IN THE UNITED SUPREME COURT OF THE

UNITED STATES

SOUTH CAROLINA

Original No. 138

vs.

NORTH CAROLINA

Complete transcript of testimony and other incidents in the above, when heard March 28, 2008, before Special Master Kristin Myles, held at U.S. Courthouse, 1000 East Main Street, Richmond, Virginia, 23219.

JOB No. 85120

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THE COURT: Good morning, Counsel. I just have a few preliminary matters before we get started. This is my law clerk, Amy Tover, whom you have spoken with on the phone. I think the order of proceedings today is we'll start with motions to intervene, go until about lunchtime. Hopefully, we can finish them and then do the pleading issue after lunch and any status conference issues after lunch.

Did Counsel have a chance to do an order for motions to intervene?

MR. PHILLIPS: We did, Your Honor. Carter Phillips for Duke Energy. I'm going to begin. I will try to shoot for around 20 minutes and that includes rebuttal time, then Catawba will argue next and I think finally the City of Charlotte.

THE COURT: That's fine. I don't think I'm going to impose -- to hold you to those limits. Let's see how it goes. The other thing is, I want to make a disclosure, which will manifest itself in a written order, but I want to mention it now by way of disclosure. My law firm, at some point in time in the past, has been adverse to Duke entities, most specifically I think Duke Energy. I mention that by way of disclosure. I will formalize that in a written order. If there's any comment on that now, you're welcome to make it.

I should mention also, I was never

personally involved in any such matter either on behalf of or against Duke Energy. I'm quite confident there's no current adversity.

Thank you for the map. There was so much geography involved, I thought a detailed map would be useful. Why don't we get started then.

MR. PHILLIPS: Good morning. Carter Phillips for Duke Energy. I have to say it's not often I have an opportunity to stand at the podium without a light in front of me. I'm feeling quite free today. I will, nevertheless, try to be relatively brief.

I'm inclined to start by answering the specific questions you asked and then describe why I think it is appropriate for Duke to be entitled to intervenor status in this particular case. The specific questions are, you asked whether a ruling in this case might cause or compel either State to impose obligations on Duke that could conflict with its rights or obligations under either the current or future FERC License. Let me start by saying the answer is probably could cause. I don't know if it can necessarily compel any state to do that. Presumably, states have a certain amount of freedom. It certainly could cause Duke to face inconsistent obligations.

I will tell you specifically what I have in mind. Obviously, the licensing arrangement certainly can

provide both minimum and maximum flows at various times. Currently the licensing arrangement has a cubic foot per second of about 400 minimum flows. That minimum flow would be ratcheted up under the current comprehensive relicensing agreement of the CRA. I suspect you'll hear references to the CRA quite often during the proceedings this morning.

That would ratchet that up to around 1,100 cubic feet per second. There are also maximum flows that are embodied in the CRA at this point. Those are usually designed to deal with ecological concerns; that is, spawning of fish. If you have too much water flowing through the river, it interferes with the fish's ability to reproduce. There can be other ecological concerns.

What you could have happen, obviously, if the Court ultimately were to adopt an equitable apportionment that provides for a minimum flow different from whatever the CRA provides and that's enforced by North Carolina, for instance on the minimum side, that would take water out of the river that would otherwise run south and thereby interfere with the obligations we have under our license and under the CRA to provide certain minimum flows. On the other end, it's possible that South Carolina could insist on maximum flows that are designed to protect its interest in having water come in that would, in fact, impede some of the obligations we have or interfere with obligations we have now

to provide flows that exceed certain limits.

All this is in flux, because we have one license today. We're in a licensing process. We have a 70 party CRA that's in place. It imposes obligations on us as I speak today, but it's still not been embodied in a license. It's potentially subject to change. Obviously, whatever the Federal Regulatory Commission does as part of that licensing process is much broader than just simply dealing with the water that's going to run through here. I don't know if you've seen the CRA. It's about this thick and I think it's on two disks. The licence for the FERC is on 10 disks.

The bottom line is, it is certainly conceivable, if not likely, that there could be conflicts that will arise between whatever is ordered by the Court and what FERC might regard is in the public interest either independently in its own review or by approving what is currently provided. Then the question is, what is the effect of that on our intervention issue?

It seems to me that it gives a strong argument for having Duke involved in this case, because it seems to me a mistake to have two parallel proceedings that are dealing with essentially the same subject matter without some nexus between the two if only to alert each other to the potential risks of conflict. It seems to me it's probably in both this Court's interest and in the FERC's interest to

avoid conflict if at all possible.

I think the only way effectively to implement that is simply to be sure that both sides are communicating. At the moment, it seems to me Duke is in the single best position to articulate the process before the FERC and to explain to the Court and then also to be in a position, because it's a party to the case and those records being created here to the FERC apprised as we go forward. It seems to me those risks support intervention in this particular case.

THE COURT: Let me ask you one question about your last comment. The Maryland case, the pipeline case, involved -- the United States was a party. FERC was a party. One possible thought in reading your position, hearing you today would be, one wonders whether FERC has an interest in being involved or should be involved. I agree that the proceedings one would think, if one were to say the proceedings should be somehow coordinated or one should be informed by the other. That would be another way of achieving that.

MR. PHILLIPS: That would be another way of achieving it. The problem is there's no mechanism in place that I know of to necessarily bring the FERC or the United States into these proceedings. The Federal Government is aware of this litigation. Obviously, every case that's in

the Supreme Court is a matter of intimate understanding by the Solicitor General's Office that today has not made any decision, as far as I know, whether or how to participate. Even if it begins to participate later in the process, which it may well decide to do, who knows at what stage, it seems to me it's still quite appropriate and reasonable for the Special Master to get the benefit of ongoing insights into what's going on in the FERC process. That may be filtered to a certain extent because Duke does have an independent set of interests. At least, you can test those directly if Duke's a party. If nobody's a party, if it's just North Carolina and South Carolina, then it seems to me the risk of tripping over each other is increased dramatically and to no good end.

The fundamental question, it seems to me, is does this Court have the authority to allow Duke Energy to intervene? It is clear that the Court has in many instances allowed private parties to intervene when it will promote efficient and a comprehensive resolution of a particular case.

South Carolina obviously argues that there's something different about water apportionment cases and that they stand on a different footing. I have a very difficult time understanding that argument, because why does a boundary dispute, which goes to the very core of the existence of a state, for taxation, which is the lifeblood of the existence of a state, why are those sovereign interests

less important than water rights? To me, intuitively, that makes no sense. The courts have consistently recognized that in those other contexts it is appropriate on occasion to allow private intervenors to participate. It seems to me there's no absolute obstacle to us coming in, and it's a question of discretion of the Court.

Here, where we have much to offer and have been as explicit as we can, and we have no interest in making this process more protracted than it would otherwise be. I think we can cooperate with Counsel on all sides. Candidly, as a matter of just getting the information into the court in the first instance, it's much easier to do that when Duke Energy is a party to the litigation than it will be as a third party, because you've got to go through the cumbersome nature of the subpoena. There are fewer discovery tools available. Duke is willing to provide the information. It's going to be much more willing to provide, it's going to be much more efficient to provide it if it's at the table and it's participating as part of that process.

We not only have information that's important to the Court, but it gets to the Court in a much easier to digest form and in a fashion much more simple if we are a party.

One other, to my mind, significant advantage of having us as a party is, we are the only entity,

obviously, that is directly defending the comprehensive relicensing agreement. It is extremely important to us. Neither North Carolina nor South Carolina necessarily is going to embrace that approach, particularly if we're talking about the kind of classic free-wheeling equitable apportionment issue that the Court has recognized in the past. It takes into account virtually any kind of consideration.

We think the CRA ought to start as a very significant linchpin on how this Court should analyze this issue. We are the only third party, so far as I can tell, who has a huge stake in promoting that particular position. We think it's important for the Court to have that.

The other thing that comes out, what arises out of the CRA process is that, at the end of the day, hopefully this will be a settled litigation. It seems to me very important to have the significant players available at the table for that kind of settlement. It's much easier to do that if you are a party to the litigation to be sitting there to try to negotiate out a final resolutions of these matters rather than serving as an amicus. The State of South Carolina says we can continue to participate as an amicus. The reality is that is a disembodied presence and it's not one, it seems to me, that allows the kind of give and take that would hopefully bring this case to closure.

Water apportionment cases have a way of going on for decades. I think all of us have an interest, frankly, in trying to resolve this one much sooner than that, and to put it in a position where it can come to closure with and hopefully in cooperation and coordination with the way the FERC is going to resolve the issues that are before the FERC.

That's going to happen sometime probably in 2009. I would hope nobody has an interest in having this case go on in 2019 or whatever it may proceed. I don't think an amicus role is an adequate one under those circumstances.

The second question you asked is, how did the public interest obligations that we have to satisfy arise? Unlike entities regulated by, say for instance, the Federal Communications Commission, we do not have direct responsibility to, quote, operate in the public interest. That's not the way the regulatory scheme operates.

How the regulatory scheme operates in some ways is much confining on us because we have a licensing arrangement. It is very specific and FERC has statutory authority, clear statutory authority, to impose any conditions on our license. Those conditions, of course, have to satisfy the public interest, as well. We have no discretion to deviate from the conditions that are imposed on us.

Everything that we do that complies with

our license, in fact, is designed to promote the public interest and anything that we do that violates that license, obviously, undermines the public interest at least as the FERC has determined it to be under those circumstances.

While we don't have a free-standing public interest responsibility that we have to satisfy, we have a much more confining public interest duty that arises out of the license. Again, that's in a state of flux.

We obviously have a license that we operate under today. We have another set of duties that we have to comply with under the CRA as a matter of our contractual responsibilities. But the license is going to be renewed sometime probably within the next 12 to 18 months. There will be another set of duties and much more extensive duties. You can imagine the kind of environmental ecological concerns that would have animated FERC in 1958 are not quite the same as they're going to animate them in 2008 and 2009, and the original the license was, at the time, regarded as quite extensive. It was about this big as opposed to the license that we have that embodies the CRA today, which I said the CRA itself is this big. The FERC license is enormous in terms of the application.

THE COURT: Just out of curiosity, has the 1950 license been amended over the years or is it the exact same one you have?

MR. PHILLIPS: I don't think it gets amended. It stays in place. I think we can go back and get approval for various contacts if the FERC wanted, for some reason, to deviate from it. I don't think it's been amended.

THE COURT: Let me go back to my question. It goes more to the first set of issues you were taking about in the first question. In the New Jersey vs. New York case, and later in the Kentucky vs. Indiana, case the Court talks about in both of those cases, the Court mentioned the role of the intervenor. What does the intervenor do? What role does it play?

The reference in the New Jersey case is talking about New York City's position in that case, not Philadelphia's position, New York City's position as a party defendant, and then in that case, moving party, because it was the subsequent proceedings. The court --

MR. PHILLIPS: New York was already a party. Philadelphia was trying --

THE COURT: New York City was a party, named defendant, but then was the moving party. Anyway, the Court says because this position as a defendant, speaking about New York, the primary defendant, New York City's position raises no problems under the local amendment, but the point was only that as a party in the case, New York City by definition was subordinate. Why? Presumably because the

original jurisdiction is between the States.

MR. PHILLIPS: Right.

THE COURT: I don't know what the Court means by that as a practical matter. It did mention that. It makes some sense. Likewise, in the Kentucky case, there's a long discussion of this concept, albeit in a different -- it comes up. It's a party. The individual defendants. The issue is somewhat different really where the question is whether the difference of opinions between the individual citizens of Indiana and the State of Indiana matters. The Court said it didn't.

There's this long discussion and I don't mean to put you on the spot now, it's Page 173 is where the Court says a state suing or sued in this Court by virtue of the original jurisdiction of the controversies between states must be deemed to represent all citizens. That's quoted in all the papers.

MR. PHILLIPS: That's common ground.

THE COURT: Then it says an individual citizen may be made a party where relief is properly sought as against him. In New York City, for example, they would be -- there was an effort to enjoin them from doing something. They wanted to enjoin New York City. To which case, you should have a suitable opportunity to show the nature of the hidden interest and why the relief asked against him

individually should not be granted.

Then the Court goes on to say, and I won't quote this all into the record, but that the individual citizen may be made a party defendant in that context where there's specific relief sought against him. Clearly, he has to have the right to defend himself as to that relief sought, but the Court said that's the limit of his involvement. He can't be a general party to the case. He can't be, as the Court put it, has no standing to litigate on his own behalf; that merits of a controversy which properly viewed lies solely between the States.

This made me wonder if this set of issues could be framed in those terms. If there's relief, not necessarily injunctive relief, being sought against say Duke, but a set of concerns that uniquely affects Duke as distinguished from broader concerns in the case as a whole, depending, of course, on the scope of the case, which we haven't decided yet on the scope of the case, assuming it involves many issues between the States that don't implicate Duke's specific interests.

I've never heard of there being a status intervenor that's limited in some way. I'm kind of posing the question whether that kind of status would be possible.

MR. PHILLIPS: Clearly, to a certain extent it would have to be. For instance, it's clear we could not

come in as a party plaintiff intervening here to add -- to seek additional relief against a sovereign consistent with the 11th Amendment. Inherent in that concept I think there's some notion of limited intervenor status. It goes to one of the arguments that South Carolina made, which here we've come in clearly adverse to South Carolina because we came in as a defendant. In truth, we came in as a defendant to avoid precisely the 11th Amendment concerns that might otherwise arise. We are not seeking affirmative relief from South Carolina.

We only had two choices; you come in as a plaintiff or defendant. We came in as a defendant under those circumstances. It's not because our position is necessarily -- it's not adverse to South Carolina as in the sense of trying to do anything specifically to change the course of the litigation so much as it is to make sure the Court is aware of this agreement and the importance of the agreement in its own inquiry.

I think the specific answer is yes. Inherent in this whole process is that any private entity has to have a somewhat limited role. I think we would concede that we have a secondary role to the States. They are the parties who really are going to dictate the terms of this litigation. But the reality is in some ways if it gets to the point where you're going to try to enforce a lot of this,

then, it seems to me, it's going to be more important for Duke to be involved. You have to remember this entire water system essentially exists because of the Duke system. If we don't impound all that water and then allow the releases of the water in order to fulfill our immediate objectives to produce electricity, the water flows into South Carolina would be demonstrably different than what they are today.

If the time comes and something has to be modified, it's quite likely that some effort may have to be made directly against Duke, and it would be easier in that context to have us as a party. Frankly, I would say I'm slightly surprised that South Carolina is opposed having Duke Energy in the litigation.

If you read both their moving papers and North Carolina's opposing papers, Duke gets mentioned more than anybody and probably somewhere two dozen times on both sides. We are all over this litigation both in terms of what we know, what our involvement is, what our activity level is and what the risks are of the litigation. Notwithstanding the significance of Duke's involvement here, including candidly our independent state rights preserving water that North Carolina recognizes and how that's going to play out, we have the independent rights that state laws specifically provide for, notwithstanding all that, we do recognize that we're in a forum that is uniquely for the States to control.

Our objective here is, candidly, to be as cooperative and helpful in getting this Court a resolution of the matter as quickly as possible in order, hopefully in our mind, to be in a position where the comprehensive relicensing agreement can be blessed and at least recognized as an important element in any approach this Court takes in resolving these issues.

THE COURT: On the issue of the nature of the involvement, for example, there's seems to contention in the cases on what the role of the intervenor is, what the test or intervention is. The cases aren't always very, very thoughtful about what the standard is. Nonetheless, what I found interesting about these two cases is that in the Kentucky case, it's clear what the Court was saying was that the States could settle the matter over the objections of the individual defendants.

Now, how that would play out in another case, I don't know. That case had a set of unusual facts. One wonders really was there a controversy at all that the two States didn't really disagree with each other, except in very minor respects. But I think the Court felt in a position to try to help out and whether it really was a controversy. Nonetheless, clearly, what the Court was saying was that the individual defendants couldn't stand in the way of a settlement.

On the other hand in New York, New York had the right as a nonparty to -- I mean a non-state, to seek relief, affirmative relief on its own behalf in subsequent proceedings. Then one does wonder because of the logic of the other case why wouldn't New York State have been the one to do that rather than New York City. I don't know the answer.

MR. PHILLIPS: I mean, to me at least I mean the more interesting question would be could North Carolina and South Carolina agree on a settlement that imposes certain obligations on Duke in a particular way and through injunctive relief without Duke having an opportunity to participate in the defendant's interests. My guess is the answer would be no. There would have to be some mechanism by which Duke would be entitled to challenge and it couldn't be binding in that sense.

On the other hand, it's quite clear to me that we cannot simply obstruct a settlement between North Carolina and South Carolina that imposes no independent duties on us. That much is clear to me. I don't envision our role as an intervenor -- one, I don't envision us as an obstructionist at all, but more to the point, I don't think we're entitled to be obstructionists for precisely those reasons.

To me, there are two issues; the first

issue is, is there authority to allow us to intervene and then under what standards. In my mind, there is clear authority the Court has routinely authorized. It's recognized that.

I don't think there's anything inherently different about water rights opposed to the other sovereign interests that are implicated in the original actions.

Then the question is under what standards. There I think it's either a presumption against or a strong presumption against or we have to have a clear and convincing showing. I don't care which of those legal formulations is used. I think at least with respect to Duke, it is absolutely clear that we satisfy that, because we are in a unique position and our situation is unlike anybody else's and is much stronger and one that both should be taken into account as part of any equitable allocation issue, but will assist the Court in evaluating any equitable allocation. That's question one.

To me we ought to be entitled to intervene. What our rights will be as intervenors going forward it seems to me there's a fair amount of flexibility that both the Special Master and the Court will have as we go forward. There's certain limitations on what we would be able to do. We're not in a position to come up with a counterclaim, for instance, that would add to South Carolina's woes. I'm quite

certain that the 11th Amendment would be a serious obstacle to that kind of effort.

What we could normally do as an intervenor in traditional litigation is not available to us in this particular forum. That's clear. We don't have any quarrel with that suggestion. We do think what record gets created here and what the Supreme Court itself will be reviewing from what gets created here is something that ought to be informed by the presence and by the materials and arguments and evidence that Duke can offer. That, to my mind, is the compelling reason to allow us to intervene at this point.

THE COURT: I have one more question. The one difficulty with Duke's position -- I don't mean this in a way of difficultly -- but difficulty in understanding it as a whole, is how if you had to use the simplistic hypothetical, for example, how things might play out in this case, there being challenges to interbasin transfers, a large one being Charlotte, which we're going to talk about shortly I'm sure, but this is in the category of a dumb question, I think, partly. If there were to be such an interbasin transfer or not, how does Duke's interest, if you will, how is Duke's interest affected by the existence or nonexistence of the large interbasin transfers that are being challenged? Not that those are the only ones being challenged, but if I just have to pick a hypothetical example, those are good examples.

MR. PHILLIPS: Well, the answer is, we have certain responsibilities on water flows that arise under both our agreement and will arise under the -- and do, in fact, currently exist under the license, although sufficiently small. They don't create much of a problem, but will be the larger under the proposed relicensing and we have both minimums and maximums.

In order to comply with those, what this Court enters by way of orders will affect our abilities to satisfy our license. Whether the Court is inclined, either to permit or prohibit those transfers, it seems to me should be informed by whether or not the FERC has made a determination or has blessed that a determination made by 70 other parties who have compromised their own interests here to say what kinds of flows ultimately serve the public interest beyond just simply worrying about transfer in one direction or the other.

It is inherent even in the narrower theory of South Carolina if that's the way that the proceeding plays out and all we're looking at are the transfers. Ultimately, you still have to evaluate a broader set of issues, I think at least, to understand what are the implications.

The one thing you've got to realize is, this is all one system. It's not as though you take something out here, you can do something else downstream to

fix it. Once it's out, it's gone. Everything works in that way. It seems to me you're going to have to evaluate it in some sense as a system, which is part of the problem of you've got North Carolina and South Carolina giving you conflicting views on their side of the law. We are one of the unique entities that's worried about the entirety of the system and to make sure that the Court is informed about that as part of its decision making process, whether it's deciding on any interbasin transfers or deciding on any other facet of the equitable allocation between the two States.

THE COURT: If there were a resolution of one of the issues that's -- getting back to the earlier question -- that caused Duke to be either under the minimum or over the maximum, then there would be a need -- if that were to be the order of the Court, then there would be a need to amend the license presumably.

MR. PHILLIPS: Most likely, yes. Maybe at the end of the day that's the answer and the law requires it. My guess is, this is a question for which the Court will have a fair amount of discretion. I would think that before it decided to force a relicensing process or at least modification of the license, that it would take that into account, or it might have it very much in mind and what was the purpose of it and how to understand that carefully. In order to do that, it seems to me Duke is uniquely situated to

assist the Court in making that judgement.

THE COURT: Part of the reason I ask is that concrete effects -- South Carolina argues that it's not relevant that argues that the ability to provide data and information while helpful to the Court, may not be relevant to one's right to intervene. There's at least one or two cases that mention it as a factor.

MR. PHILLIPS: It seems to me it has to be a positive factor. It's not dispositive to be sure. The question is particularly when you're at the very outset of the process, an awful lot of these cases arise where intervenors show up 8 years or 10 years into it. It seems to me those don't tell you anything about what you do.

When you're starting off with litigation and you don't know, as I said, you can -- there are two parallel paths that are currently in place. We've got the litigation here and we've got the FERC licensing process and all that goes with that. Is it possible that they can remain parallel for all time; or like all parallel lines, do they intersect at infinity? I don't know the answer to that.

