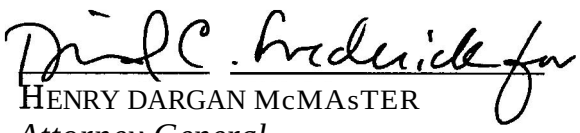
This evidence will easily exceed the Court's standard of harm. *See New Jersey v. New York*, 283 U.S. 336, 345-46 (1931) (entering decree enjoining portion of interbasin transfer based on anticipated threat to recreation (including reputational harms to recreation) and oyster harvesting during the summer months); *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945) ("[W]here the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination."); *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982) (threshold harm shown where "*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").

CONCLUSION

The Special Master should order discovery and trial to proceed as a single proceeding, without bifurcation, and order the parties to meet and confer to propose appropriate revisions to the Case Management Plan.

[13] *See* Comments by the State of South Carolina on the Draft Environmental Impact Statement, *Duke Power Company, LLC*, Project No. 2232-522 (filed May 8, 2009), *available at* http://elibrary.ferc.gov/idmws/File_list.asp?document_id=13716906.

Respectfully submitted,



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