What I do know is there's a risk that they're going to cross. It would seem to me much more sensible from the Court's perspective to have access to information to guide it. As I say, if it turns out they have to cross and the law requires you to go in a particular

direction, so be it. I understand that. I'm sure FERC will understand that, as well.

If they don't have to cross or if the Court could come up with an equitable apportionment that completely accommodates Duke Energy's and the comprehensive relicensing agreement's interest and the FERC's interest, it seems to me that's probably not a bad outcome. The best way to achieve that, at least to keep that uppermost in the Court's mind I think, is to make sure that there's somebody representing those interests independently, recognizing that you have a significant amount of discretion to tell Duke what you want it to do in terms of getting involved or not getting involved, because we don't have the same status as North Carolina or South Carolina.

If there are no further questions, I urge you to grant the motion.

MR. GOLDSTEIN: Good morning, Your Honor. I'm Tom Goldstein for the Catawba River Water Supply Project. I thought I could help put this in two parts. The first one is dealing with facts and explain who we are and how we're affected by this case, and just provide some more meat on those bones, and that would include answering the questions that you asked in Case Management Order No. 5 and then turn to the legal issues. I think I have some further answers to the questions that you asked Mr. Phillips. If that plan

works for you, maybe we could start with the maps.

I would like to start with -- the way I'm going to do this is I'm going to start with the big map and then hopefully you have a somewhat smaller map that was distributed by Duke, as well. What I'm going to try to do is start with the whole river system. There should be one big Duke map that's in that Plat 14. I apologize. It was provided by South Carolina.

Duke had a map that, I think, was distributed. It says in the bottom left HDR1 Company. Do you have that?

THE COURT: I wouldn't mind having it.

MR. GOLDSTEIN: What I'll do then after starting with the big map, South Carolina's map, I'll turn to this document that we distributed both by e-mail yesterday and provided our hard copy today. It says Catawba River Water Supply Project Exhibit Index at the front and Tab A starts with a map. What I'm going to do is start with the water system and then look at it more closely. You should have effectively a spiral bound binder from us.

Let me just start with the big one. The big map from South Carolina shows the Catawba River Water Basin, which is in purple. Then below that the Wateree River Basin and then down into the Congaree and Santee. It goes from up in North Carolina, down to the state of South

Carolina and to the Atlantic Ocean.

This case concerns either exclusively or principally the Catawba River Basin, which is in purple, and we are going to, as I take you to the more detailed map, the Catawba River Water Supply Project is going to be right at the border between North Carolina and South Carolina. You'll see Charlotte and down below Charlotte is Fort Mill. There, the county to the east on the North Carolina side is Union County, and the county on the east in South Carolina is Lancaster County. We are an entity, joint venture, of Union County and a special purpose district situated around Lancaster.

What it is that we do is, we take water out of the Catawba River and we make it drinkable and we provide it principally to folks in Lancaster, South Carolina and Union County, North Carolina -- Lancaster County and Union County.

Let me take you to the more detailed map. That's going to be Tab A of the spiral bound piece that we gave you. The purple in the first page of Tab A is Lancaster County and the blue -- Lancaster County, South Carolina. It's the water and sewer district there, and the blue is Union County, North Carolina. The river is the left edge, the western edge, of Lancaster County Water and Sewer District.

If you come along the left edge, you'll see at the top that's the North Carolina and South Carolina border, and as you come down the left side, you'll see notations for CRWTP Intake. That's the Catawba River Water Treatment Plant. That's our plant. That's our physical plant, principal physical plant. That's where we take the water out of the river.

It's a little hard to see, but coming to the east from that point, there's a blue line and a green line and those are really the lines that are a principal source of our unique status because those lines go from the Catawba River intake in South Carolina east, back into North Carolina. This is the oddity, the strange situation, that my client presents; that is, the water comes across the state line, down the river into South Carolina to the water treatment plant. It's withdrawn and treated there in the state of South Carolina and then it is used in South Carolina, but it is also shipped to customers, to Union County's customers, back up in North Carolina.

This is going to be the source of our concern; that is, that while it's the case that certainly individual citizens and companies that are residents in a state are presumed in original actions to be represented by the states in which they reside, we have a difficult situation because our water goes to another state.

THE COURT: Is the water piped?

MR. GOLDSTEIN: Yes. There are two. There's a 24-inch and a 48-inch main that run from the water treatment plant after it's treated, over back across the state line. Those two green lines -- the green and blue line once you got back over into the state line would come back together. They were built at different times.

THE COURT: The plant is right at the river?

MR. GOLDSTEIN: Yes. It is right at the river.

THE COURT: Then the pipes run separately and rejoin on the other side?

MR. GOLDSTEIN: Yes.

THE COURT: What happens on the other side?

MR. GOLDSTEIN: There's a distribution network. It is distributed from the plant inside the Lancaster County Water and Sewer District to the customers in Lancaster and elsewhere, as I'll explain. As far as Union County is concerned, it gets shipped over into Union County, and then there's a distribution network in Union County North Carolina, as well, for its customers.

THE COURT: I don't want to jump ahead. If you want get to this later, that's fine. Is there a

separate transfer that is directly by Union County that is independent of this intake?

MR. GOLDSTEIN: No. I take your question to be, does Union County get water from the Catawba other than this way. The answer to that question is no.

THE COURT: I understand there to be an issue in the case that South Carolina is challenging that you say transfer by Union County through CRA. Is that transfer occurring -- is that transfer that you're talking about that you say South Carolina is directly challenging, is that transfer then through this intake?

MR. GOLDSTEIN: Yes.

THE COURT: Through this process?

MR. GOLDSTEIN: Yes. Just to put it in terms, Paragraph 21 of South Carolina's complaint reads the statute also grandfathers the transfer by Union County --

THE COURT: What paragraph?

MR. GOLDSTEIN: It's 21 on Page 8 of the complaint. That paragraph begins that statute. This is the North Carolina IBT Statute.

THE COURT: Why don't you just read it.

MR. GOLDSTEIN: Sure. The statute also grandfathers the transfer by Union County of at least 5 million gallons per day from the Catawba River Basin. That's what we say they're complaining about. I've just read what

they are complaining about and that's us. That comes from our plant through these pipes back into Union County.

THE COURT: I wasn't clear on --

MR. GOLDSTEIN: There is not. Now, let me just say while the principal source of the complication and the reason that we've got a unique stake in this case and just to very briefly jump to the end, we hope to intervene just for the purpose of dealing with that. We have no desire to complicate the case and make arguments about lots of other parts of the Catawba River. We're very focused both because we're pragmatic and we don't want to incur the costs of litigating every aspect of this case by any means.

While the principal source of the complication is the fact that we are in South Carolina, but providing water to North Carolina in Union County directly through the water mains, it's also the case that this water network is quite sophisticated and complicated and there are other ways that water can make its way from our distribution system from South Carolina back into North Carolina and indeed, from South Carolina back into North Carolina back into South Carolina.

If I could, again, just point you to the map on the first page of Tab A. We have water supply agreements that particularly deal with situations where some other water surface has a shortfall. We have water supply

agreements under which we provide water to Carolina Water, which is the big wholesale circle at the top of this map so that water gets shipped back up to Charlotte and Union County has agreements where they could be called on to supply water. Union County is in North Carolina. Our water goes through the blue and green mains into Union County North Carolina and then it would need to supply water back into Chesterfield County back in South Carolina. My point here is that --

THE COURT: How does that happen?

MR. GOLDSTEIN: That happens when Chesterfield County has a water shortage. These different water systems have agreements where they will effectively back each other up.

THE COURT: How does it physically happen?

MR. GOLDSTEIN: There's an interconnection.

THE COURT: There's a pipe?

MR. GOLDSTEIN: There is. In the eastern part of Union County, we have a pipe interconnection.

THE COURT: The same for Carolina Water?

MR. GOLDSTEIN: Yes. That's not limited to emergencies. We have some limited, just active distribution back into North Carolina through Carolina Water. By far the biggest amount of water when we talk about transshipments across the state line, is certainly Lancaster

Water and Sewer District, the pipes that cross it directly into Union County. There are other things that are going on that would and certainly the Chesterfield County distribution agreement would have this in interbasin transfer.

The reason for all this by the way just to help give you the broader context is that the river that's on the eastern side of all of these maps, the Pee Dee River, is not as good a source of water as the Catawba River is, both in terms of its volume and its quality. That's why you have those interbasin transfers. The interbasin transfer here is we take water from the Catawba River and the environs and move it over into another river basin, to other population centers that are farther away. That's what interbasin transfer is.

The reason is twofold; one is that the source to the east isn't as good. But another is that there is a lot of population growth out of Charlotte further and further away, just like in every city where people are commuting into the city. That's why there's so much action that's focused right around where we are, right at the Catawba River, right at the state line, because Charlotte sits near the river and on the border, effectively on the border, between South Carolina and North Carolina.

That is sort of physically who we are and how we take water out. I can more briefly take you through

Tabs B, C and D and then turn to your questions that you asked in Case Management Order No. 5.

Tab B just gives you some basic information on how many customers we have. In total, it's about 65,000 folks both through retail and wholesale. Most of those, interestingly, are in North Carolina rather than South Carolina. While our withdrawal from the river is in the state of South Carolina, Union County has roughly 60 percent of the retail meter customers. This also gives you just a little bit of information about how it is that we pledge to be able to expand the distribution as we have greater demand.

Tab C is just a simple statement of how much money has been invested in this effort. It's just an effort to give you an indication of how much we have a direct stake in this.

THE COURT: You're on Tab C?

MR. GOLDSTEIN: I've moved from Tab B, which is how many people we serve in each county, to Tab C, which is how much money we spent in putting this together.

THE COURT: Wait a second. I was wondering is this an indication where your customer base is in South Carolina?

MR. GOLDSTEIN: Sure. That would be where we have under retail customers LCWSD, we directly serve roughly 20,000 people and then under wholesale customers, we

distribute to other municipal networks that have and who have customers. They aren't customers of LCWSD, but we supply the water.

For example, if we go back to the first map on Tab A, there's the City of Lancaster. There are different cites that have -- sometimes a city has its own water distribution network and it sends the water bills out. We might be the water supplier for it. The city would be our wholesale customer. If you combine those two, there are about 28 thousand folks in South Carolina who get their water from us and about 36 thousand folks in North Carolina.

Tab C is how much money we spent putting this thing together and it's for two not huge and not particularly rich counties along the border of South Carolina and North Carolina. It's about 32 million dollars. This is the be all, end all, of the operation.

The Court's decree in the case, to the extent it does what South Carolina asks in either of two respects, is going to have a dramatic effect on not just our facility on the cost of water to the residents in these counties. We get all of the water out of the river. Union County's 5 MGD interbasin transfer comes entirely from us. Union County gets the water off the Catawba through us, and we have a direct stake.

That's a slightly different question.

Everybody along the river has some stake and it's not our contention that that means everybody should intervene, but a threshold question is do we have a direct and substantial stake in the outcome of the case. I think there's no question that we do. South Carolina in Paragraph 21 has a specific complaint.

You had asked Duke, for example, if this case really is about interbasin transfer how does it affect Duke? And Duke explained how it's affected. But ours is substantially more direct than that, because South Carolina is complaining about something directly that we do in the supply of water. It's also more generally asking for a more equitable distribution of the river.

If you were to decide that either, that either that interbasin transfer should be limited as an equitable matter, and so a lot of North Carolina's residents should get less water or conceivably that broad equitable apportionment you could end up concluding the reverse or concluding the reverse at different times of year, and so flows to the Catawba River Water Supply Project could continually even be limited rather than increased. We are effectively right at the heart of what the decree in the case will be.

The other thing I would say, again, just not trying to move too far beyond the facts and turning to

the legal argument and opinions is that it is, I think, helpful to have in front of you a party that is directly affected by the interbasin transfer objection that South Carolina is lodging that being through the people who work at the facility, who manage it, who've been dealing with this for the past 15 years can give you a hands-on concrete sense of what it means if you were to do X or Y, how much water is coming down and how people are affected by it and all those sorts of things. We are people who can generally provide very helpful information.

I think that's very consistent with Mr. Phillips' theme that we are here to help rather than obstruct. We have a real interest in helping. We have a financial interest, not mucking things up, but we also have a lot of information and experience.

With great respect to my friends from the South Carolina Attorney General's Office and North Carolina Attorney General's office, they are not people who have to confront these questions day in day out, and dealing with the issue before this Court, which is the flow of the Catawba River is really our business 24/7, as the plant operates 24/7.

Tab D goes to the question of what our permanent scheme is. You had some questions about this, as well. I want to let you flip through this very quickly, and

then turn to your questions. We have a whole bunch of interlocking turbines both --

THE COURT: Just related to Tab C, I do have one question about, you said this really goes to who are the other entities along the river other than Charlotte and your client that are similarly situated in, as well as the magnitude of their interest?

MR. GOLDSTEIN: Well, let me just put aside, so I don't end up repeating it every 5th word, our point is that nobody is similarly situated than us. The order of volume of withdraw goes Charlotte is the single greatest user of water from the Catawba River and we're Number 2. Let me just say that that description user of water goes to the diversion of water from the Catawba River for potable water supplies; people are going to drink it. Most of them end up using to water their lawns, but, you know, we clean the water so that people can drink it.

Duke's use of the water in another form, generating electricity, is substantially larger than even that. I don't mean to denigrate it in any way. Duke has a very substantial interest in the case. I'm just talking about taking water out and --

THE COURT: That's what I was asking.

MR. GOLDSTEIN: Your question is what other cities are there and other people like that take water

out the drink it so that if you were to use that to measure how many other people would be similarly affected. There are across the river a variety of other cities, so that if you were to look at the big South Carolina map, you'll see, and this is not surprising, that over the course of history, cities do tend to grow up along the course of rivers and other water bodies as distribution efforts for trade and sources for water.

There are other cities along the way. You see Warrenton, Hickory, and the like, that do get their water supplies from, in whole or in part, from the Catawba River. I unfortunately don't know the volumes of those, although I do know that it is not as substantial as ours.

I think we could in relatively short order, if you would want to know, for example, could you tell me the top 5 water users from the Catawba River for potable drinking water and the like, that type of use, I think we would provide that to you in short order, but I know that we're number 2 after Charlotte.

THE COURT: I knew that. Your brief said that.

MR. GOLDSTEIN: The question is, you know, is there a close number 3, 4 and 5? I think that given the fact that we serve two different counties through 1 plant, I think that there's going to be a reasonable amount of

daylight between us and the other folks. I am happy to get you that information and make sure that we have it exactly right.

THE COURT: If you want to do it, that's right. At this point, more information is good.

MR. GOLDSTEIN: That's really my point in general of walking through this. I can only imagine coming into this and all of the lawyers here sort of jump in.

We have these permits. We have -- the water supply project itself has the series of permits, and we tried to identify for you who it is that gives us permits.

Now, interestingly, we have effectively 3 different sets of overlapping permitting agencies; South Carolina, North Carolina, even though we physically exist in South Carolina, and the federal government. The water supply project itself has 3 permits.

The first permit is, in a sense, the most important. This is the withdrawal permit for the plant itself.

That allows us to take out in South Carolina, as authorized, to take out of the river 36 million gallons per day through the Catawba River Water Treatment Plant.

On the second page of Tab D, I have listed the permit that were issued to the water and sewer district in Lancaster County and to Union County, North Carolina, and

the most important of those permits is the third one, because it is our South Carolina IBT permit. This authorizes us to have a maximum withdrawals of 100 million gallons per day from the river in South Carolina, just as entities, and to transfer 20 million gallons per day of that into other water basins. So in a very real sense, South Carolina's 21 that we started with in terms of what South Carolina is complaining about, South Carolina is in no small part complaining about something that is authorized by South Carolina, because it is complaining about a 5 million gallon per day interbasin transfer, and that the permit listed as Number 3 on this page, includes a 20 million gallon per day interbasin transfer to Union County -- to Lancaster County and Union County. Union County is, of course, in North Carolina.

So this goes to the point about how we are sort of in the cross-hairs between two different states where we have been licensed by both of them, but neither of them has the direct interest in protecting this status quo and the permitting arrangement that exists today.

The third tab is the permits that Lancaster County water and sewer district have, and the 4th is the permits that Union County has. These are both the permits to participate in the plant itself, but for example, the first one on Page 4 of Tab D, we had early on when the plant first went into operation, we had to have a permit for

the transmission to go from the plant into Union County, North Carolina.

We have a fairly complicated regulatory scheme to which we're subject, and has been the subject of extensive negotiations over a long period of time, and that is directly brought into question by South Carolina's complaint in the case, even on its most narrow reading directed at IBT.

The last sort of set of factual points that I wanted to make are the ones addressed in your questions 3 and 4 of Case Management Order No. 5. I just have very straight forward answers, and I've covered almost everything by walking through this binder.

You first ask are the interbasin transfers carried out by Union County North Carolina about which South Carolina complains, see the motion for leave to file a complaint, which is just where we were at, limited to transfers authorized by North Carolina? The answer to that question is no. That was what I pointed you to the second page of Tab D, the third permit Class 1 Interbasin Transfer Permit is a 20 million gallon per day interbasin transfer authorization to the Pee Dee basin, which is authorized by South Carolina.

We had to get permission both from South Carolina, because the water starts there, and North Carolina,

because the water ends there, for that interbasin transfer. If either one of those had not been permitted, then the water couldn't make its way away from the Catawba River. The second page that says at the top permits issued to LCWSD.

THE COURT: This is a very specific question. I want to make sure I have the right document. Is it the document headed Public Water System dated February 17, 2008?

MR. GOLDSTEIN: No. I think that this I think this was dated 5/08/89. It's called a Class 1 interbasin transfer permit.

THE COURT: The one that was dated January 08 -- I see. It's the first one.

MR. GOLDSTEIN: That's our ongoing operations permit.

THE COURT: That's from South Carolina. Is second one after is issued in '00 and then the third one -- the one you're referring to starts on the second page, which is somewhere back in here.

MR. GOLDSTEIN: Yes.

THE COURT: Okay. It's dated 5/8/89.

MR. GOLDSTEIN: Yes. Just to explain for a second, you wonder why is that permit issued to the Water and Sewer District in Union County rather than to the project. It's because we had to get the permission while we

were in the planning stages of the project. In 5/08/89, this was more than a glimmer in our eye, but the plant construction wasn't even underway yet. This was all at the very beginning. We wanted to say here's our idea. We want to get together Union County and Lancaster County Water and Sewer District and work together to be able to supply water.

In order to do that, we had to get South Carolina's permission to take the water out of the Catawba and ship it over to North Carolina and out of the Catawba river basin. That's why it's dated 1989. That's why it's not issued to Catawba River Water Supply Project, but rather to the underlying joint venture partners.

THE COURT: I think you've already answered the second question.

MR. GOLDSTEIN: Yes. You asked it at the very beginning; and that is, do they get it from anybody else? No. They only get it from us.

Then the third is does the water supply project get direct authorization by either State to effect transfers itself or the transfers effected by Union County and Lancaster County Water and Sewer Districts? The question has both a technical answer and a pragmatic answer; that is, technically, for the reason I gave you, the original permit was to the joint venture partners, but it was an operating join venture and lots of the subsequent permits of these are

listed at the first page of Tab 1. Ever since, since the plant was built, the water supply project came into being.

You asked for the permit and we gave you the permit. Question 4, the sort of the legal status of the entity. It's a joint venture, and so it's a classic joint venture in the sense of joint venture law. It physically, the assets that it owns are physically in South Carolina, but it was formed under the laws of South Carolina and North Carolina. Legal opinions had to be issued on its legality as to both states, because it has a North Carolina unit of government as a participant and South Carolina special purpose district as a participant, and so it has to be -- it has to operate consistent with the laws of North Carolina and South Carolina. As one example, it complies the Freedom of Information laws of both states, but it's not a corporation. It is a classic joint venture.

THE COURT: What law of government under the joint venture agreement?

MR. GOLDSTEIN: I think that disputes under the agreement, so for example, if the joint venture participants have a dispute, I'm not sure the answer to question. We would pull it out. My bet is it would be South Carolina. I don't know. This is my colleague, Mr. Sheedy, who from the very beginning for the 20 or so years of this, has been involved.

MR. SHEEDY: Just to keep the record clear, James Sheedy also appearing on behalf of the Catawba River Water Treatment Plant. Practically, an extensive effort is always made for compliance. So for example, when North Carolina is more stringent, we meet the requirements of North Carolina.

As to any dispute that pertains to the assets that are located in South Carolina, going by state law, South Carolina state law applies. As to any disputes with respect to issues on the other side of the state line that are state law issues, North Carolina law applies, and there is in the joint venture agreement, and I don't remember the paragraph right now -- here it is.

It's on page 48 and it's Section 19.5. I'll read it real quick if Your Honor doesn't mind. Except to the extent that Union County is governed by the laws of the state of North Carolina, this agreement shall be governed by, construed, interpreted under, and enforced exclusively in accordance with the laws of the state of South Carolina. I hope that's responsive.

THE COURT: Thank you. It makes sense, since it was located there.

MR. GOLDSTEIN: That's sort of my factual backdrop for the legal points that I wanted to make. The legal point that I want to make is that I think this

intervention motions can actually help with being resolved by analogy federal and civil procedure 19A 1B, and I think that's true for two reasons. The first is, as South Carolina itself points out, with frequency in dealing with the question of the scope of its complaint, the Supreme Court's jurisprudence says while the Rules of Civil Procedure aren't binding, you should take a look there for helpful guidance.

Obviously, we have an overlay in case law that's specific to the question of intervention, although as was pointed out with Mr. Phillips, it sometimes not that illuminating. The thing I think is interesting and I came to the conclusion in thinking about it some more is that there is a great deal of consistency between that Rule of Civil Procedure and the point of the Supreme Court's case law.

The Rule provides, 19(A)1(B), I won't quote it, but there are two requirements in this form of intervention as a matter of right, that the punitive intervenor obviously should have an interest in the case and second, the absence of the participation in the case would impair their ability to protect their interest. I think it's that second requirement that links up with the point of the Supreme Court's case law that the sovereign, generally speaking, represents the interest of its citizens. I think with represent to Rule 19 what one would say is that in the ordinary case and in most cases, the absence of the citizen

of the state in an original action of the Supreme Court doesn't impair the citizen's ability to protect their own interest, because the sovereign is responsible for protecting their interest.

I think the 19(A) provides a helpful framework for deciding this, and the reason I point to it is, I don't think it's really any question at all if one were to think about this in 19(A) terms; that is, the Catawba River Water Supply Project would be allowed to intervene in the case, because we have a relatively straightforward point that's simply correct; and that is, in this case, South Carolina has an interest in limiting interbasin transfers within North Carolina and, in general, limiting North Carolina's consumptive use.

Put interbasin transfer entirely aside. Remember the use by Union County are roughly between 10 and 13 million gallons a day of water from the Catawba River through the Catawba River Water Supply Treatment Plant. About 5 million gallons per day, roughly speaking, is interbasin transfer. Union County gets a bunch of water from us, some of which is interbasin transfer and some of it isn't. Some of it makes its say through the eastern part of the Union County and out of the Catawba River basin and some of it is consumed in Union County within the Catawba River basin.

South Carolina, in this case, has a substantial interest in limiting that. It thinks that folks in North Carolina should use less water from the Catawba River. It has explained in characterizing the complaint that it's concerned not just with interbasin transfer; that is, taking water away from the Catawba River and taking it towards another river basin, but just general North Carolina's consumptive uses. That's during time of drought and non-time of draught.

South Carolina, though we're in the state of South Carolina, and though we are licensed by the state of South Carolina, has a significant interest that it is expressing to you and intends to litigate in limiting our operations in that respect.

Conversely, North Carolina has a significant interest in maintaining the high level of flows above the border. That's what it expresses as its condition. It says that in a variety of places, but the one that comes came to me most directly was at Page 1 of their response, State of North Carolina's response, to the motion of Charlotte's intervening. It's just a sentence. At .1 on Page 1 of that response is the state of North Carolina agrees with Charlotte that the State must represent the interests of every person who uses water from the North Carolina portion of the Catawba River basin. That's their focus, as well.

That is -- that just takes the case as it exists right now.

THE COURT: Why would North Carolina have an interest in preserving your right to transfer of water from the river back up into Union County?

MR. GOLDSTEIN: I do think, to be honest, it has some interest there, but the way that this case is structured and likely to play out is going to involve volumes of water that must cross the state line in times of drought and times of non-drought. I'm not here to deny that the folks in North Carolina, in the North Carolina Attorney General's Office, have some interest in protecting the use of the citizens in Union County. It is an interest that's substantially diluted, if you will, because the structure of the fight of these cases really does involve the volume of water that has to make its way into South Carolina. Their concern is by far, and they express it in answering the motion to intervene from Charlotte, is the above border flows.

The other thing I would say is that North Carolina, of course, while it's true it may have some interest with respect to the transfer back to across the state line for the folks who are in North Carolina, has a contrary interest to ours when it comes to all the folks in the Lancaster County Water and Sewer District in South Carolina. They want to maintain high levels of flow in the

state of North Carolina, which, as South Carolina points out, zero sum that the body of water that comes across the state line and is used below the state line by the folks in Lancaster County and the folks -- the Lancaster County Water and Sewer District supplies. There is significant adversity by both states as to portions of what we're doing.

THE COURT: Except that the latter portion is an undifferentiated portion. It isn't as though there's two channels of streams in which one --

MR. GOLDSTEIN: That's true, but it is important notwithstanding it undifferentiated difference, because the question is look, Catawba River Water Supply Project can't North Carolina protect you? That's the question. Given that they have got an interest in Union County getting that water through, even you're sitting in South Carolina, are you really effectively protected by North Carolina and isn't that good enough, to which the response is not so much.

We have a permit to take water out of the river and North Carolina is adverse to our system, some significant part of the water that we take out of the river. It's the case that if you wanted, you could sort of split the baby at the Catawba River Water Supply Project and say well, South Carolina has a concern about some of it, and North Carolina has a concern about the rest of it.

But my point is that the Supreme Court's case law says we have a special rule that keeps you from intervening in cases; and that is, somebody is there to take care of you. Both of the people who are proposed to take care of us in this case are adverse to us in part. So there's not anyone. The question is not withstanding that we would otherwise satisfy Rule 19 or its common sense equivalent, is there somebody that ought to just take our place and service our proxy and protect our interest? There is no such person. There's nobody out there that's sort of parens patriae to us.

Now, that said, the point that you asked Mr. Phillips early on is okay. With respect to your interest, I can kind of see that. Am I opening a sort of Pandora's box when I make you a party defendant to the case? Am I opening the door to you taking about it, if you were to go back to the map, if you were to say am I going to get some brief that says from the Catawba River Water Supply Project that says, you know, there's an interbasin transfer from the area around Hickory to Statesville, North Carolina. Is the Catawba River Water Supply Project here to get into the weeds of this entire case to talk about, you know, interbasin transfers that have nothing to do with us and water levels that have nothing to do with us? I think both as a legal matter and as a pragmatic matter, the answer to that question

is definitely no.

I think you can limit our intervention. I think that's what the Supreme Court's case law says. When you pointed to the New York City, New York examples, the Kentucky example, the Supreme Court is saying that we have to respect the things that you are subsidiary to the sovereign, and the sovereign represents your interest. You don't have independent standing. The Supreme Court's equally clear, I think, that when somebody isn't there for you, to that extent, you can participate in the case.

The pragmatic answer to that question is that even if that weren't formally true under the rules, we accept it. That's what we're here to do. We're here to focus on the things that directly affect us, and that's what we propose that you would hear from us about, and so that we would sort of self-condition our participation in the case on that constant. You do not have that concern from us.

The other pragmatic piece of this that I mentioned, and I will just briefly mention again, is cost. There's a very serious concern here; and that is, this is two small counties that are involved that don't have a ton of money, are not here the muck up the works. They're just here to make sure that you have the benefit of their knowledge about the water and what's going on in that part of the River, and the people who get water from it, and the

consequences of interbasin transfer, and somebody to stand up for their interest. They have no desire whatsoever to get more deeply involved in the case.

I think the final question that I wanted to answer is okay, why not an amicus? I think the answer to that question is what is the difference between an amicus and a party supposed to be in this context? I don't quite understand the logic underlying South Carolina's position that we ought to participate as an amicus.

An amicus, classically speaking, is a friend of the Court, who has some different perspective. South Carolina's legal position is that we don't have a different perspective. We effectively don't have the right to present and argue that is contrary to South Carolina's, because South Carolina is the sovereign here and it stands in our shoes.

I think the limited things that draw a line between us being an amicus and a party are this; first, discovery from us is going to be much easier if we are a party, not because we're going to be petulant. That is not my point, but rather third party subpoena practice, the original action Special Master Practice is complicated enough. Addition third party subpoena practice adds a layer of complication that's totally unnecessary and I think a distraction that would not be helpful to anyone.

I think the place for you to look to that is South Carolina when it address you in its proposed case management plan says look, we think the schedules that have been set out here are pretty aggressive to begin with, but they are going to get much, much more substantial and more delayed if the Catawba and Duke are not in this case, because that's going to add additional complications of third party practice.

The second thing is that we do have distinct legal arguments when it comes to our interbasin transfer, our withdrawals from the river. That's why we should be a party rather than an intervenor, not to hold up a settlement in any respect. Remember, we rely on the States to permit us, and if the States decided to revoke our permits, that have processes to do that anyway.

Our point again is not to muck up the works, but we do have distinct legal arguments that go to an interest in the outcome of the case. That's why Rule 19 exists, because in every case when there's an intervenor, you could always say, you can be an amicus, but the rules draw the line and the Supreme Court's case law says no. You can be a party if you have no a definite interest in the case.

THE COURT: You said legal argument. Are those the ones you've talked about or something else?

MR. GOLDSTEIN: Well, I sure there will be

things that we haven't mentioned yet. The things I talked about so far are why we can't be protected. The reason I can't sort of lay out all of our points is because South Carolina makes the point that it wants to engage in the, as what Mr. Phillips called the classic sort of sweeping equitable apportionment of the river. So it will -- we'll know precisely what it is we have to say as soon as South Carolina -- as soon as either you decide to more narrowly construe the complaint or South Carolina has as a part of the an elaboration of the complaint if that's allowed, it details further what its concern is about drought, non-drought, about different kinds of flows and interbasin transfers.

Our legal arguments will go to our consumptive use of the water is an equitable one and we haven't talked about that at all. It is very strange for you to hear from us as an amicus about why our particular use when the very definition of it is it's a distinct interest of ours that will be directly effected by the decree, why it is that you hear from us in that defense.

THE COURT: Let me ask you this, just in conclusion in some of the things you said. It seems to me probably the strongest interest that you have is persevering your ability to make the transfer that's authorized by your firm.

MR. GOLDSTEIN: The only thing I would say

is not merely interbasin transfer, but the shipments of water, because a lot of our consumptive uses are not interbasin transfers.

THE COURT: Most immediately is the one that's in Paragraph 21.

MR. GOLDSTEIN: That's right. I don't mean to disagree with you. It depends on if you were to say I'm concerned here with the text of South Carolina's complaint, not the broader implications of it. That's Paragraph 21, while Union County uses roughly on an average 10 to 13 million gallons per day, South Carolina has pointed to one very particular one, which is the 5 million gallons per day of that 10 to 13 that is interbasin transfer.

THE COURT: The only reason I mention that is not -- what I'm trying to ask you some what complicated. What distinguishes your client from the average user along the river are two things; one, your interstate nature; and secondly, that the your transfer is a complaint as something that South Carolina appears to be seeking.

I was referring to the later thing. Water affects everybody on the river, because if you look to the broader you say okay, well more water to North Carolina and less to South Carolina, or the more water to South Carolina and less water to North Carolina. Those are the kinds of issues that are bigger that presumable at a minimum, the

parties will need to contend with, but depending on the scope again of the complaint, but that are harder to put your client as a uniquely interested party, even if one accepts your interstate character, because I think it's fair to say that yes, your interests are by represented by North Carolina represented by South Carolina and some ways adverse for the same reasons. Right.

For the same reasons you're represented by North Carolina, you're adverse to South Carolina. Accepting that without qualification would put you in a position of being able to challenge everything up and down the river, logically. It wouldn't limit you to what affects you directly. That's why I think the stronger connection is the one that's more direct, whether it be your South Carolina direct or interbasin.

I guess that's sort of my question to you is, doesn't your position that you are adverse to both parties and therefore uniquely situated, prove too much? Doesn't it allow you to then get involved in the entire proceeding in the way that seems inconsistent with the flood gate issue that if you can do it -- the extent to which you're adverse to anybody indicates other people are too.

MR. GOLDSTEIN I understand. I guess I have two reactions. Let, me start with your conclusion; that is, the question in the Supreme Court's case law isn't can you

find somebody in the case that you're adverse? Charlotte's clearly adverse to South Carolina. Lancaster City is clearly adverse to North Carolina. The question is, is there somebody in the case, one of the sovereigns, that protects your interest?

THE COURT: In toto?

MR. GOLDSTEIN: I think so. I think that the Supreme Court's point is that a sovereign represents each of its citizens and therefore, rather than having each of the citizens come in and muck up the case, the sovereign represents that citizen's interest in toto. That's, I think, why it is significant that we do -- we are crosswise with both sovereigns.

The second is, I do think that you're right that it's significant that South Carolina points a finger at us in the complaint. I think it's significant of both, because it is clearly a narrow and focused part of the complaint. I think it's significant because South Carolina intuitively, since we're in South Carolina, would be the sovereign representing us, but it's complaining about us.

the thing I would say however, is I would treat our request intervention as resting on the cumulative set of factors; that is, that particular IBT. The fact that we are crosswise with the different states, I think -- and that we are a group that will be significantly affected by the case.

I would stack those on top of each other. Rather than breaking them apart. I think it's the combination of them that distinguishes us.

I don't think it's a combination that distinguishes us in a way that should trouble you in that oh gosh, now Catawba thinks it has these cumulative interests and so we can complaint about the general equitable apportionment of the river. I don't think the latter follows. I think that our interest in the case, is still limited to what happens to us, and that general apportionment of the river is the concern of the sovereigns.

The question of whether our particular withdrawals from the river and our particular interbasin transfers are authorized are what do genuinely concern us and what have, we think, the legal right to talk about in the case. We have no desire to reach more broadly and no right to do so. Thank you.

MR. BARTOLOMUCCI: Good morning, Your Honor. My name is Chris Bartolomucci. I represent the City of Charlotte in this matter. There really is no question about the magnitude of Charlottes's interest in this case. I think the clearest item to point to is the fact that Charlotte is in possession of an IBT certificate, which authorizes it under North Carolina law, to execute interbasin transfers of up to 33 million gallons per day, and this is by

far the largest IBT certificate in the State.

Of the three authorized, of the three entities authorized to execute IBT's above 2 million gallons per day level, we have 33. Concord and Kannapolis has a certificate for 10 and Union County has a grandfathered authority to implement IBT's above 5 MGD.

This certificate that Charlotte possess really puts Charlotte squarely in the crosshairs of South Carolina's complaint. There's a present dispute over how broadly South Carolina's complaint should be construed, but it's clear to everybody that the central object of their complaint is the IBT's in North Carolina and so that really means what they're complaining about, in very, very large part, is the Charlotte IBT.

Since Charlotte's interest, in my view, is quite clear, the only remaining question really is should Charlotte be denied intervention based on a special rule that would say that North Carolina's presence in the case is a sufficient reason for excluding Charlotte from a party status? I think it's helpful to analyze that question in light of the most pertinent precedent from the Supreme Court that the New Jersey vs New York State and New York City case.

In that case, as I'm sure you well know, that the Court denied the stay of Philadelphia's motion to intervene, but I think on balance in that opinion is actually

quite support of Charlotte's motion to intervene. One of the arguments that Philadelphia made was the City of New York is a party to this case. Why not us? What the Court said was if in effect New York city is a proper party to this case, because she is, quote, the authorized agent through the execution of the sovereign policy and, quote, that threatened injury in the view of state. And those words describe Charlotte exactly.

We are the authorized agent under our IBT Certificate to execute the interbasin transfers at the 33 MGD level and these are, in large part, the IBT's that South Carolina is complaining about.

I think it's also important to note that in the New Jersey case, Philadelphia's motion to intervene was opposed by its home state, the Commonwealth of Pennsylvania. That is not the case here. Obviously, North Carolina and the City of Charlotte do not see exactly eye to eye on every issue as reflected in the responses that they lodged to our motion to intervene, which I think actually goes to support the point that our interests are not exactly aligned.

The bottom line is that North Carolina does not oppose Charlotte's intervention in this matter. I think that's a very significant fact when you look at all of the relevant Supreme Court cases. In the Texas vs. Louisiana case, you had a successful intervention by the City of Port

Arthur, Texas in an original action involving a claim to an island and Texas did not oppose the motion. In fact, no party opposed it and the court granted it without any problem.

Similarly, in the Arizona vs. California, case there was a successful motion to intervene by Indian tribes. That motion was objected to by the state parties in the case on the grounds that -- the United States is a party in this case and they adequately represent the Indian tribes' interest in this matter. The United States didn't oppose the motion. That was after the Supreme Court pointed to it and in saying that intervention was proper.

In the New Jersey case, the Supreme Court explained that the doctrine that they were applying, that the parens patriae principal is a consideration of what they call sovereign dignity; that is, it's inconsistent with the notions of the sovereignty for a city to appear in a case over the objection of its home state and that, I think, is an objection that South Carolina doesn't have standing to make, where the state of North Carolina is fine with Charlotte's intervention. I don't think that South Carolina really is in a position to claim that there has been an affront to sovereignty to have Charlotte in the case.

THE COURT: Let me ask you this about North Carolina. North Carolina said that it will

adequately protect will Charlotte's interest. Although I think you're right to say there's nothing in the response that opposes, there's also nothing in the response that encourages Charlotte's participation. If anything, say well we wanted to correct your point that you are asserting, your motion that North Carolina wouldn't adequately protect Charlotte's interest.

I guess I have a couple of questions about that. One, is North Carolina's position on that issue dispositive by virtue of it being a sovereign? In other words, is it even appropriate to entertain a dispute between Charlotte and North Carolina over whether or not North Carolina will adequately protect Charlottes's interest? That's the first question.

The second one is, to the extent that North Carolina is wrong about that, first of all, how is North Carolina wrong about that, if at all? Then if it is wrong about it, doesn't that then raise the specter of the intramural disputes that aren't supposed to be the purpose of intervention? In other words, a dispute between you and your own state about how much water Charlotte should get, for example, if that is a dispute. I don't know what the dispute is.

MR. BARTOLOMUCCI: To start with the first question, which I think is, is it dispositive that the North

Carolina's view that it does adequately represent Charlotte's interest and I think the answer to that is no. If there's anything dispositive in the position taken by North Carolina, it should be that the bottom line is they don't oppose our intervention motion. The case law, I think, supports that in Texas vs. Louisiana, there was no obvious reason why Texas couldn't have represented the City of Port Arthur's interest in that matter. In that matter, Port Arthur was allowed to intervene.

In Arizona vs. California, the argument was made that the United States could adequately represent the Indian tribes and that wasn't really denied by the Supreme Court, but the Supreme Court said nevertheless, the United States doesn't oppose the tribes' motion and furthermore, the tribes have an interest that would clearly satisfy the standard for permissive intervention.

If you look at the case law it seems like whether or not intervention is opposed by the parties said to adequately represent the would be intervenor, seems to be a more important factor than whatever it does. That would be my answer to whether North Carolina's position is dispositive.

Your second question was, I believe, is North Carolina's position correct. Our answer is that Charlotte's interest overlap with North Carolina's, but they

are not, in fact, identical. We set out two reasons in our intervention papers. The first is that the state of North Carolina has responsibility for representing all water users along the Catawba within the state, and there are lower Federal Court cases, a Circuit Court case and District Court case, decided in the intervention context, decided in the context of water rights disputes and in these cases -- and I'm referring to South Carolina vs. Wilhold and Alabama vs. US Army Corps of Engineers.

In these cases which involved vary similar contexts, the Court's recognize that when the argument is made that one sovereign adequately represents a smaller entity, it's appropriate to consider the scope of the sovereign's duty. These courts made the point that the parties said to adequately represent it would be the intervenor, had responsibility for representing all interests along the river, whereas the would be intervenor was only representing downstream interest.

That's exactly the situation here. Charlotte sits on the border between the two Carolinas. Our interest is exclusive that of a downstream user of the water, and we come to this case with the intent of defending the withdrawals, consumptive uses and IBT's that we do at bottom of the North Carolina portion of the Catawba River.

There are other populations north, that is

to say upstream of Charlotte, like the city of Hickory, the City of Marion that have -- that the state of North Carolina will have a duty to look out for and we don't -- we're plainly here to represent our interests.

THE COURT: Why wouldn't those cities have the same right as Charlotte? Putting aside the size and the quality issue, wouldn't that logically mean that all upstream users and all downstream users and all midstream user would have the interests that are separate from North Carolina's local interest and not all those users interests in the overall interest in the state?

MR. BARTOLOMUCCI: I think the question goes to the flood gates point. The fact is, Charlotte is in a class by itself. Because her size, we are far and away the largest municipality in either state. We serve a population of almost 800 thousand for our water supply and waste water treatment services. Not only are we the biggest, we have by far the largest IBT certificate.

These other municipalities upstream of us don't have IBT certificates. The only other certificate user of water in the state are the cities of Concord and Kannapolis have a joint MGD certificate. On a certificate basis, there are only two certificated users of water and we have by far the largest certificate. I think Charlotte's size and IBT certificate, the size of the IBT certificate are

a sufficient basis to distinguish us from the other users, who, of course, have not moved to intervene at this point.

THE COURT: Who are the other certificates?

MR. BARTOLOMUCCI: The City of Concord and Kannapolis. In 2007, I believe, the North Carolina Environmental Management Commission issued a certificate authorizing 10 MGD for the those cities. Interestingly, that 10 MGD certificate has not been implemented or put into effect yet, and, as we discussed in our opening brief, it's entirely possible that Charlotte will end up being the body that actually effectuates that 10 MGD of interbasin transfer. Charlotte has been in discussions with Concord and Kannapolis about whether Charlotte would be responsible for carrying out those IBT's.

Not only does Charlotte have a 33 MGD Certificate in its own right, but it's entirely possible in the future Charlotte would be the entity that's actually carrying out the 10 that Concord and Kannapolis have.

Union County has a 5 MGD authorization, but it's not based upon a certificate. That authorization comes through a grandfathering. Other users in the state are authorized to execute IBT's so long as they are under the 2 MGD level. That's the minimum threshold that you can do without some kind of specific authorization.

Of the specifically authorized users, there's a total of 48 MGD. Charlotte had 33 of the 48. It might well end up carrying out an additional 10, which would be a total of 43. That is really how we would distinguish ourselves from other municipalities along the Catawba River.

I have one more point I want to make in terms of how your interests are not identical with that of the State of North Carolina. Charlotte's interest includes fully supporting the comprehensive relicensing agreement or CRA. I think maybe that is not exactly what Mr. Phillips said. He may have said that Duke was the only party that wanted to four square support the CRA. Charlotte also is fully supportive of the CRA.

We are different than the state of North Carolina in that we do not have obligations like the State does understood section 401 of the Clean Water Act. That provision of the Clean Water Act says that in order for a federal license to issue for discharges into navigable waters, and that is the very kind of license that Duke now has and seeking to be relicensed to have, in order to have such a federal license, the State must make a determination that the discharge will not violate federal water quality standards or state water quality standards. Because of that Section 401 obligation and because North Carolina has not yet made it a determination that the various flow and regimes set

forth in the CRA do, in fact, comply section 401, North Carolina has reserved authority under the CRA to execute its 401 responsibility. There's a provision in the CRA, which I think is helpful, and with your permission, I would like to give this to you.

This is Page 5 of the CRA. It's the recitals provision. I wanted to draw your attention to the first whereas clause, which says, the parties understand that certain governmental parties have independent statutory responsibilities processes that may result in mandates that are not consistent with the terms of this agreement; that it is nonetheless necessary to preserve the integrity and independence of those responsibilities and processes. This agreement specifically does so.

It does so in a subsequent provision that we've quoted in our briefs. That's Section 19.3. This whereas clause is really talking about North Carolina's Section 401 responsibility, because they have federal law -- duty to make a determination under Section 401. North Carolina, at least at this point, is not able to give bottom-line approval to the different flows and regimes in the CRA. That may happen at a future point, but it has not happened now.

While Charlotte is able to fully endorse the different flows and regimes in the CRA, that's something

that North Carolina, by the terms of this CRA, is not able to do at this time.

THE COURT: A couple of questions about. One is, North Carolina says that in response to your motion that it doesn't believe that 401 impairs its ability to under the CRA. Then I'll let North Carolina speak for itself in a moment, but one doesn't read that and come away with that impression. They obviously meet federal independent statutory and regulatory requirements and needless to say, that has to be built in the CRA because of the whereas clause you say indicates, one must preserve the integrity and independence of those responsibilities, which are separate and apart from the CRA.

The first question is, I'm not sure I see that as an impediment to North Carolina's ability to be supportive of the CRA. It would distinguish it from Charlotte, unless there's some reason to believe, which there isn't from the record, that North Carolina intends to use that regulatory responsibility as a way of somehow --

MR. BARTOLOMUCCI: Just to be clear, it's not so much that North Carolina can't vigorously support the CRA. It can, because the CRA contains this clause for Section 401 responsibility. The point is that the various agreements embodied in the CRA as to minimum flows and protocols in the event of drought, the substance of the

document, it's possible that North Carolina, in exercising its 401 obligations, would have to come along and say we can't support that. That's inconsistent with our duties under 401, whereas Charlotte can advocate for the things that were agreed to within the agreement, North Carolina has to have this overlay reservation as to 401.

THE COURT: I guess, but I guess my first question is, that's really more than anything of a theoretical possibility at this point. Obviously, the State has complied with that requirement. Is it anything more than a theoretical possibility that North Carolina could stand in the way of uses or require obligations like the Clean Water Act and the second question is, even if there were an obligation that North Carolina found itself obliged to comply with, that obliged it to take advantage of the clause and say well sorry. We can't enforce the CRA because it just came to our attention that there's this violation of the Clean Water Act.

How could Charlotte then stand in the way of that? I mean, Charlotte's position couldn't be well, you should just go ahead any way; right?

MR. BARTOLOMUCCI: Right. First of all, as to the first question, I wouldn't characterize the potential difference of interest as theoretical, but I would say it's a potential divergence. Because North Carolina has not yet

exercised its 401 responsibility and has not made a determination as to the various provisions of the CRA, we don't know now whether they would say that there was any problem with the CRA. This is something that's lurking and I would say more than theoretical, but hasn't occurred yet and possibly would not occur if they were to make a Section 401 determination that the CRA has no problems with North Carolina State law or with the Federal standards, then this argument wouldn't be available to us.

As to how Charlotte could therefore continue to defend the terms in the CRA, if North Carolina concluded there was a Section 401 problem, the answer to that is North Carolina doesn't have the final word on whether those 401 problems actually exist. If they were a matter of State law, for example, if state law gave rise to the problem, Charlotte, through other parties, could be able to urge change in State law or could seek judicial review of North Carolina's 401 determination. It's possible that North Carolina could be wrong if they find something problematic within the CRA.

That would come out either in a Legislative process or some kind of judicial review. My answer to that question is, North Carolina does not have the final word on whether there would, in fact, be a 401 problem with the various agreements within the CRA.

THE COURT: My question was relating to the things you said earlier about the New York City case. North Carolina argues that New York City was different. You made a good point that the language in New Jersey vs. New York was very adaptable to your situation in the sense of being the object or the instrument of the injury or the object of South Carolina's relief sought, but New York was named as a defendant. How do you contend with that distinction?

MR. BARTOLOMUCCI: Well, it was named as a defendant, but I don't think that it answers the question whether Charlotte should, therefore, be allowed to intervene. I think both pose the same fundamental question of, is this entity a proper party defendant. The language that I pointed to was language that the Court pointed to or used to explain why Philadelphia was not allowed to intervene.

The Court said Philadelphia, New York City is the authorized agent for the execution of the sovereign policy and said to cause injury to New Jersey and you aren't.

THE COURT: The Court also said in the next breath that New York City is a party.

MR. BARTOLOMUCCI: True enough, but there are -- we don't rest our position solely on the New York case. Texas vs. Louisiana establishes that cities are permitted to intervene in original actions, especially

whereas here the home state that is not opposed to intervention. You pointed to language in the Indiana vs. Kentucky case, which I agree is further supportive. That language that you recited indicated that where the plaintiff is seeking injunctive relief against you, you ought to be allowed to be in the case.

When South Carolina is seeking to stop interbasin transfers, they're really looking for injunctive relief against Charlotte. It's Charlotte that has the certificate authorizing 33 of the 48 MGD's of IBT's at issue. In a very real sense, Charlotte is the principal target of the complaint and the party against which the relief would really be felt.

If I could make just one last point about the amicus participation. I don't want to take up more of your time, but it does seem to me that this is an equitable apportionment case and in these kind of cases, decisions, final decision, is made based on the equities and therefore, Charlotte needs to have party status in order to develop the kind of factual record of the equities that would justify and defend our current and projected water uses consumptive uses, and IBT's.

This is not like the kind of typical Supreme Court case where there are two discreet questions presented in putting your briefs and you go home. This case

is all going to be about developing a factual record that demonstrates where the equities lie and in order to do that for Charlotte, we really need to be a party to have the ability to shape such a record.

THE COURT: I've read North Carolina's brief, but certainly now would be an appropriate time, if North Carolina had something to add, and then we can hear from South Carolina.

MR. GULICK: Your Honor, I'm Jim Gulick from the North Carolina Attorney General's Office. I don't think I have much to add other than what was put there. We deliberately, the State of North Carolina deliberately, did not take positions with respect to these. I believe Your Honor sees the competing issues involved with respect to -- one thing I think I would say, with respect to Charlotte's motions, because they are in possession of a great deal of information that can be of great use to the Court.

On the other hand, we are not interested in seeing a whole bunch of interventions in this case making it more complicated and prolonged. We believe, it's certainly within your authority to appropriately eliminate involvement to where it is helpful and keep it away from the hands where it is not.

The State of North Carolina issued the IBT to the City of Charlotte and intends to defend it. It

believes it is not wrongful in anyway, but there's no question, as Charlotte's counsel advocated, that Charlotte is in possession of a great deal of information about its water use and the needs. It certainly has more information than the State has itself. If you have further questions --

THE COURT: Let me ask you a couple of questions. Again, feel free to demur to either of these questions. I don't want to force you to take a position. One question is just factual. I think Charlotte may have answered it for me.

I did wonder how many interbasin transfers are at issue?

MR. GULICK: As we will indicate later, we believe that South Carolina has fairly put -- well, certificates, I believe the answer you got was the correct one from the City of Charlotte. We do believe that South Carolina is putting at issue all interbasin transfers that are authorized implicitly or explicitly under North Carolina Statute. That, we believe, is the full scope of what South Carolina complains about.

THE COURT: Assuming that your position on the scope is correct, and then how many then -- assuming that one were to accept Charlotte's position implicitly or explicitly being the object of a judicial request to enjoin interbasin transfer, is it sufficient to give status as an

intervenor? Obviously, they have other arguments, as well. How many people would that be?

MR. GULICK: There is a limited number out of the Catawba. I do have a document that I was planning to distribute for later purposes that sheds some light on that. If you would like to see that now, I can do that.

THE COURT: It can wait.

MR. GULICK: I will be presenting that later on. It's the water supply study that was done in the licensing matter. It actually presents information about some other information that you have.

All of them are very small, under 2 million gallons. Most of them are substantially smaller than that, with the exception of Concord and Kannapolis, which is -- originally, Concord and Kannapolis asked for a larger interbasin transfer and were only allowed 10 million gallons a day.

It is correct, as Charlotte indicates, that has not yet been effectuated. The transfers have not happened. The permit has indeed been issued. It's the only other expressly permitted one that even gets close to the size of Charlotte's. The others were not expressly permitted. They were allowed in under the sort of less than 2 million gallons a day.

THE COURT: Another question I have is the

one you should feel free not to comment on. I appreciated North Carolina's position with respect to the City of Charlotte that North Carolina can adequately represent Charlotte. Does North Carolina have the position with respect to the argument, we'll call it CW for now, Catawba River Water District, that North Carolina, in fact, in so far as it serves South Carolina customers?

MR. GULICK: When this case reaches the point which there is an actual apportionment, we will be contending it should never get that far, but if it does, then North Carolina's is -- it's going to be complicated, because North Carolina's interest will be in insuring that an adequate -- it gets its fair portion of the river in that apportionment. The complicated relationship here, because as you heard, I have no quarrel with any of the facts that you heard from Catawba Water Treatment Supply Project. I have no quarrel with any of the facts that were presented.

Obviously, it's not adverse to the interest of North Carolina. That water has come to Union County out of that project. I don't think you would -- the State would be contending that Union County should not be entitled to take advantage of this arrangement that is made for water supply.

Unfortunately, the equitable apportionment does create a risk. On the nearer term with respect to

entitlement even to get an apportionment, North Carolina's view is how can South Carolina about the very -- especially in an equity case -- about the very thing that South Carolina does?

THE COURT: Fair enough.

MR. GULICK: If you have other questions.

THE COURT: I don't. Thank you.

MR. FREDERICK: Thank you, Special Master Myles. I'm David Frederick for the State of South Carolina. There's a lot of ground to cover and I'll go in any order that you want, but I think it's probably appropriate to start with two just general themes.

The first, is that no one has cited a case for private intervention or by legal subdivision in an equitable apportionment case that's been permitted by this Court. The closest case is the New Jersey vs. New York case, which I'll discuss at more length. I want to emphasize that what they are asking you to do, would be without precedent; there being no private party ever permitted to intervene in an equitable apportionment case.

The second theme of my presentation is going to be that all of the interests that have been asserted today, all arise at the remedy phase of the case. Until Mr. Gulick just spoke, no one had asserted any right or claim or interest in denying that South Carolina has suffered

substantial harm by North Carolina's overconsumption of the Catawba River. That's very important for you because both Mr. Phillips and Mr. Goldstein, and to a lesser extent Mr. Bartolomucci, were saying that their interests for their clients was for the limited intervention to protect a limited interest that their clients had in this case.

We would submit that any interest that they have, and I will argue that it is, in fact, protected by both States' interest in respective ways, only comes in in phase two of the litigation. Phase one of the litigation, as we will discuss today, is going to address the extent of harm to South Carolina by North Carolina's overconsumption.

What these entities want to do is, once you decide there has been harm and there needs to be an equitable apportionment and we go to a remedy phase, that the equities support their particular consumption or use of the river and that their particular uses need to be taken into account in the fashion of an equitable apportionment decree. Our central submission is, we don't think there's any case law to support their intervention at all.

But to the extent that you think there is any merit, even to a limited intervention, it is premature now to be considering that intervention, because no one has expressed any interest in denying South Carolina's development of a record of harm with the possible exception

of Charlotte and Charlotte's interest is fully encompassed by the State of North Carolina, as Mr. Hewlett said, they would represent Charlotte's interest with respect to those harms.

Now, with those two themes as the backdrop, let me first start with the law and the legal principles. The Court has made very clear, this is from Nebraska vs. Wyoming, that on many occasions it has said it has decided water disputes between states without the participation of individual claimants who, quote, nonetheless are bound by the result reached through representation by the respective states. That's from Nebraska vs. Wyoming, 515 US at 22.

The New Jersey case which you asked about and which my colleagues on the other side have discussed, is the closest on point case where there is an equitable apportionment and parties not sued sought to intervene in the case. There, the City of Philadelphia, although Pennsylvania had already intervened in the case, Philadelphia sought to intervene and the Court denied the intervention and the rationale is that a state would be judicially impeached on matters of policy by its own subjects. The Court, as you used the phrase intramural disputes, that comes directly, as you know, out of that case. What the Court was seeking to do was to avoid having the citizens of the state complaining about the policy decisions and matters made by the Sovereign that was represented in the original action.

The standard for intervention as a result is quite high. As the Court said there, a compelling interest has to be shown when the State's intervenor is already a party.

Now, I want to address the question that you raised earlier about New York City's participation in the suit because it's an important distinction that's got to be made here. In that case, New York City was sued by the state of New Jersey because it was the authorized sovereign agent for the particular acts of which New Jersey complained. As a named defendant, it came in to represent the City's interests along with the State of New York, because New York City was taking the acts -- and it was an injunction suit. What New Jersey sought to do is stop the City of New York from engaging in certain actions.

Now, Mr. Bartolomucci says the City of Charlotte is in a similar position because you're, in effect, complaining about what Charlotte is taking out of the water. But the answer to that is no, we're not. Their authorization comes from the State of North Carolina. We seek to stop North Carolina as the parens patriae on behalf of its citizens from authorizing interbasin transfers and improper and excessive consumption of the river.

An equitable apportionment classically involves just states because the states are bound by virtue

of the natural resource of the water to have the ability to control what the individual citizens and users of that state will do with the water. What the Court has assiduously avoided is having the kind of discussion that we've had here for the last two and a half hours over whether or not a permit in one particular context allows one particular user to do something or not.

What this case is about fundamentally is North Carolina's overconsumption of the river and whether or not there need to be some equitable apportionment of those river waters so that South Carolina gets its fair share. Once that determination is made, then it is true that the political process and the processes within each state will unfold to allow the complainants in South Carolina to say we get a certain amount of water, or for North Carolina to say we get a certain amount of water. But those are really properly directed at State Government.

Once the Court ultimately decides how the water is to be apportioned between the two states, it then becomes an intramural dispute for that state to decide who is going to have priority in use. As the Court would take into account, certainly existing uses. I'm not denying that. That is a classic part of the doctrine, but in terms of future use, which a decree by this Court equitably apportioning this river would do, that would be decided by

each state ultimately whose state political processes subjected to the state of politics and political system. That is how the Court has classically allowed these cases to unfold.

Now, reference was made to the Arizona vs. California case where the Indian tribes were permitted to intervene. Their intervention, I would note, first was denied and it was only after the case had progressed quite far along into the process that the United States was perceived by the Indian tribes not properly and fully to be representing the interests of the Indian tribes and at that point, the Indian tribes were permitted to intervene for the purpose of protecting their particular quasi sovereign interests in the water that was being allocated.

I don't think that case supports intervention at this point in the lawsuit. I don't think it supports intervention at all, by these particular entities, because Indian tribes, by virtue of their long recognized status within the American legal culture, really stand in quite a different position.

THE COURT: Right. Let me ask you a couple of questions. I think it might help. The first question is, it's one discussed. If it's really disputed, we should probably talk about it at the scope phase. You say rather categorically that the first phase of the litigation

should only involve, I think you said two things; you said whether North Carolina's overuse of the river has hurt South Carolina. Assuming two things; one, overuse and two, injury, doesn't that necessarily encompass Charlotte's client and Mr. Goldstein's client that their uses are equitable, or is that truly something that could only be considered at the second phase? If that's disputed, if that's beyond dispute, I guess, we can incorporate it into this discussion, but if it's really a scope question; you can put it off until then.

MR. FREDERICK: Let me try and answer it this way: The two states in meeting agreed to bifurcate the proceedings to look at the first phase; has South Carolina suffered injury. So the proposal will be the two states that South Carolina must meet its burden to show that it has been injured as a result of insufficient water flowing down to South Carolina.

THE COURT: When you said overuse, you weren't really meaning the inequitable overuse?

MR. FREDERICK: I was speaking in a more rhetorical way that our position is the State has overused. We say that in the complaint, but our burden at the first phase is to show that we suffered injury by virtue of the consumption occurring in North Carolina.

Now, it is true that an equitable consideration is going to have to be taken of everybody's use

of the river, but I think properly the cases that tended to do that at the remedy stage in determining how water is to be apportioned, how it is fair to constrain the rights of one state vis-vis another state and not so much at the harm stage. Our burden at the harm stage, as I read the Court's cases, is to show that South Carolina has suffered harm by virtue of the consumption by the state of North Carolina.

THE COURT: The claims that there would be no rigorous flowing into South Carolina if it weren't for the operations, I may be overstating, it would be much less of the river flowing if it were not and that's the reason why you ought to be involved. I don't know if the position extends to the first phase, because of that interest you should be involved in phase one, because has South Carolina really been injured if it is correct that -- there's the factual question that may or may not be involved. I just throw that out. I don't know how anyone would answer that.

MR. FREDERICK: Let me tackle that. I'll talk about the various points you made in more detail momentarily, but let me address this one first, which is that it is beyond plausibility for me to suggest the river isn't different by virtue of the dams. There is scientific evidence though that the flow of the river coming into South Carolina would be comparable to what it is now if there were no dams on the project. There will be at some appropriate

point some discussions of the relevance, actually the dams affecting the water flow. I'm not here to argue that the river hasn't been affected by the dams. It most certainly has and Duke has an interest in handling water, and that does affect the river flow. That's undeniable.

But I think the question is fundamentally from Duke's perspective not about consumption by North Carolina. Mr. Phillips did not try to defend Duke's interest, because Duke is a large consumer of the river water by simply ensuring that there's a proper flow so it can run the turbines of its hydropower facilities. If that's so, then Duke doesn't have an interest in the first phase because the first phase is going to be talking about consumption, not about the flow of the river. It will be working through the dam.

I would submit that even if that second phase, I want to reserve the State's argument that Duke's interest would, in fact, be quite limited as to flow, could probably better be represented by the FDRC or the United States acting through the Solicitor General or through a presentation of what Federal documents are available at that time. I don't think the case has been made here to support Duke intervening at this phase in the lawsuit based on what its stated interests are.

THE COURT: Okay. That makes sense.

MR. FREDERICK: Let me turn -- if there are any questions about the law, I would like to address those.

THE COURT: Let's do that next and then the question of law. I do have a question. I think the position is very theoretically sound but one needs to deal with the precedent, and that's what I'm having difficulty with.

First of all, New Jersey vs. New York, it's true that New York was sued. The rationale is in part that the sovereign agent wasn't asking -- you said here the authorization comes from North Carolina. Isn't that also true in New York?

MR. FREDERICK: Well, it's true, but the particular acts that were complained of by New Jersey, there were taken out specifically by the City of New York and the way the Court explained it, the alignment as it occurred for purposes of having injunction in that case was carried out. New York City was directly implicated and its acts were those acts that New Jersey sought specifically to enjoin.

THE COURT: Right.

MR. FREDERICK: This case is different, Ms. Myles, if we had sued Charlotte, as well as North Carolina. That would make it all fours with what New Jersey was.

THE COURT: In both cases, the actions that's being challenged, obviously, you're not speaking against Charlotte, but the transfer that you're challenging and then in the case of New York, the transfer that was being challenged was subject to opposition from the state in both cases; right?

MR. FREDERICK: There's no question that's true. There was -- the Court said there that the City was acting as a sovereign agent for the State. Now, I want to add a caveat to my answer, which is that I've not read the briefing in the underlying case or the Special Master's report in the case, but at least from the way the Court tees it up in the decision reported at 345 US, my impression is that the City of New York was engaging in very particularized conduct that New Jersey complained about, and that's why it was the defendant to begin with.

THE COURT: It was a diversion --

MR. FREDERICK: And the manner in which it was being diverted, which appeared to be something that the City had a direct stake in. More to the point, as the Court explained by not allowing Philadelphia to come in, the Court made very clear that it did not want there to be intramural disputes. It regarded it as a single difference that normally naming an entity as a defendant is a significant difference as contrasted with an intervention in the lawsuit,

and the latter part of the Court's opinion I think makes it quite clear that New York was forcibly joined as a defendant. I'm looking now at 345 US 375, was forcibly joined as a defendant to the original actions since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey.

It's a long-standing principal of our system that the plaintiffs are the master of their complaint. They can determine who to sue, how to sue, what claims they want to bring and, in effect, what the intervenors are seeking to do here is to intrude onto the decisions that South Carolina made as to how to fashion the lawsuit and we made very particular decisions for very particular reasons.

THE COURT: Let me ask you about that. The Court stated that in the case that -- let me just turn to the passage. Here it is. Page 375.

She was forced to join as the defendant to the original action since she was the authorized agent to the execution of the sovereign policy. That may be the reason why the State chose to join New York. It may not be. It may be as a factual matter why New York -- here's what I'm getting at; as well in the case brought by, I think it was Minnesota against the City of Chicago and the State of Illinois, there again, the City of Chicago was named as a defendant to the party because it was the authorized agent.

It was under direction and permission of the State of Illinois.

Here's what I'm getting at, the Court I'm not sure it's true that the State is the master of its complaint in this context because the Court always has the ability to deny the complaint in the first place, because a State has named an individual or municipality that is not properly a party to the case. My question is, what is the back argument in support of the distinction between somebody who is named, whose state decides to name as a defendant because they're the authorized agent of the injury and the Court hasn't allowed that because the Court in its discretion can say no; right?

MR. FREDERICK: That's correct.

THE COURT: The situation we have here where someone is arguably an authorized agent of injury, as Charlotte claims to be, and the State chooses not to name that entity as a defendant, that entity seeks to join as a defendant, what is the analytical difference between those two situations other than this referencing the case, which I'm not sure is totally dispositive?

MR. FREDERICK: That I think is answered on the previous page in the Court's opinion in New Jersey where the Court in denying Philadelphia says, quote, the City represents only a part of the citizens of Pennsylvania, who

reside in the Watershed area and then it goes on to say, if we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth.

The principle, the overriding principle, is one of parens patriae, which is that the State is presumed in the Court's cases to represent the interests of all of its citizens and by allowing some of the citizens to come in to fight for their particular state in the lawsuit, the Court's, in effect, tipping -- allowing a tipping of the scales to those who happen to have the wealth and wherewithal to be here seeking to intervene in the case as opposed to these citizens upstream on the Catawba, who also are taking water out of the river and affecting downstream users. I think the principle here is that North Carolina's job is to represent the consumers of North Carolina.

THE COURT: Just on a footnote, why wasn't that true in the case of New York, other than the fact that the state chose to name New York City as a defendant?

MR. FREDERICK: That is the difference. The particular relief requested in that case sought specifically to have the City's officers enjoined for the particular reasons that New Jersey wanted to enjoin them.

THE COURT: But the Court could have said

no. The Court could have said just what you just said. Because the state of New York -- if you follow the logic of the Kentucky/Indiana case, which was that if the State is enjoined even though the State doesn't contest the relief, you enjoin the State. Therefore, you don't need an individual defendant. That's a concept the Court is familiar with. If that's the rule, why then did it allow New York City, which was in the exact same position as the defendant, to be involved? One might argue it was because New York City was the authorized agent.

MR. FREDERICK: I think that is a principle. I think the second principle is that the plaintiffs are the masters of the complaint. I think that the third principle is that once two states have been properly joined as plaintiff and defendant in a suit which the Court recognizes original jurisdiction, it does allow for factors to be involved in determining whether or not intervention by municipality is appropriate or some other entity.

In the Texas case that Mr. Bartolomucci was describing, that case started out as the state versus state, but the interest ultimately was titled to land in Port Arthur. The Court allowed Port Arthur to intervene, even though the United States was the only adverse party, because the United States didn't oppose intervention by Port Arthur,

and its stake was directly related to the title decision that the Court was going to make in the case.

I'm not saying that there is a categorical rule applicable in all original actions. Our position is a narrow one, which is that there's no case cited in equitable apportionment cases that allow individual claimants to be involved in the decision over which state has paramount rights to certain amounts of water.

Yet the Court has only found that compelling interest in an equitable apportionment case since then that we're aware of for an Indian tribe, which stands in a different legal status to the States or to the United States. Here, I mean, there's no doubt given what North Carolina said today in its papers; it adequately represents the City of Charlotte's interest in terms of consumption. It authorizes that transfer after all. It says that the State says they will defend that transfer.

Our complaint only is that we will join issue with North Carolina as to the legality under the Federal Common Law of equitable apportionment of the transfer and other consumptive uses. That does not go and create the next step, which is that any IBT permittee acting as the agent for the State for purposes of taking the water out of the river, is entitled to party status in an original case. The State authorized those transfers. The State is held

accountable for these transfers, just as it -- in all equitable apportionment cases is held accountable for how much water its individual citizens consume by taking out of the river.

The Court, in the case in Nebraska vs. Wyoming, was quite clear in making that distinction so as to avoid having this Court serve as the arbiter of lots and lots of individual claims. Now, there is an illusion in the Maryland pipeline case where Justice White's opinion says we have allowed people -- individuals to get involved, but the only case that he cites in that opinion is the Oklahoma case, and that's quite a different case.

THE COURT: Very different.

MR. FREDERICK: Yes, it is quite different. It is important though to keep in mind what that case was about.

THE COURT: It was also a Rule 19 case.

MR. FREDERICK: It is, although I don't think that the Court anywhere else has applied the Rule 19 standard in quite the way Catawba River here argues. In fact, all the cases seem to point the other way, but in that Oklahoma case, it was certainly a different era where there was literally gunfire over the particular rights, the claims. The Court appointed a receiver to take control over the land.

THE COURT: It's very unique.

MR. FREDERICK: Thankfully no one here is resorting to such actions. We are in a different era, but our point is that for purposes of what this case ultimately is about, the State can adequately represent the interests of its citizens. I'll go through the particular intervention motions in any order that you want, but I'm ready to move on now unless you have a questions.

THE COURT: I have a question and that is, apart from the existence or nonexistence of precedent, what is the difference between a border case and a water apportionment case and for that matter -- I'm having a little bit of a hard time coming up with a principle basis that distinguishes, especially with water disputes.

MR. FREDERICK: Water dispute involves a discrete piece of land typically, where the determination is made as to how to draw the boundary. That is one where there's a discreet subset of interested parties, either those who claim title to the land or those who are asserting to deny their right of a particular entity to claim title to the land. Even in the boundary dispute cases, the Court is quite clear in saying ordinarily the rule is going to be that its duked out between the two states. The individual claimants might have a right as to the state once the boundary is resolved, but it is by no means permissive of intervention to allow any interested party to

be involved in that kind of boundary dispute.

THE COURT: Is that a compelling interest standard?

MR. FREDERICK: Yes, but, of course, compelling interests in various contexts can mean different things. In the pipeline tax case, for instance, it wasn't clear that the pipeline companies would be represented by any of the sovereign states that were involved in the lawsuit and the tax was being imposed directly on them. They had a commerce clause challenge to the application of the tax and their complaint was since the tax falls to us, we have to pay it, it's unconstitutional and the Court agreed that was a valid distinction, and the record in the case, as reported by the Court, doesn't make it clear that any state particularly represented any of the interests of those pipeline companies. It may have, but it isn't clear from the cases, the way the cases are recorded.

THE COURT: I have a question about that. Wasn't the argument of the Court over the fact that the interest that was held by the state, was an interest of the state as consumers, the other state, the plaintiff state? They were really -- the reason they had an interest in the case at all was that they were purchasers.

MR. FREDERICK: I think that there were -- there's a confusing aspect of the case, and that is as I have

read that case, I understood there to be two distinct ownership interests that were being complained about. There was the pipeline companies' ownership interest in the natural gas, which was being subject to tax and there was the individual states as consumer of gas, their ownership interest and so there were two clusters of owners of gas, if you will, both of whom were complaining about the way the tax fell on them.

The Court, I think, felt it was appropriate to have them all together, because they were representing this interest and it wasn't clear that the pipeline companies were, in fact, being represented adequately by the sovereign states. There were only eight states involved in that case. It wasn't clear they were being adequately represented.

I think that it is fair to say that the legal standard is a compelling interest. It is -- but I think it is also fair to say that on the particular facts, how that compelling interest gets played out is treated differently, and our submission is that the parties that are here, the intervenors here, seeking to become parties are basically standing in the sheets of claimants just like there are hundreds and thousands and tens of thousands of other interested claimants in the outcome of this dispute to determine which state is going to be apportioned what amount of the river waters. They just happen to be larger.

Our submission ultimately is for the purposes of how the law has played out. Size does not matter. Size does not give an entitlement to right to be involved in this suit where there is adequate representation and there's no compelling distinctive interest that would justify that participation as a party. That is certainly true at this stage of the litigation where the burden is going to be on us to show harm.

If I could go to Duke, I'll just start arbitrarily with Duke. The first point that I want to make is that some emphasis is made on the CRA, but the CRA specifically disclaims any interest in dealing with water rights. The point of defending the CRA, which Charlotte also makes a big point of doing here, I think is best answered by Page 6 of our opposition brief to Duke, where we quote section 39.9 of the proposed CRA, which expressly disclaims resolution of the water rights that are at issue in the case.

It says, quote, water rights unaffected. That's the subheading, water rights unaffected. This agreement does not release, deny, grant or affirm, any property right, license or privilege in any waters or any right of use in any waters. To the extent that the CRA has any application here, it expressly disclaims the ownership rights of the water or the rights to apportion the water, which is the fundamental issue that South Carolina has

presented in its complaint.

THE COURT: I don't think anybody is arguing otherwise. I think they're arguing that the CRA comes into play. It affects, I think, it affects, I don't mean to paraphrase, I hear them as saying that it has more of an impact on what -- certainly has an impact on what an equitable apportionment would take into account. I don't think anyone's saying that process is supporting the property or what the ultimate apportionment should be. I also think they're saying that to the extent that this proceeding causes a conflict, theoretically the terms of that licensing requirement they're under, that you take that into account, as well.

MR. FREDERICK: I think those conceptions are important conceptions to make actually because they underscore the relationship of the CRA to this lawsuit is actually quite tangential and would come in, at best, in the remedy phase and come in, at best, in the consideration of what equitable factors and what the historic uses have occurred with respect to the river, but they do not justify intervention, certainly at this phase in the lawsuit or a general intervention for purposes of contesting the extent of harm South Carolina has suffered.

I would also point out that it is a proposed agreement. It has not been entered into. It has

not been sanctioned by FERC. It is part of a FERC process that has not been finalized and it is, in effect, an effort by Duke to get up a large number of stakeholders and get them to agree in advance to what their position was, that it doesn't fundamentally go to the core question of the case, which is, which state should be given what portion of the water for its use and consumption.

Ultimately, Duke's interest, as Mr. Phillips said here, is that the water flow down the river and Duke has an interest in determining the rate of flow for purposes of its hydropower. Duke disclaims any interest in contesting how much water can be taken out of the river to the extent that there is an interest by Duke, it's disclaimed by counsel this morning.

I want to emphasize that the relief requested is not directed at Duke at all in this case. The relief requested by South Carolina is against North Carolina. That is an important principal here because ordinarily, where an intervention would be occurring, the relief, the special injunction or the specific declaration would be affecting the defendant in a way that is sufficiently tangible to justify the intervention.

THE COURT: You say relief sought here. That's Charlotte?

MR. FREDERICK: Yes, although can I add a

caveat to my answer, which is that at the end of the day, it may be that the other consumptive uses by North Carolina through appropriate conservation measures and through a lot of other factors that would go into an equitable apportionment decree might end up having no real effect on where Charlotte is right now. I think it's speculative right now to say what affect it would have. To the extent Charlotte's basic position is we are a big consumer of the river. There's no doubt that it has an interest in the relief. It is distinct from that of Duke.

That's not to say it supports intervention, because the State of North Carolina is the ultimate target of the relief sought to the decree that we will be urging the Court to impose. It's just different from what Duke is asking for.

THE COURT: I have another question, whether South Carolina in some right has taken a position.

MR. FREDERICK: An agency of South Carolina has taken a position with the CRA. That position has not been sanctioned by the Attorney General. Our position is that this lawsuit represents what South Carolina's official views are with respect to consumption of the river.

THE COURT: South Carolina doesn't have a position on whether Duke's license ought to be renewed?

MR. FREDERICK: Well, the CRA is addressed to a different cluster of issues. It directed to one aspect of the licensing proceeding. An agency of South Carolina has acceded to the principles of the CRA, but, as I said, the Attorney General's position on behalf of the State as the Chief Law Enforcement Officer of the state, is that the CRA does not affect the consumptive rights as between the two states; that it is speculative at this point, whether the CRA would have any bearing on an ultimate decree by the Court.

THE COURT: Uh-huh.

MR. FREDERICK: In other words, I want to try to make this as simple as possible, because it is a complex subject matter. I think there is an effort to make the CRA into something more than it really is in its relation to the lawsuit. That's for the purpose of amplifying the importance and the need for these various proposed intervenors to be parties to the lawsuit.

Our view of it is that the CRA by its plain terms doesn't affect the core of what our suit is about, which is consumption, and that to the extent that it will ultimately have some bearing on the water flow, that's something that can be gauged much later in the litigation.

Now, with respect to your second question to Duke, there is no statute that imposes any public interest obligation on Duke. Duke is in compliance with Federal law

and that is a very important difference. Last term the Supreme Court decided a case called Watson vs. Phillip Morris, where it expressly said that compliance with Federal agency dictates does not transform that entity, that corporation, into a Federal officer. There, the particular statute involved was the Federal Officer Removal Statute.

We submit that the principal is analogous. Duke is acting for its corporate interests. It is complying with Federal dictates when it accepts and applies for permits from FERC, but that does not transform Duke into an agent to the United States Government. The United States can speak for itself as to what public interests it deems to be the most important. But Duke certainly can't stand in the shoes of the United States for purposes of making those judgments and determinations.

I do want to make one other point about the CRA with respect to Duke, which is at Page 11 Footnote 5 of their reply brief. They acknowledge that, quote, there is no current dispute over the meaning of the CRA. If there are no other questions of me regarding Duke -- I do want to address the maximum/minimum flow point that Mr. Phillips made.

That fundamentally is a remedy decree part of interest and I did not hear him to argue that Duke has an interest with respect to its minimum/maximum flow provisions concerning consumption of the river. They simply have an

interest in ensuring that they can run their turbines efficiently, which is determined by their hydrologists to be at a certain minimum flow and the flow through flooding, I suppose, gets to be at a certain point, because we haven't gotten anywhere near maximum flow for quite a long time; that there would be some interest that Duke has there. But that would strictly be the remedy phase interest, not an interest that would be here, and that interest probably I will address the issue of amicus participation versus party status globally with respect to all three of the intervenors.

Now, with respect to Catawba, let me just start with the Catawba legal points that were made. Notwithstanding the reference to a district court case that involved Rule 19, we don't read the Court's cases as saying that the intervention legal standards are the same as Rule 19. I think that New Jersey vs. New York sets out a different framework and one that is appropriately more stringent because the exercise of the Court's original jurisdiction is done sparingly. The Court does frequently deny states and other entities the right to invoke the Court's original jurisdiction.

In fact, here, as you know, North Carolina opposed South Carolina's motion for leave. The Court granted the motion any way. I think the appropriate standard is really to look to the Court's cases, which we discussed at

some depth.

Ultimately, I think what Catawba is getting at here is wanting to involve itself in intramural disputes on both sides of the boundary to the extent that South Carolina's interest are to protect its citizens and their right to consume water. The state represents those citizens of Lancaster County who are users and consumers of the water.

To the extent that water is being taken out on the South Carolina side and transferred to the North Carolina side where Union County residents are consuming water, North Carolina can adequately represent those users. If there is any distinctive use or distinctive interest, any, I think it has to be measured by what would be the cost of the profit that the joint venture gets from extracting the water on South Carolina's side and selling it on the North Carolina side.

As I understand joint ventures, and I only got a copy of the joint venture agreement recently before the hearing, most joint ventures that I know split the profits equally or in some fashion are governed by contract. Ultimately, those benefits flow back to the citizens to each of the political divisions of the two states. I really don't think, notwithstanding the lengthy presentation we heard today about the way the permits work, that their interests really boils down to anything more than an effort jointly to

work out something that maximizes the interests of the citizens of those two counties.

THE COURT: What about the fact that there was another point made that one of the transfers South Carolina is concerned with is the transfer to Union County?

MR. FREDERICK: Let me address that, because we moved for a preliminary injunction and the Court denied that. The complaint seeks an injunction for purposes of determining what the equitable apportionment is. The injunction is no longer directed specifically to that transfer and the reason for that is that North Carolina in its opposition to the South Carolina application for a preliminary injunction specifically disavowed that very transfer on the North Carolina side. That's contained in Pages 3 and 4 of North Carolina's reply to South Carolina's request for preliminary injunction.

What the State said was, quote, there are no pending petitions with the NCEMC. That's the agency in North Carolina. Page 3 of the reply North Carolina replied to the South Carolina application for preliminary injunction. It's at the bottom of the page.

What the State says is that Union County has not taken further steps to pursue an interbasin transfer and has not entered a petition to NCEC, NCDNR, that's the environment agency, has been informed by Union County that it

is exploring options other than applying for a certificate for an interbasin transfer from the Catawba River Basin.

North Carolina made the representation that, in fact, the Union County piece of this puzzle has been taken off the table and that, therefore, is not a basis for an injunction specifically directed at that transfer. Now, on -- there is a permit on the South Carolina side that's still governing, but South Carolina controls that and South Carolina's permitting authorities are on that aspect of the case.

Catawba cannot assert the unique interest by virtue of that particular interest simply because of the representation made in the complaint, which was filed at the same time as the preliminary injunction and, therefore, were doing the regular abatement on information and belief and we were informed by North Carolina's response that Union County was, in fact, taking that particular IBT transfer off the table.

Respectfully, Ms. Myles, I would submit that that allegation in the complaint cannot be the basis for an intervention where it's been superceded by subsequent events.

THE COURT: It's not the permit that South Carolina issued?

MR. FREDERICK: No. It was the -- the

problem, as I understand it, is that what South Carolina had done was to grant a permit before the North Carolina IBT statute came into effect. That permit issued in the late 80's allowed for a certain amount of water to be withdrawn subject to a certain cubic feet per second flow rate.

What the North Carolina IBT was designed to do, proposed one that we learned about and put in the complaint, was to increase what would be the actual withdrawal from the river and the diversion of that to North Carolina. Our position in the complaint is North Carolina is overconsuming and shouldn't be allowed to do that.

It is not a case of South Carolina speaking out of both sides of its mouth as was suggest this morning. It's a question of where the Union County, North Carolina side was seeking to get a permit that would allow it to get more water to be transferred to it than would have been permitted under the terms of South Carolina's permit. When North Carolina took that off the table in its formal pleadings in the case, that is not to say it is not a threat, it shouldn't be taken into account, but it is not the kind that is subject to the harm the Court deemed to be appropriate for a preliminary injunction. The relief, as I said, sought in the complaint is far broader going to the equitable apportionment of the river and an injunction that would enforce the terms of that apportionment.

Now, if I could go --

THE COURT: I guess I'm misunderstanding the facts. Maybe this is a question for Mr. Goldstein, but would that transfer that you've referenced in opposition to your preliminary injunction, you just pointed me to on Page 3, have come out of the intake in South Carolina?

MR. FREDERICK: As I understand it, because it is water that is going into the County, Union County, North Carolina has permitting authority under its state law and what they were seeking to do is get North Carolina's permission for the movement of this water into the county.

THE COURT: It was drawn from South Carolina?

MR. FREDERICK: That's correct.

THE COURT: Is it a transfer that's already authorized under South Carolina?

MR. FREDERICK: It is a transfer that is authorized as to amount. The permit in South Carolina allows for, at the current time, and I want to emphasize at the current time, allows for the withdrawal of up to 20 million gallons per day. That is not being taken out at the present time.

THE COURT: In the permit application that was mentioned in your complaint and then taken off the table, would it not have gotten over that amount?

MR. FREDERICK: It would have gotten very close to the amount. What South Carolina was complaining about, in effect, because we have policing authority over our citizens, we can take the appropriate steps particularly with a permit that's coming up for renewal, but we can't effect that to the extent that it affects the interests of the State where the water is being given legal effect by North Carolina's permitting authority.

That was what we objected to. That is why fundamentally the case has got to be resolved through some application of the joint interests of the two states in its river system. It doesn't, however, justify Catawba's independent status as a party here, because ultimately, it's representing consumers on both sides of the boundary that are adequately represented by each State's Attorney General.

THE COURT: One more question because I didn't quite understand what you said. If this proposed additional interbasin transfer had been going forward in Union County, would South Carolina have had to -- would Union County or Catawba River have to obtain authorization from South Carolina or would it already -- obviously, it fits within the limits of the permit. Would any additional action had to have been taken?

I think what they're saying is how could South Carolina complain about something that South Carolina

authorized. I'm trying to get to that point. You said well, South Carolina might have done something to say at the licencing phase or permitting phase, I guess what they're trying to say is what about right now. Would South Carolina have any say in that if they had gone ahead with that other transfer?

MR. FREDERICK: Let me try to answer the questions this way. As I understand it, the Union County transfer was to increase the amount taken out on the South Carolina side. Under the existing permit, the global amount would have permitted that withdrawal. Because in the late 80's when that permit was done, there appeared to be more water in the river than there now appears to be 20 years later.

There was a flow rate provision in the South Carolina permit that says that the rate of the river has to exceed a certain cubic feet per second flow rate. As I understand the hydrology, the concern was that if all of that amount was authorized to be taken out and transferred, it would affect the flow rate that was -- the minimum flow rate that was authorized under the '89, I think '88 or '89 permit. So South Carolina would have been affected to the extent that there could have been a violation of the minimum flow rate provision, even if the maximum amount of withdrawal was permitted by the '89 permit.

The complaint is really seeking to supercede the amount of withdrawals to put it in a --- really, the status quo, in fact, so that we can figure out who is consuming from this fragile ecosystem, scarce resource and not allow the water transfers to be pulling water out of the river that ultimately affect those states rights and the ecosystem downstream of the river.

The lawsuit is designed to try to ascertain consumptive uses, to make determinations about what is fair for both states and to stop the kinds of large transfers of water out of this river basin that we think are having a substantial and profound affect on the river downstream. This Union County piece is quite a complicated narrow piece. I think if you look at it in perspective of what we're trying to do is to stop the other consumption on the North Carolina side, that was why we objected to it, because without that, the Lancaster County residents themselves are not going to be consuming 20 million gallons per day of the river water.

If there are no other questions on Catawba, I can move on to Charlotte and make just a couple of points there. I appreciate your patience.

THE COURT: I have one general question with respect to all three, which is there hasn't been much discussion in the briefs about the concept of prejudice to South Carolina. One might ask if there were to be an

intervention granted, how would South Carolina be prejudiced.

One of the cases, Arizona vs. California, which I think Charlotte cited, mentions the prejudice and whether it's relevant. I don't know, but if it is, you might address whether it's relevant and then maybe you might want to address what prejudice there is to South Carolina.

MR. FREDERICK: There's no question that South Carolina suffers prejudice from having to fight a lawsuit against four parties opposed to one and one sovereign entity, as well as the political subdivision of the same sovereign entity and a large and powerful economic unit. We have not tried to address that, because our point here is not to be whining about what hurdles we face in the litigation, but the practical reality of it is that we regard the situation as critical for moving quickly in the lawsuit so that the river system is protected, because as the downstream state, we're the ones suffering the injury and to the extent that any of these intervention motions is granted at this stage, that promises to put substantial delays into the process simply through the administrative pact of dealing with additional sets of lawyers, additional sets of interests, additional discovery requests and the process, we would submit, is likely to be slower than it should be if North Carolina represents itself and all of its citizens, including those really seeking to intervene as North Carolina

residents.

I think that there is no doubt that the credit is really going to be suffered at the practical litigation phase and the speed with which the case can be resolved. 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.

In this phase, there is no doubt that there would be prejudice, particularly because North Carolina submitted a discovery plan for four and a half years of discovery for phase one and we have quite a substantial interest in moving quite a bit faster than that so that we can move on to the remedy phase.

THE COURT: I guess as to the prejudice question, assuming it would be a benefit, would it be helpful to have them in the case?

MR. FREDERICK: We don't think so. There were several suggestions by counsel for the proposed intervenors to suggest that somehow it would be easier for them to comply with discovery requests if they were parties as opposed to recipients of a third party subpoena. I don't think that I heard them say they would be obstructionists if given a subpoena. I think what they said and meant was that

they would cooperate as fully with the subpoena directed to them as they would with the regular document request and interrogatory request. But as a party, they certainly would be given more litigation rights for purposes of deposing witnesses, asking for documents from South Carolina and its various state agencies, propounding interrogatories and all the rest of that that would be quite substantially more burdensome than allowing each state to be the two generals directing this particular effort and having their efforts be channelled through whichever Attorney General's Office they think can appropriately represent their interests.

There is the practical reality of that aspect of the litigation that I think is quite an important one and the benefit I think is answered if they fully cooperate with any subpoena that we send. I don't understand the argument that's made and suggested here by the proposed intervenors that somehow they would not -- they would find the subpoena process more cumbersome. It would simply be the same document request with a piece of paper on top that says this is a subpoena and please comply with it. I presume that any objections or motions to quash would be brought to you for resolution.

THE COURT: I read them to be saying that they would be able to seek discovery not just involved in.

MR. FREDERICK: Well, I think the answer

to that is they can seek the discovery by lobbying the North Carolina Attorney General's Office to include it in North Carolina's discovery requests whatever they think is relevant to protect their interests.

That's why this is, in part, a political process. You've got the largest city in North Carolina that somehow doesn't have the sway with the North Carolina Attorney General's Office to get what discovery requests it thinks are pertinent. It's a concept that seems baffling actually, and one that the Court in the New Jersey case seemed to be rejecting because of Philadelphia's effort to get into a suit where Pennsylvania was already a party state.

THE COURT: Then you have the same problem with New York City.

MR. FREDERICK: I think there's a difference when you are hailed into Court, as I've said, versus seeking voluntarily to intervene to be a defendant in the case, which is what these intervenors seek to do. I think that fundamental difference is what drove the New Jersey case.

The only two points that I think I haven't made with respect to Charlotte that I want to emphasize here is that the discussion by counsel of the Section 401 issue, really is a remedy phase issue. It's not a harm phase issue. It's also an issue that could be submitted by an amicus

submission where Charlotte outlines what it thinks its distinctive interests are with respect to the Clean Water Act. It's not something that justifies full party status with all the accoutrements and aspects that that entails.

The second aspect they argued was they should have a role in developing the record. Nothing is to preclude the people from Charlotte talking to the people from North Carolina and help develop the record in whatever way they think is appropriate, but there's no reason to think that given the parens patriae representation by the State that North Carolina cannot adequately represent Charlotte's interest in developing the record as North Carolina's submission here indicates they intend to do.

THE COURT: With respect to this transfer, there's no question that it directly challenges the transfer of which Charlotte is the beneficiary. Doesn't that put Charlotte in someways more in the position of Port Arthur where the City has a direct stake? One might say yes, Port Arthur should have gone to the State to represent its interests. That happens in border cases, and like cases like the Mississippi River case, where the question is damage to the property individual. There the City and State challenged the right to represent its citizens. The Court said no, the State can represent those as parens patriae.

Why isn't that also true in the case of

Port Arthur that the State could have done that? One still has the question why then was it permitted to intervene. If it had a unique, some sort of special interest that is just to it, why is that different from Charlotte here?

MR. FREDERICK: Well, one distinction is that the title to the land was held by the City itself. It was not held by the State. Now, the City was holing it, I suppose as the political subdivision of the State so the State had an interest. I think the United States, which was the defendant in the case, the opposing adverse party, seeking to get title to the land didn't oppose intervention. I do think that there's a meaningful difference between the party opposing intervention and one that is allowed and permitted. I think that's well recognized in the cases.

The third distinction that I would draw is that use of the IBT's as examples of overconsumption and diversion of the water really are exemplars of the kind of overconsumption that South Carolina asserts North Carolina to be committing. It may well be that, as I said earlier, Charlotte's particular transfer ultimately poses no problems if looked at in the global context of all the consumption that North Carolina is having on its side of the river.

Ultimately, it is an intramural dispute that the city -- that the State of North Carolina can resolve as to who is going to get the particular pieces of its fair

share. We use that because it is by far the poster child of overconsumption by North Carolina and we submitted that in our complaint as an example of that. We do think that, as we understand the facts now, that if that IBT were not permitted or were limited in some way, that would have material, beneficial consequence to the users of water of the South Carolina side. I think that it is different from the Port Arthur case, because in the Port Arthur case, the title was held by the City and it was a binary choice. It was, is the United States going to own the land or is the City of Port Arthur going to own the land.

Under the Texas constitution, as I understood and learned about it in law school, the City's ownership rights of that particular piece of land were given a great weight of respect. Here, we're talking about molecules of water that have to be distributed and disseminated to various users. Although we can highlight and point to particular interbasin transfers because they are known to us, as we point out the complaint, we'll get into this more this afternoon, there are lots and lots of consumptive uses about which we do not know because they are allowed to proceed without a permit. We can direct the complaint to a large transfer, because it does have what we think to be material adverse effects on the State.

I appreciate your patience. If you have

any more questions, I would be happy to answer them, but that's all I came to say.

THE COURT: Thank you.

MR. PHILLIPS: Your Honor, let me answer two or three points that Mr. Frederick made. First of all, for the first time I'm hearing today suggested that you ought to think about the bifurcation and use that to dictate what to do with respect to the intervention. The problem with that is he keeps talking about the standard being overuse. Well, what does overuse mean?

Overuse means you have to have some baseline to serve as the comparison point. Well, we have a very strong interest in determining that the baseline is where it is today or at least no higher than where it would be under the CRA, and as a consequence of that, we have very distinct and significant and inviting interest in participating in the litigation from day one on through. To be sure, we have deep concerns with respect to the apportionment, if we get to that point, but our interests arise much sooner in that regard.

The second point that is it seems to me that Mr. Frederick was trying to make is to suggest there's somehow a difference between consumption and flow, but as I think he acknowledged later in his own argument, the reality is the more you consume, the less there is to flow. That's

our concern.

Obviously, our obligations under the CRA and under the license dictate the flow. That's inextricably linked to what consumption is being used there. So it seems to me that's a completely false dichotomy. I think Mr. Frederick just misspoke when he said that the CRA is not itself in place and binding. It is. It's an agreement. It's a contract. It's been signed by the parties. Duke is complying with its obligations as are the other parties to the extent they have obligations.

What has not happened, obviously, is the FERC has not approved of that particular agreement, but the agreement is in place and is binding. Again, whether you think that the baseline is what happens prior to the CRA or under the CRA, those are important, and, I think, absolutely critical in deciding whether or not even at the first phase South Carolina has any basis to go forward.

Mr. Frederick suggested that we are not the United States. We don't claim to be the United States, otherwise I would be here in a gray pinstripe outfit as opposed to what I have on at the moment.

The basic point we're making is that our interests are not solely profit maximizing. In some ways I suppose Duke wishes that were true, but the reality is a lot of what we do is significantly constrained by the

requirements that are imposed upon us under either the CRA, which we agreed to, but under whatever FERC chooses to impose upon us and those are, in fact, in view with the public interest. To the extent that we have to comply with them and they don't protect our profit maximization, we, nevertheless, have to comply with them.

Again, we're not the United States, but the truth is an awful lot of the decision making that we have to undertake is not made solely from maximized profits. It's to serve the public interest. We think that the Court will benefit from having us available to deal with that issue.

With respect to prejudice -- before I get to the prejudice point, I understand South Carolina today to have receded from its categorical position. Maybe it didn't mean to do that. I read the brief to say there's something completely unique about equitable apportionment that puts it in a different category and you can never have a private party participate.

I got the impression ultimately that he recognized that there is a compelling interest test and that probably applies in this context, as well as others. It may have a slightly different application. My point is, unless there's a categorical ban allowing private parties in the litigation involving equitable apportionment, it seems to me we would satisfy whatever standard you want to have.

That takes you to the question of prejudice. Here, it seems to me, one, I'm not 100 percent sure that's part of the equation, because that may well be what's imbedded in the compelling interest test itself if the interests of the intervenor are so overwhelming that, of course, there's going to be prejudice in some sense. I understood South Carolina to basically be talking about the prejudice that would be inherent in any intervention; that there's nothing specific that any of the parties coming into this litigation that would be particularly prejudicial over and above having more parties.

The reality is, I do think that it will be significantly easier, both as a matter of -- to be sure, we will have the right to ask for discovery, although I'm not sure how much discovery we're particularly interested in pursuing at this point. We don't have a discovery plan.

Our intention is to be a follow along with the States. I thought his argument was particularly interesting when he said Charlotte should go to North Carolina to get its discovery, which is great. What he didn't say was who Catawba and Duke are supposed to go to when our interests, obviously, overlay both of the States. I guess we go to North Carolina. If we don't like what we get there, we go to South Carolina.

THE COURT: To the extent you're

representing the interest embodied within the FERC license, I guess.

MR. PHILLIPS: I guess that's what he's saying, although I don't know why -- I mean, given that we don't know that. Would their argument be different if the United States were in this case? It might be.

THE COURT: They were in the pipeline case. FERC was in the pipeline case.

MR. PHILLIPS: Yes. I think I would probably still have an argument why we would have an independent role, but the reality is the case that exists today, we don't know what the United States is going to do. It seems to me the safer course, given, I don't think there's going to be significant prejudice to South Carolina, would be to allow Duke to participate, because it does and it will be much more efficient.

One point that he didn't resolve, which I think is responsive, is the settlement motion and whether it isn't more likely that a settlement can be achieved with all the intervenors participating, as far as that process.

Given South Carolina's over arching desire to get this to closure sooner rather than later, it seems to me that that would be a hugely important avenue to pursue. Again, it seems to me, we are part of the solution there and not part of the problem. If you have other questions I would

be happy to respond.

I did misspeak about amendments. There have been, apparently, numerous amendments to the license over the years. They're all very minor. They tend to deal with changes in the property within the project boundaries that are non-project specific. If someone wants to put a herein or do something like that, we have to go back and get an amendment to the license as part of the process. None of the amendments, I'm told, deals with anything that is operational or would affect the water flow. That's not to say it couldn't, but it's to say none of it has to date.

THE COURT: The current status that you said you're operating under the CRA, but also, obviously, operating under the existing license.

MR. PHILLIPS: Under the existing license.

THE COURT: There's nothing in the CRA that's in conflict with the existing?

MR. PHILLIPS: Not as it exists at the moment. I think the CRA is generally more protective of -- the harm is probably the biggest change over and above it, but it also provides significantly greater water flow throughout the river system as exists under our current license, but nothing in that license prevents.

Again, the basic point I think, and I didn't hear Mr. Frederick respond to this or deny it, we're

talking about parallel paths. Again, they may never cross. That's a possibility. But there's a serious risk that they will.

It seems to me that in any assessment of either South Carolina rights have been violated or in trying to decide what, if any, remedy to impose as part of the process, this Court will benefit from having an input into the parallel proceeding. That is an input, that seems to me, Duke is uniquely, at the moment, capable of providing.

THE COURT: Let me ask one question. I just want to make sure. You may have already covered it. You said that the, I think, Mr. Fredrick referenced it. I think that goes to the question, of whether any possible -- I think it went to the question whether any could affect the United States. You answered that, unless you had something to add to what he had to say.

MR. PHILLIPS: I mean, there's no question the complaint doesn't read specifically against it, but the reality is, obviously, the practical impact of whatever comes out of this would be quite significant. At a minimum, before the Court makes a judgment in any direction, it seems to me that it ought to understand what the impact is going to be both on Duke itself and then on Duke as a licensee and the Federal Energy Regulatory Commission's public interest concerns and determinations. I don't quarrel with his

comment that none of the remedies flow directly against us in terms of an injunction, but it wouldn't. If the Court were to a adopt a particular equitable apportionment, it wouldn't be inconceivable down the road that we would then be added in as a necessary party for purposes of obtaining that.

THE COURT: The principal interest, which is the flow issue, the possibility that this case goes back to flow, would affect the flow either at the minimum or maximum level.

MR. PHILLIPS: Precisely. Thank you.

MR. GOLDSTEIN: I want to start out with what I think is unfortunately my friend, Mr. Frederick's misunderstanding of the allegations of the complaint, relief it seeks and the answer of North Carolina. You had asked the question well, Catawba River Water Supply Project says you're trying to get relief against and you pointed to the complaint. Mr. Frederick said no, things have changed in the way that the answer of North Carolina, and we're no longer trying to get relief about that. I wanted to explain why that's not correct, if I could.

We have to start with the complaint. We're back to Page 8 of the complaint in Paragraph 21. There are two different sentences involved in it. The first one says the statute also grandfathers the transfer by Union County with at least 5 million gallons per day from the Catawba

River Basin. That's one point. That's talking about the present interbasin transfer authorization, and then there's another sentence that says in addition, heading before the ENC, which is the North Carolina Regulatory body, is an application by Union County to increase by 13 million gallons per day its transfers of water from the Catawba River Basin to the Rocky River Basin.

Then on Page 10 of the complaint, this is not a preliminary injunction request or anything else, it's the complaint. While South Carolina has an expansive view of what the complaint means, nonetheless, nobody doubts that it actually means what it says and says what it means. The second paragraph in our prayer for relief is that the Court enter a decree enjoining North Carolina authorizing transfers of water from the Catawba River past, which is the first sentence, the existing 5 million gallons per day, or future, which is referring to the application that South Carolina filed, is pending before North Carolina, inconsistent with that apportionment; that being the equitable apportionment.

The complaint by its terms points its finger at the 5 million gallons per day interbasin transfer that was authorized by North Carolina. Mr. Frederick says no. What happened is, North Carolina in its response clarified that the complaint was wrong and that interbasin transfer is now, as he says, off the table. That

misunderstands the difference between the existing 5 million gallons per day and the future application for 5 million gallons.

At Page 3 of North Carolina's answer to the request for a preliminary injunction, North Carolina says quite correctly, currently there are no pending petitions with the North Carolina EMC for interbasin transfer from the Catawba River, although, Union County, North Carolina forwarded a preliminary environmental impact statement to the North Carolina EMC concerning a potential petition for an interbasin transfer, Union County has not taken further steps to pursue an interbasin transfer. What North Carolina was explaining is that in the complaint, South Carolina was just wrong.

When South Carolina said in Paragraph 21 that there was a pending application, that wasn't right. There was, at one point, a preliminary environmental impact statement. That has been withdrawn. It's not pending currently, but that has nothing to do with the 5 million gallons per day that's authorized interbasin transfer.

THE COURT: Maybe South Carolina's disclaiming any exemption to seek an injunction against the existing transfers.

MR. GULICK: I don't think that's true. I think that, for example, if you ask, Mr. Frederick, Union

County is getting 5 million gallons of IBT. Charlotte has an authorization of --

THE COURT: Not Charlotte.

MR. GULICK: Okay. I just -- I didn't hear him say that. If South Carolina wants to stand up and say that the way the Catawba is operating, we have no problem with that. Catawba by that, I mean my client, or Catawba River Water Supply Project.

It's also the case that they do point to future uses and we would be directly affected by Union County potentially later getting further interbasin transfer, but I think this is all relatively academic. The complaint, by its terms, points its finger at us, seeks an injunction against the authorization of all interbasin transfer and that's where we stand today. That's part of our direct interest.

THE COURT: Well, the objection speaks to the portion that and then speaks to enjoins transfers past or future inconsistent with the apportionment. I suppose it could be said it's not directly going to your transfer, necessarily.

MR. GOLDSTEIN: It could be said, but it would be hard to say given Paragraph 21, which calls out our transfer quite specifically. Then there was the question you asked about what Mr. Frederick characterized as the talking out of both sides of the mouth question; that is, what's the

state of the law with respect to our current transfers between the water supply project in Union County and potential, if later authorized, interbasin transfers if North Carolina were to give us permission to send more water to the eastern part of Union County.

You said, Catawba River Water Supply Project says they already have permission from you for that. I wanted to make clear that you were quite right. We do have this 20 million gallon per day transfer authorization. Whether it might well -- if we were to take too much water of the river, it might create some other problem. That's a very distinct question.

On the question whether the injunction requests that arises from Paragraph 21, which is 5 million gallons per day, is authorized by North Carolina as an interbasin transfer to the Eastern part of Union County, is that also -- notwithstanding that South Carolina seeks an injunction against it, is it authorized currently by South Carolina law, and the answer to the question is just yes.

I did want to turn to finally the suggestion that the question of intervention ought to track the bifurcation of the case in Phase 1 or Phase 2, because that, too, is a new argument, I think, by South Carolina. I think that we have a better solution to that. I think Mr. Frederick's basic point is, they don't have a dog in the

fight in Phase 1.

I actually don't think that's quite right for a couple of reasons, most specifically, we are physically located in South Carolina and we have views on the question and can help you understand whether the amount of water that's coming over the state line into South Carolina is causing harm to South Carolina. That's where our plant physically is at. We can usefully participate and help guide the Court in that respect. That's part of our broader point; that is, I think we genuinely can help here.

As I said in the opening argument, it will help you to have someone in the case that is a significant water user that's affected by these interbasin transfers that are the principal target of the least of the complaint that recognizes its limited role, that isn't trying to muck things up. Nonetheless, this case is a very abstract phenomenon at one level; that is, this notion of equitably apportioning the river. But that abstraction affects millions of people very concretely, and whether they get water and whether businesses can run, and having someone in front of you that's directly involved in that process, I think, would be useful. I think we can be useful in Phase 1.

The broader point is well, I think that Phase 1 inevitably shapes Phase 2; that is, this bright line, I think, when it comes to the discovery that's at stake and

the arguments that are made, the way the complaint is shaped, it's somewhat of a false distinction to say there will be this role that Phase 1 will have nothing to do with Phase 2.

I said that we had a better solution; that is, Mr. Frederick's point, in general I think, is well taken; that is, that the intervenors ought to focus on the things that affect the intervenors. His way of addressing that problem of bifurcating and having the intervention track the bifurcation, I think, is a less refined solution than the more direct one; that is, if there are lots of things going on in Phase 1 that don't affect the Catawba River Water Supply Project, or don't affect Charlotte or Duke, they're not going to have anything to say. We don't have any interest in just propounding discovery because we have nothing better to do and we would expect that the Court would be extremely sympathetic to arguments from South Carolina that, you know, what in the world are those people asking all these questions, making us race around, when it doesn't affect them.

Our solution is much more direct; that is, we intend to participate in those specific pieces of the case, be they Phase 1 or Phase 2, that really, directly go to our interests in the things that we can hopefully guide the Court on. We don't think it's necessary to sort of cleave the case that way when more directly you can direct us to

stay focused on what really matters to you. Thank you.

MR. BARTOLOMUCCI: I'm mindful that I'm the only thing that stands between all of us and lunch. I'll be very quick.

Two points, one factual and one legal. The factual point is that to the extent that the proper scope of the complaint is broader than the interbasin transfers and more broadly looks at consumptive uses in North Carolina and whether North Carolina is overconsuming water, once again, the case becomes very, very much about the City of Charlotte. In 2007, Charlotte was responsible on an MGD basis of 35 MGD's of consumptive use of water. That is the water that Charlotte consumed in 2007 and water that never made it down to South Carolina is actually greater than the IBT authorization that South Carolina complains about, which is 33.

As a factual matter, Charlotte represents 64 percent of all municipal consumptive use of water in North Carolina on the Catawba River. Charlotte's consumptive use is greater than that of all other cities combined in North Carolina in terms of consumptive use. If we are the poster child for IBT's, in South Carolina's view, I think that would be true as to non-IBT consumptive use.

The second, the legal point, I believe your dialogue with Mr. Frederick about the New York City case

really goes to confirm that the only real difference between the posture of the City of Charlotte and New York City is that New York City was named as a defendant and we weren't. I don't think that's a difference that can control the intervention question.

It's certainly true that South Carolina is the master of their complaint, but they are not the master of this case. Special Master Myles, with respect, you are the master of this case. Even though they are the masters, they can't just name parties willy-nilly. They couldn't have named Florida as a defendant because they had a grudge over college basketball.

New York City was named as a defendant because it was a proper party. It was the authorized agent to carry out the alleged injury. If New York City was a proper party, then I would say so is the City of Charlotte. This is why we have interventions on the case that if there are proper parties out there who have very, very strong interests in the case and haven't been named as defendants in the case, they have the ability to come in and defend those interests.

I would say that's the position that Charlotte's in. If there are no other questions, that's all I have. Thank you.

THE COURT: I think that's all. Why don't

we take an hour for lunch.

NOTE: At this point recess was had.

MR. FREDERICK: Thank you. David Frederick for the State of South Carolina. The briefing that we presented on Case Management Order Number 3, I think, is clearly self-explanatory, but I do want to focus on a couple of points and then I want to walk through certain paragraphs of the complaint and, of course, answer any questions that you have.

The Supreme Court's Rule 17 specifically provides that the formal pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed and then says that in other respects those Rules and the Federal Rules of Evidence may be taken as guides. Our principal submission here is that our complaint comports with the notice of pleading requirements that is set forth in Federal Rule of Civil Procedure 8, which provides in A(1) that a pleading that states a claim for relief must contain the short and plain statement of the grounds for the Court's jurisdiction and two, provides a short and plain statement that claim showing that the pleader is entitled to relief and in 3, a demand for the relief sought, which may include relief in the alternative for different types of relief.

Now, the complaint, which the Court has given us leave to proceed with, provides for exactly that in

attempts to provide a short and plain statement of the nature of the relief sought and the prayer for relief and in all pertinent respects, complies with Federal Rule of Civil Procedure 8 and standard pleading practice.

In Paragraph 4 of the complaint, South Carolina asks for an equitable apportionment because the state of North Carolina refuses to enter into an interstate compact that would afford South Carolina a fair share. We detailed how we approached Attorney General Cooper in North Carolina. We sought to engage in negotiations for an interstate compact to equitably apportion and share the waters of the Catawba River and we were rebuffed.

Our only opportunity to achieve fairness for our citizens was to bring this suit, which the Court has accepted. Throughout the complaint the words equitable apportionment throughout the brief in support of the motion for leave to amend, equitable apportionment is the feature concept underlying the lawsuit.

In Paragraph 17, we detailed the drought that occurred most recently ending in late 2002 and described the harm suffered by citizens with the word including and outlined specific harms.

In Paragraph 18, we allege that the transfers authorized by North Carolina's IBT Statute, quote, exacerbated the existing problems with the river. In

Paragraph 19, we set forth that the North Carolina statute contains no provisions that require a reduction in the amount, whether it's a drought or natural fluctuations in the flow of the Catawba River limit the water available to downstream users.

In Paragraphs 21 and 22, we explained that the North Carolina Statute permits by grandfathering in existing uses or through a threshold for the permitting requirement a lot of transfers and consumptions that are not known to South Carolina, but which we seek to learn about during the discovery process.

In Paragraph 24, the very last sentence says and alleges that North Carolina's transfers also are, quote, in excess of North Carolina's equitable share of the Catawba River. The point being that before you can even ascertain the scope of the harm by the transfers themselves, you have to understand what the consumption of the river is and what North Carolina's equitable share of that river is vis-a-vis South Carolina.

In the prayer for relief, in the first paragraph, we seek a declaration that the North Carolina Statute cannot be used to determine each state's share of the Catawba River and equitably apportioning the Catawba River. Here, the point is that under the cases of states involved in equitable apportionment actions will seek to occasionally

invoke their state statutes as a ground for what they deem to be their fair share.

Our point here is to argue that North Carolina should not be permitted to invoke the IBT Statute in that process, because it's taking out more than its fair share and those statutes authorized transfers that are impermissible and beyond North Carolina's fair share.

The second paragraph of the prayer for relief specifically requests an equitable apportionment and a decree enjoining North Carolina from authorizing transfers of water that are inconsistent with that apportionment, and declaring the statute to be void to the extent it's inconsistent with that apportionment.

Following on, the way we presented this case to the Justices on the briefing for the motion for leave to file the complaint, the central allegation as set forth in our motion was that we have -- that North Carolina is asserting a right to claim control over the entire flow of the Catawba River. We repeatedly said that the Court needed to develop, quote, a full record and of particularly pertinence to you and your role, Special Master Myles, in our motion at Pages 13 and following, we explicitly explain why we think a Special Master should be appointed in the case, and I would note that we go through all of the factors classically accepted by this Court in equitable apportionment

cases.

The words interbasin transfer do not appear once in that passage, because what we're seeking here is your role in developing a factual record and recommendations to the Court that would equitably apportion the Catawba River, and the factors that are set forth from Nebraska vs. Wyoming are well known factors. I think that both at the level of what the pleadings are required under the Rules, how we set forth the complaint, the plain language of the complaint, what we described for the Justices in our motion for leave to file, and then basic common sense notion that the river is a contained system where any material withdrawals are going to have significant affects and the IBT's are, in effect, a headline point here that cause us to be of particular concern, because those are significant, mammoth amounts of water that are being taken out of this river system that are causing significant downstream consequences.

Now, the last point I would like to make unless you have questions is, we don't see North Carolina suffering any prejudice whatsoever by having the complaint understood as we have presented it. Discovery is just the beginning. If North Carolina had thought our complaint should have been limited in the way they now think it should have, that would have been an appropriate ground to raise in their opposition to our motion for leave to file, but they

did not complain about the words equitable apportionment or our description in our motion for leave to file our complaint.

If any limitations would subsequently be warranted, you have within your discretion and power to make those determinations once the discovery process had unfolded and the case has proceeded to summary judgment phase. We think that at this point, what North Carolina is seeking to do functionally is to revisit the Court's decision to allow us leave to file the complaint or in the alternative, a targeted motion to dismiss without going through the normal processes for doing so and properly limiting the scope of the complaint. If you have any questions.

THE COURT: Well, I do have one. Obviously, the dispute in the cases, I think, correct me if this is wrong, cited for either proposition, because as you point out, the Nebraska case was decided on the standards for equitable apportionment. But at the same time, I don't see any cases cited in the opposition that is the Rule and I wanted your comment on that, the case law and then the second question is, North Carolina argues that the Rule, referring to Rule 10 and Rule 17 of the Federal Rules of Civil Procedure, there are form motions, there's some logic to that because of the word form is used. I wondered if you had a thought on that.

MR. FREDERICK: I do have several thoughts about that, and let me describe this. In the time that we have, we do not fully get into the briefing, but I think it's important to look at these Rules and their historical context, because over a period of about 50 years the Federal Rules follow the code pleading and the notion was that you had to state everything with great particularity and that if you couldn't prove every jot and tiddle of your complaint, there would be problems that arose. There is in a period from about 1870 when David Dudley Feel, the brother of Justice Stephen Feel, promoted this concept under New York law. The Federal Rules followed that, and there was code pleading for a period of about 50 years between the 1870's and when the Federal Rules of Civil Procedure were beginning.

When the Federal Rules came into being, there was a very decided shift in the approach to notice pleading, and the concept was a plaintiff is not always going to know every specific little fact to put into a complaint, but if it puts the defendant on notice of what its general allegations are, the discovery process will enable the parties to work out what the nature -- more precise nature of the harms and how those are to be resolved. That concept of notice pleading I have thought was so well engrained in our Federal System that I was somewhat taken aback when I saw North Carolina assert that a provision of Rule 7, which

speaks simply to stating with particularity what the nature of the issue relief is sought, somehow would denude our complaint of its normal common English meaning where we say in multiple places we're seeking an equitable apportionment and our prayer for relief specifically sets out that we're seeking an equitable apportionment, and the way we framed the case to the Justices says we want you to appoint a Special Master to look at all these various factors, because we don't know enough of what's going on on the North Carolina side of the boundary to be able to give the kind of particularity that say 9(B) does for fraud claims where you have to plead those kind of allegations with particularity.

The notion seems to me to be so alien to the way we have operated under the Federal Rules that I'm not surprised that in the short time North Carolina was unable to come up with any cases. The concept of liberal amendment is well entrenched, as well, in the law. What they're asking for basically is this kind of disjunctive notion that you would liberally permit amendments to complaints, but not liberally to construe them to begin with. It's kind of a backwards notion.

THE COURT: I think they're saying the opposite of that. We have found this solicitude from the amendments pleadings does not suit cases within this Court. They're, I think, taking back from Nebraska and applying it.

MR. FREDERICK: I guess my point here is that the cases where they cite restrictions on amendments really are entailing brand new claims that are legally divorced from the basic quarrel of the complaint that was originally filed. I don't think that is a fair way to characterize South Carolina's complaint.

THE COURT: I read your prayer as asking for equitable apportionment. I guess the reason I raised notice pleading is that, to me, that in terms of relevance, because if you ask for equitable apportionment, that you raise that issue, but if you were to be subject to a more heightened standard to particularize what it is that you're saying should be done, or the harm that is being suffered, then that mere statement of the relief being sought might not be sufficient. I think it may satisfy notice, but it may not satisfy a higher --

MR. FREDERICK: I think that -- I don't think that a higher pleading standard necessarily is pertinent here in light of the way we frame the allegations. What we said is that North Carolina's taking more than its fair share; that in times of drought and in times of inadequate natural flows, there are wide variations in the river flow that affect South Carolina and that these IBT's are sufficiently dramatic and pointed in their size and magnitude as to be directly causing harm to South Carolina,

but you can't make that determination ultimately unless you know what consumptive uses are occurring on the river and what effect these large IBT's are having on the ecosystem of the river.

We could have stated, as we think we did, in these complaint paragraphs that North Carolina's taking more than its fair share. We'll allow the discovery process to let us figure out where they are doing that. I think that would have satisfied notice of pleading. We went beyond that to say there are specific instances where a state's statute is being used to harm South Carolina and we think that that is encroaching on North Carolina's equitable share and harming South Carolina and it's one of the prayers for relief. We don't think you should count what they are taking by virtue of that legal statute under Federal Common Law, and we think that you should enjoin uses that are inconsistent with the apportionment to the extent that they seek to use that statute for that purpose.

THE COURT: Do you think at some point in time it would be beneficial as well about the power to amend the pleadings or to seek particularity at some point in time?

MR. FREDERICK: I don't know that a bill of particulars would necessarily be an appropriate procedure. I think that what tends to happen in these cases is that as the discovery process unfolds, as more become learned, the

process of understanding the particular aspects of harm and the particular aspects of relief become known to all. The point as to how they intend to defend, I think, is a point of prejudice that they're not suffering right now, because they haven't seen what evidence we are going to seek to gather to show the harm and how we're tending to present why South Carolina should get a larger share of the apportionment of the river than it currently is getting through North Carolina's unilateral extractions of water.

If I understand the other part of your question is do I think you have the power at some appropriate point in time, I think that is encompassed within the Supreme Court's order referring the matter to you. If you think there needs to be some greater statement that tends to happen at the requests for admissions stage or later points in the written discovery phase as more documents are exchanged and more information is gleaned about the state of the river, that's a natural part of how the litigation process is supposed to unfold.

THE COURT: Okay.

MR. GULICK: I don't think there's any question that South Carolina has asked for an equitable apportionment. That's not where we have -- that's not what we have an issue about the scope of the complaint. According to the Supreme Court in Connecticut vs. Massachusettes, this

is a quote from Page 669 of 282 US, this Court will not exert its extraordinary power to control the conduct of one state in a suit of another unless the threatening invasion of rights is of serious magnitude and established by clear and convincing evidence. The burden on Connecticut in that case to sustain allegations on which it seeks to prevent Massachusettes from making the proposed diversions is much greater than that generally required to be borne by the ones seeking an injunction in a suit between private parties, unquote.

Then it says the injunction issues to prevent existing or presently threatened injuries. I quote that to point this out; South Carolina, or any state, is not entitled to an equitable apportionment just because it asks for it. It has to allege and it has to prove that some act by the State it's suing, and it's typically a diversion, is wrongful and it has to prevail on that before it's entitled to further relief.

As I now understand what South Carolina's asserting is we can't know the extent of this wrongful conduct until you have apportioned the river. That cannot possibly be right. We don't think that's what the case law says. That is an outcome that is part of the remedy that the Court will impose if it finds that the State being sued has engaged in wrongful conduct.

Let me touch on the burden issue. As I understand the cases, that's something that has to be quantified. You have to quantify the harm that will result from the diversion that's being alleged. In order to quantify it, you have to know what it is. It has to be something that is sufficiently discrete that both parties and the Court that this is the diversion of the water that is being complained about. This is the cause of this action being filed and for the relief to be sought.

We believe, and I think, the record is extremely clear that the reason that South Carolina brought this case was because it was offended, rightly or wrongly, we contend wrongly, by a very specific interbasin transfer that was then pending and then was approved by North Carolina's Environmental Management Commission. This is the one for Kannapolis and Concord, which is the second of the two that were mentioned that were certificates, for which certificates have actually been issued by North Carolina, and the other being Charlotte/Mecklenburg.

The complaint itself in the last several paragraphs is extremely explicit about the exchange, between the Attorney's General anyway, with respect to this particular transfer. If you look at the proceedings as it was presented to the Supreme Court, we said in our first opening brief, which I suppose could have been -- both of

them could have benefitted from more time. We did it in the time that we had. We did recite at some length the specific allegations of wrongdoing that were in this complaint on the part of North Carolina. Every single one of them relates to interbasin transfers.

Interbasin transfers are not something -- what I wanted to point out is that even in the brief to the Supreme Court, the summary of the argument is particularly telling. What South Carolina says on Page 9 of its brief in support of this motion to be allowed to file this complaint is the North Carolina Interbasin Transfer Statute and the transfers from the Catawba River authorized under that Statute, are directly contrary to this Court's decision with respect to interstate rivers.

There alleges, without any factual basis whatsoever, that those decisions make clear that North Carolina has no right to claim control of the entire flow of the Catawba river. Well, we agree with that. We don't -- but we never claimed we had the right to do that, and there's not a shred of evidence presented thus far that shows that's what's happened.

Then it says, following the full development -- I'm quoting again from Page 9 of South Carolina's brief to the Supreme Court. Following the full development of the record, the Court should enter a decree

equitably apportioning the Catawba River declaring North Carolina's Interbasin Statute invalid with respect to an equitable transfer out of the Catawba River and forbidding all transfers by North Carolina, past and future, that are inconsistent with that apportionment. That's what this case is about.

What we're now led to believe is that every single consumptive use in the State of North Carolina, no matter how long it's been going on, no matter what it is, is at issue. Those consumptive uses are many. They are large and interbasin transfers are much smaller.

I want to point out I passed up to Your Honor a document, which is the Water Supply Study. We cited this actually in our responses. We cited this document, Your Honor, in our opposition brief and referred the Supreme Court to the place on the Internet that you can find it. I find it might be helpful in some respects with respect to the argument I'm making today. There is a map Your Honor, if you will --

THE COURT: Page 13.

MR. GULICK: I believe that's correct, Page 13. This is a map that was developed as part of this water supply project. Of course, it shows a lot of municipal returns that are at issue here, a lot of other returns, power withdrawals. Duke Power currently is probably the biggest

consumptive user in this entire river basin at the present time.

What's set out in this entire document is the protocol for coming up with this plan. It details all of the consumptive uses occurring within the scope of this project, the map of which is outlined before you here. It is not the case that there's not a lot of information already out there about what all of the consumptive uses are. In fact, there's a great deal of information that was used in and incorporated in this water supply plan to form the comprehensive relicensing agreement, which South Carolina itself alleges in some of the -- it references in some paragraphs of its complaint.

My point here is this; it is not true that South Carolina does not have a lot of information at its disposal before it filed this complaint about the consumptive uses in the State of North Carolina, because the State of South Carolina was a participant in this study. If you go to the beginning of this document on Page 1, the very last sentence of the introduction you will see that a study team was formed to help guide the study, including representatives from North Carolina and South Carolina Regulatory Agencies, Regional Public Water Supply and Duke Power.

If you go past -- forward to Appendix A, which is after Page 84, and then go to page 5 of this

Appendix A, you'll see at the bottom of the page, there are study participants in the agency for South Carolina Department of Natural Resources, apparently this rogue agency of the State of South Carolina, Mr. Bud Banner, one of the affiant's for the State of South Carolina. It's attached to its motion to be allowed to file this complaint.

There are many appendices that follow at the end of this document, which outline and detail the consumptive uses within the project. My point on this is, the State of North Carolina is taken very much by surprise that the case is about something other than interbasin transfers. The significance of this is twofold; had we known that South Carolina was going to take the position that the Court -- that the river had to be apportioned before you could determine what the wrongful conduct on the part of North Carolina was, that would have been grounds to oppose this, because that's not what the law of this is.

We didn't understand that they were opposing interbasin transfers. That was very clear. That's one part. I think we were prejudiced. If we understood this is what it was, we would have had another argument to make. It might or might not have prevailed, but we would have had the opportunity to make argument to the Supreme Court.

There is a second matter, and even I would say, even if you were to accept the concept of liberal, and

let's say, we didn't cite any cases or, I believe, South Carolina didn't cite any cases with regard to interpretation directly, because I don't think there are any, at least in the amount of time we had to research that question. We could not find any cases directly on that point. It appears they could not find any, either.

At some point, even liberality of construction has to come to an end. This complaint can't mean everything that South Carolina wants it to mean, notwithstanding the words they actually used. Interbasin transfers is featured so many times in so many places, both in the introduction and the allegations of wrongful conduct, on the part of North Carolina, and with respect to the relief that's requested, that we think it's really unfair to say no, it means all of the withdrawals within the State of North Carolina. It certainly made no such reservation of that issue by direct language, but especially in light of the history between the two States of working with Duke Power to come up with a way to -- and one of the major issues there was coming up with a low-inflow protocol, which you will see referenced in this document, which as Duke Power's representative indicated, is much more generous to downstream than was the old license.

North Carolina worked hard and we believe that South Carolina worked hard to come up with something

that would provide more relief downstream after the serious drought that affected the states in 1998 to 2002. Then this controversy of the interbasin transfer came up, and as best we can see, it's what led directly to this lawsuit. We're very surprised. We believe we are prejudiced now to find at this stage that all of the consumptive uses in the State of North Carolina are now viewed with suspicion as being wrong, no matter they've gone on.

THE COURT: They seem to be saying that we have to look at the cumulative effect of what all uses are. You have to look at the cumulative effect in order to analyze the transfers. That's part of it.

MR. GULICK: Actually, I don't agree with that. Certainly, if you decide and the Court decides we have done injury to South Carolina, at some point in the apportionment, you have to look at all and you have to get there. Then all of these, and all of the withdrawals, all the returns, all of the alternatives, all those other things that have to be examined in order to arrive at an apportionment, but if what they're alleging is wrongful are these interbasin transfers, the amount of those, in fact, and it also has to be quantified, and the -- it is, in fact, from an expert's, that we've engaged, it has to be quantified in order to determine the impact they're having downstream.

In fact, if you can quantity the thing, the

diversion that's complained of, whether it's these interbasin transfers or the diversion in the New York case to the City of New York, you can model the impact that that diversion is having downstream, and you can determine the impact of that diversion, or set of diversions, as in this case, actually have. You can factor those out. In fact, you have to know what the amount of them are. You have to have a finite amount in order to be able to reach that quantified result in your modeling those three.

That's what these hydrogeology experts do. That's their job. If you don't know what it is, if you don't have that quantification, you cannot do it. It's possible.

I will say North Carolina is not interested in carrying on this case for the next 10 or 20 years. I will say that we're very much concerned about what the United States referred to in its brief to the Supreme Court in 1998 in Kansas vs. Nebraska and Colorado, Original Action 126. The United States in its brief said at Page 18, interstate water disputes pose complex trial management problems once they proceed past the pleading stage. The factual issues on complex questions of meteorology, hydrology, geology and engineering and economics, which must be applied thousands of square miles of terrain and land uses. The litigation, particularly discovery and trial preparation, correspondingly tends to be extraordinarily complicated, time consuming and

expensive.

In fact, North Carolina has no interest, at all, in being put through that if it can help it. We believe that South Carolina chose the transfers that they meant to complain about at the time they filed this complaint; that they were talking about interbasin transfers. Interbasin transfers are a very specific animal. You can't help but realize that when you read this document here, which defines exactly what interbasin transfers are.

I'm referring to the water supply study. It was well-known to South Carolina. They knew about the amount of the City of Charlotte's other consumptive use. It's in here. They knew about Duke Power's consumptive use. It's in here, and Hickory and Marion and all those others.

They chose to file their complaint very specifically though to interbasin transfers. The consequences for opening it up is we will not -- we believe it is a matter of interpretation, even liberal interpretation, should not give them the benefit of saying now it's all the consumptive uses that we're complaining about.

THE COURT: All the consumptive uses added up and then, at that point, being too much. I don't know if I hear them complaining about each and every use, but it's a complaint about the cumulative effect. Now, it raises the

question whether you're talking about wrongful conduct. What's wrongful?

MR. GULICK: Well, what the Court indicates is wrongful is that they've got to show that the diversion that they're complaining about, and very clear they're complaining about these interbasin transfers. That's what they're complaining about; that those diversions are causing them substantial harm downstream. That's the test that was used, I believe, in Oregon vs. Washington and some others, and what's referred to in the Connecticut vs. Massachusettes and New Jersey vs. New York. They've got to show a harm from that; that action has got to be causing them a demonstrable harm downstream.

If they can meet that burden, we believe we may be able to counterbalance that. That was that second point, I suppose, in the initial stage or maybe middle stage, that what North Carolina is doing with that water outweighs, the benefits outweigh this downstream harm that those transfers might be causing.

THE COURT: If you can construe South Carolina's complaint as encompassing all those uses by implication, if nothing else from the term equitable apportionment in the prayer for relief, supposing you could infer that South Carolina's complaining in the way they now say about all of the uses that that itself is the wrongful

conduct for injury. When they say yes, the interbasin transfers jack it up quite a bit, we also have to take into account the other uses, assuming that's the case, just hypothetically, is that a permissible?

MR. GULICK: I don't believe so, Your Honor. It's for this reason; clearly, under the case law and, for example Colorado vs. Kansas, clearly, North Carolina is entitled to use of water out of this river basin. It uses water and -- in Colorado vs. Kansas, the Court said the lower state is not entitled to have the stream flow as it would be in nature regardless of the use.

Clearly North Carolina has a right to the use of the water. It has been using water and always some of that consumptive use -- well, the consumptive use means that some of the water that's been used is not going downstream. That's always going to be the case.

But the what their argument essentially is, you have to provide the remedy for first and then decide if the State is doing the wrong thing. You have to apportion the river between North Carolina and South Carolina and then you can find out if North Carolina really was taking more than its share. That's not what the law is.

That's the reason that's an undifferentiated amount. If all of those consumptive uses were stacked up, as you say, then there's no way -- then, of

course, you just say well, do all of those consumptive uses have an impact on downstream? Well, all of them probably do, but that doesn't mean that North Carolina has taken more than its share. That begs the question.

I believe that the case law, such as in Connecticut vs. Massachusetts, requires that the state that's making this complaint, that's seeking the Supreme Court's power to compel the upstream state, they have to make some choices and they have to say this thing you're doing, this thing you're doing, is wrong. Now, maybe conceivably they could have said well, it's the interbasin transfers and Charlotte's taking this much too much. I would concede that had they done that, I would say that was the proper complaint. That's not what they said. They might have said North Carolina's taking X-volume of water, whatever it might be, but their fair share is some lesser volume. We would know the quantity they're complaining about that we can measure.

THE COURT: Did you address either the discovery in a hypothetical that is not a pleading issue? Well, it's not a scope pleading issue. Can it be addressed through discovery or more particularity or through Phase 1?

MR. GULICK: Well, I would say yes, it can, but it's going to be a lot longer, because at the end of the day, South Carolina has to be taking a position about

what they contend is too much. There's no way that any hydrogeologist, and I don't want to disclose who he is yet until we get to that stage, he said otherwise, the parties are just waving their arms, because there's no way then to say all right, South Carolina says this much is too much, and then we know what we can go model and say is that really hurting them or not.

At some point, and you alluded to that with your questions to Mr. Frederick, and the answer is that could be done. But if Phase 1 -- I don't want to step away from that -- yes, it could be, but it's going to take a lot longer, because now we -- who knows when we will know what the full scope of South Carolina's complaint would be.

Everybody that's an expert in this that I talked to says 10 years plus for the case at least. That's what they say to me. I don't want to be there, but I want to be frank to you because that's not where we want to be, but that's where we may be. They can't wait until the remedy phase to see whether or not we did something wrong. Now, it makes a huge -- well, I guess that was my point.

There's no way that even if North Carolina's using -- let's say North Carolina is using its equitable share. There's going to be some way to measure the impact of that downstream, but that doesn't mean that it's not equitable. So the harm has got to be in the amount that

they allege is wrongful, otherwise it a meaningless exercise.

Both states are entitled to the use of the water out of this river. That's why this is such an important issue and important to find out now. We believe that the complaint shouldn't mean just anything they want; that if you look at the history of how this arose, it was clear that these interbasin transfers were the very thing that South Carolina is concerned about, and up until just a few weeks ago, that's what we believed when we filed our answer.

Now, I believe this is the biggest of the three, Your Honor. I do want to read -- I just want to touch on a couple of other things, but I think I've made my point about that. I would be happy to answer any questions that you have.

THE COURT: I don't have any questions

Mr. GULICK: The other two had to do with drought and the scope of the river. I will concede to you I don't believe either of those is as strong as I believe the issue of that interbasin transfer is. I personally do not think there's -- I don't think there's any way you can read all consumptive uses as interbasin transfers.

I do want to point out about drought. On Page 8 of the brief, we talked about it, of course, in our brief of the complaint. Page 8 of the South Carolina's brief

in support of its motion to be allowed to file this case, at the very end of a section on North Carolina's Interbasin Transfer Statute, there's a paragraph at the top of the Page 8 that says these transfers, which in this case can only mean interbasin transfers just talked about in the proceeding section, those transfers of water out of the Catawba River necessarily reduce the amount of water available to flow into South Carolina exacerbate the existing natural conditions and droughts that contribute to low-flow conditions in South Carolina and cause the harms detailed above.

The only harms I can find detailed above are a specific list of drought -- of harms, the same harms as are alleged in the complaint at Paragraph 16, but on page 5 to 6 of this brief, the argument being made to the Supreme Court, they're all related to harms and I agree, they don't appear to be exclusive. They appear to be examples, but they're all examples of things that happened during that drought.

This is important not only because of the relief at issue, but also in terms of scoping what the harm to South Carolina may have been. South Carolina's own filings have an affidavit from Mr. Banner, who certainly is a knowledgeable person, says that in times, that ordinarily there's plenty of water for everybody in this river.

The pleadings themselves indicate that the

harms complained of, whether they're meant to be an exclusive list or not, are all in relation to drought. There's no question there have been droughts. That was one of them. Of course, we contend that droughts caused the harm, but that's something that's capable of measurement. It would be very -- it is exactly what these experts do, the hydrogeologists, to say we can reduplicate those conditions and we can take out the interbasin transfers and we can see to what extent it contributed to this. That's going to be -- that kind of evidence is going to be essential in deciding this case, whether it cuts in South Carolina's favor or North Carolina's favor. It's essential to have that kind of expert testimony developed in order to be able to rule on Phase 1.

I'll say I think it's clearly the drought, but I don't think it's as strong of an argument. I will concede that to you is the one about interbasin transfers, because interbasin transfers are also in the complaint. There's no other consumptive use mentioned.

Again, with regard to the last issue about the scope of the river, I think that's the least compelling, but I do want to point out the map, the southern most point mentioned in terms of any of these harms is the City of Camden, which is right here, which is in the Wateree portion of the river. Now, having that, it's less clear because the complaint doesn't specify exactly what portion of the river

is being complained about.

I do want to point out how much more is involved if we're going all the way to the river -- all the way to the ocean. I won't contend quite as strenuously as I did about interbasin transfers about the scope of the complaint, but if we're talking about expanding this case and the volume of the case, it's going to get expanded a lot, because you have to look at not only the water uses and the conservation measures all up and down the river. You have to look at the alternatives and there are clearly a lot of alternatives in the southern portion of this river. I don't think that's particularly -- I just want to alert you to that. Because it's going to be coming when we get to the Case Management Report.

THE COURT: Let me ask you this; I did notice you mentioned in your brief that the first paragraph of the complaint defines the Catawba River as going to the Wateree River.

MR. GULICK: Yes.

THE COURT: Which is at Lake Wateree?

MR. GULICK: I believe the Wateree would start, certainly it would be --

THE COURT: It meets Big Wateree Creek.

MR. GULICK: That's where it becomes the Wateree.

THE COURT: Right. That's what I thought. Now, it is somewhat interesting to me in the first paragraph of the complaint only extends down to Lake Wateree.

MR. GULICK: In fact, the river changes its name. It's a different -- it has a different name.

THE COURT: Right.

MR. GULICK: Then you have a whole new volume of water from another --

THE COURT: That's what I was getting to. Part of the nomenclature and the inclusion in Paragraph 1, I don't know anything about this water flow other than what I've read in the papers, but it does seem logical that different considerations would enter in once you had these other streams flowing in and the intervention of a lake, I don't know if that's generated or not, the lake waters, nonetheless, Catawba's use by North Carolina would be diminished beyond that point.

MR. GULICK: Lake Wateree is the last of the Duke -- it's last southernmost Duke system.

THE COURT: Okay.

MR. GULICK: That's, of course, why we framed the question as we had.

THE COURT: I do think that all three of those points are very legitimate points and partly why I was asking about mechanisms. There are different ways you can

get out. One, it might be a problem with the pleadings, which is what we're talking about now. I think the point that the Supreme Court refers to forms and pleadings is a good one. It's not really answered by the case law.

They do allege North Carolina does not raise the issue in their opposition. You have a problem with the Supreme Court having a complaint as it did with the broad prayer for relief, the broad prayer for relief. Then an injunction to the extent not inconsistent with the broad prayer for relief. That doesn't mean, even assuming that it's the case that the Supreme Court has not blessed a very broad pleading, that there aren't mechanisms for trying to get out some of the issues you raised early on.

I can see, even looking at this map, could have huge implications for how long this proceeding is going to take and also, how -- well, the utility of proceeding. It indeed is the case that the impact of North Carolina is significantly - I don't know, just hypothetically -- less. Maybe we shouldn't have it as part of the case. I don't know.

But it may be that maybe the parties discussing as part of their case management discussions how to clarify the pleadings perhaps and then the pleadings to provide more specificity and/or set up a procedure consistent with the case law that would require South Carolina to be

more specific through the discovery process early on. That would cause South Carolina at the outset to have to define what injured them and what is it they're seeking specifically, because you make a point in your brief that when you filed the complaint, you should have some sense of what has harmed you and how you seek to be compensated. I just offer that. I'm not resolving this now. It's worthwhile for you all to think about.

MR. GULICK: Yes, Your Honor.

THE COURT: On all three of your issues.

MR. GULICK: I agree. I think the -- we will be talking about. I don't know that we can help it.

But the one thing I want to say is that the -- we think this case is, again, over interbasin transfers. If the diversion is truly wrongful, then they're probably entitled to equitable apportionment. It may not get them more. North Carolina's share and equitable apportionment may be much bigger than they think it ought to be.

As I understand the equitable apportionment part of it, but to that extent that it appeared in the complaint and there's no way that we could say they didn't ask for it, they had to ask for it. They might be entitled to it.

If on the other hand, this is the prejudice

point I wanted to point out, if what they're saying appears sometimes at least and what I'm hearing today and reading their papers that they're entitled that you can't really know whether North Carolina is doing anything wrong until you know what their share is. I don't believe that's what the Supreme Court precedent says.

THE COURT: That's an issue that one would think could be briefed.

MR. GULICK: Yes, I think perhaps it should be.

THE COURT: I think so.

MR. GULICK: Because that's a different question. The Supreme Court might not have taken the case if they understood that's what the issue was. I think fairly read and unless you're an expert in hydrology, it sounds like 30 million gallons a day, that sounds like a lot of water, if you're not a hydrogeologist. It sounds that way to me.

They're very specific about what they were complaining about and I would say if they were right, I don't think they are right, but if they were right, they would be entitled. This other theory is a very different one. I don't think that's what is in the case.

I've made my points. I thank Your Honor. Thank you very much, unless you have further questions.

THE COURT: I don't.

MR. FREDERICK: I think there's a fundamental disconnection going on here, and I want to try to clear it up. The central problem here is whether the Catawba River is over appropriated. The cases involving compacts where a single diversion is viewed as in itself a violation or infringement all arise where there has been an agreement between the states as to who's going to get how much water, and it's that violation where in the New Mexico case, for instance, the Court said the river is already over appropriated. When Colorado wants to make a diversion, we have to evaluate whether or not that's a violation or when the current shifts back to the violator of that over appropriation of the river, to determine what the remedy is.

The problem with the Catawba River is that it is not subject to a compact, so there is no agreement between the two states, who though my colleague concedes, have an equal share or an equal opportunity, quality of interest in the river. We don't have something that measures what the capacity of the Catawba River is.

The fundamental problem here is that their IBT Statute says, and I quote, we quoted this on Page 6 of our brief on the Case Management Order Number 3, the North Carolina officials require the EMC to consider in evaluating whether to grant a permit, quote, the cumulative effect on the source major river basin of any water transfer or

consumptive water use, close quote. With all due respect to my colleague from North Carolina, it's completely disingenuous for him to say that we can't look at consumptive uses on the south side of the boundary when their own statute says they're supposed to look at all consumptive uses on the northern side of the boundary.

What we're talking about here is an equality of interest in a scarce resource that has never been measured to determine what its capacity is. The fundamental point about the IBT Statute is it's a one way ratchet. It allows the North Carolina side to appropriate whenever they want and if there's a drought, they can transfer water out of the Catawba River without taking into account the harmful consequences that occur south of the boundary.

In order to determine whether or not there is over consumption by these IBT's, you have to first know what is the capacity of the river. It is true that in times of high rainfall, there will be plenty of water to go around and we made that clear in our complaint; that there are natural periodic furcations. When there's a period of low natural flow or drought conditions that obviously creates an exacerbated harm to the downstream user and users of the water and we outline some of those harms.

Respectfully, Special Master Myles, it doesn't seem credible when counsel can waive a big fat binder

and say we know everything that's going on with consumption. Why didn't you put those in your complaint? Then 5 minutes later say it's going to take us 10 years to figure out what's going on with the river so we can determine whether or not these IBT's cause a particular harm. They can't have it both ways, and the contradictions here are palpable, because what we're saying is first, we need to figure out what the capacity of the river is for the users and then we determine whether these particular consumptive uses are violations of South Carolina's right to an equitable apportionment.

We are not asking for you to decide what is our share at the beginning of the lawsuit. That is not what this is about. What we do have to determine what the capacity of the river is. That has been modeled. It has been studied. There's a lot of information that is available to it, but the problem is that on the North Carolina side, we are not privy to the information about the consumptive uses that by their own statute they are obliged to consider when they grant permission to make an interbasin transfer.

What we do know, and we state this in our reply brief in support of our motion for leave to file the complaint, this is at Page 7, that there are transfers authorized of no more than 85 million gallons per day out of the Catawba as agreed to in the CRA and that they've already, they already, permitted transfers of approximately 72 and a

half million gallons per day.

Under one scenario, there is sufficient information to provide a sense that the Catawba River is over subscribed and is at strained capacity. Our position is that we should get a full and fair opportunity to determine what should be South Carolina's share before North Carolina ends up appropriating way more than what it should get under the common law decisions of the Court.

That is well within the realm of notice pleading. North Carolina's been on notice since we filed this brief last August as to what our central contentions are, and they never complained about it until now, when we set forth our effort to proceed with case management proposal and the bulk of the argument here really goes to issues that are not germaine to how the complaint properly should be construed.

He starts by talking about Connecticut vs. Massachusetts, which is a proof standard. You don't need to decide what the proof standard is until we actually have evidence and we haven't got to discovery yet. He suggests that they know that we're complaining about their IBT's, but their own statute says they're supposed to look at all of the consumptive uses in order to determine whether to grant an IBT.

The problem is that it focuses on the North

Carolina side and doesn't take into account the South Carolina side. We're not trying to enjoin all consumptive uses. Let me be very clear about that. We understand that at the end of the day an equitable apportionment decree will give very serious weight to the consumption occurring on the North Carolina side and I'm not aware of any decision of this Court that says one state gets to have all the river and we certainly are not asserting that here, but that's a different point; that whether or not the river is over appropriated and whether or not there needs to be a fair allocation of the respective rights of the different states.

Now, I do want to make a couple of other points. I think he's basically conceded that, in general, we do have to look at the cumulative effects and in order to determine whether the IBT's exceed their fair share and he concedes that we have an equality of right under the decisions of the Court.

I think the issue fundamentally becomes how do you determine what the capacity of the river -- what the capacity of the river is and then you can determine the harm that we specifically assert of their over consumption of the river through these transfers. We have outlined that we're not just talking about drought on Pages 4 and 5 of our brief in support of our motion. We talk about periodic fluctuations and water level, inadequate water volume at

ordinary stages.

Our complaint makes that. I walked you through the paragraphs at the beginning of the presentation. I don't think the complaint can be fairly read as only being about drought, although it is certainly true, and I would say this candidly up front, that in any kind of an apportionment there will necessarily be variations depending on the river condition. That's commonly done in this Court's cases, where if the water level goes to a certain point, each state gets a certain amount. If it goes below that to a certain amount, each state gets a certain amount and that's all we're asking for. We acknowledge that when there's a lot of water, no one will be here complaining to you. The problem occurs when there are wide fluctuations and determining a fair way to say North Carolina, you've taken out your share, but you don't get more than your fair share. Save some water for South Carolina.

Now, I do want to address the issue that you raised at the end about the scope going all the way to the Atlantic. If I could direct you to the map. It is certainly fair to say that until the Catawba River joins the Congaree River that there is a certain way of evaluating the discreet part. This is right where the green touches the pink on the river.

The problem is that, when those feed into

Lake Marion, which is that rather large looking body of water in the pink right where the Wateree and Congaree River meet, there has to be enough water to sustain that ecosystem and just within weeks, the Bass Masters Fishing Tournament, a very prestigious fishing tournament had to cancel because there wasn't enough water in Lake Marion.

Now, we didn't put that in our complaint because it just happened, but our submission is that we have identified all the way to the Santee River, and this is in our complaint. It is not Paragraph 1 as you correctly noted, but it is in Paragraph 4 or -- sorry 9, where we describe the Catawba River Basin as going all the way into the Santee. Now, am I prepared to say that we're authorized to cut off the complaint upstream of the Atlantic Ocean? I'm not authorized to say that.

But I will say as we get into discovery, there very well may be feasible limits to cut off the scope of the complaints so that it does not entail apportionment all the way down to the Atlantic because the scope of the harms occur upstream. It is just the way gravity works. If the water is flowing and the bulk of the water is coming from North Carolina, and if it isn't there, and it can't get all the way to the ocean as it ordinarily would, it's already been taken out. There are significant downstream ecological effects, which we outline in the complaint. We think that

we're entitled to take discovery on. We have nothing further unless you have any questions.

THE COURT: Well, my only question is what I asked before which is, is it worthwhile discussing mechanisms for attempting to clarify the scope. I think there's a little bit of disconnect, as well, between what the standard is for going forward, seeking relief.

It does seem logical to present itself as a question. Assuming we get past the pleading issue, it seems like an issue that's worthwhile to think about sooner rather than later. That seems to me the first hurdle.

Also, what's the legal standard? That would help define this and if there's a disagreement over that, that's something that ought to be taken up

MR. FREDERICK: I think that there certainly will, in the course of our discussions over the Case Management Order, become greater as to what the issues are for Phase 1. I think it is important to keep in mind that these equitable apportionment cases are very special in the sense they're dealing with scarce resources that involve fluctuations over time and study where history, the historical flows, have an impact.

I would submit that it would be unfortunate if the Court cut off our ability to fully develop the case before we have access to the requisite information to present

the case. It may very well be that our case stops at the joining of two rivers far upstream of the Atlantic Ocean, but it also may be the case that because of such withdrawals of water from North Carolina, that the experts say if adequate flow were permitted down to the river, that some adverse effects would not be occurring farther downstream.

I think that the discovery process can play itself out to some degree before limitations are imposed that are too constraining on the ability to determine how to properly allocate this scarce resource.

THE COURT: All right.

MR. FREDERICK: We certainly have been having sessions with North Carolina, but we would strenuously object to the notion that this is going to take 10 years or needs to take 10 years. North Carolina said that before we filed the complaint and rejected our offer of negotiation and we strenuously oppose that then and we do that now, because we think that we can put our shoulders to the wheel, get the appropriate studies done, tee up motions for summary judgment, and have you decide whether or not we can make our burden of showing harm and if so, we move to the next phase to determine what the respective shares of the river should be.

THE COURT: I think that nobody is saying that it will take 10 years. I think the point is that these

things, you can see how quickly it expends if people weren't careful. I think his only point is that not to let that happen and we need some mechanism for that. I think that's true.

Whether that means we just have full discovery until the summary judgement phase or whether there's some other mechanism earlier than the summary judgment phase.

MR. FREDERICK: We don't disagree with that, Special Master Myles. In fact, we 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.

THE COURT: Very well. I guess that's all. Is there anything on the case management issues?

MR. FREDERICK: I don't think so. We've already determined a time when we can sit down with North Carolina and work through the issues for the case management

order. I think we made a lot of progress in our first meeting. I think North Carolina agreed with that in their report. In light of the hearing today and the many issues that have been discussed, we certainly will be working hard to create a prompt procedure for the resolution on the outstanding issues and for you to resolve how we would go about those matters, but I don't think we have anything further to present on that at this time.

THE COURT: Okay.

MR. GULICK: We obviously have some disagreements.

THE COURT: Yes.

MR. GULICK: We are trying to work with each other.

THE COURT: That's all. Thank you.

CERTIFICATE OF COURT REPORTER

I, Loretta L. Larsen, hereby certify that I, was the court reporter in the U.S. District Court Eastern District of Virginia, March 28, 2008, at the time of the hearing herein.

I further certify that the foregoing transcript is a true and accurate transcript of the testimony and other incidents of the hearing herein as set down, to the best of my ability.

Given under my hand this 25th day of April 2008.

LORETTA LARSEN
CCR #0315097