No. 138, Original

IN THE

Supreme Court of the United States

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JUN 27 2008

KLM

STATE OF SOUTH CAROLINA,
Plaintiff,
v.
STATE OF NORTH CAROLINA, ET AL.,
Defendants.

Before the Special Master
Hon. Kristin L. Myles

CHARLOTTE'S RESPONSE TO BRIEF OF THE STATE OF SOUTH CAROLINA CONCERNING PHASE ONE AND PHASE TWO ISSUES AND TIMING

The City of Charlotte respectfully submits this response to the Brief of the State of South Carolina Concerning Phase One and Phase Two Issues and Timing, filed June 16, 2008. Charlotte addresses three points made by South Carolina: (1) the significance of the Court's acceptance of South Carolina's bill of complaint in defining the threshold standard South Carolina must meet in Phase I; (2) South Carolina's erroneous characterization of that threshold standard; and (3) the Intervenors' participation in Phase I of this litigation.

A. Inferences to be Drawn From the Court's Exercise of Jurisdiction

South Carolina asks the Special Master to infer that the Court, in accepting South Carolina's bill of complaint, "necessarily ruled that South Carolina's allegations of harm, if proved, fully satisfy the Court's threshold standard." Brief of the State of South Carolina Concerning Phase One and Phase Two Issues and Timing, at 6 (hereinafter "S.C. Brief"). Retreating somewhat, South Carolina then asserts that "the Court necessarily has ruled that South Carolina's allegations, if proven, are of the types that satisfy the Court's injury requirement." Id. at 12. (emphasis added) While the latter inference might be plausible, in part, the former defies logic.

South Carolina's Complaint engages, as do most complaints, in conclusory pleading. It contains much discussion of legislative and administrative actions in North Carolina and describes the Catawba River Basin in detail, but it includes only three allegations of harm occurring in South Carolina. First, paragraph 17 alleges that, during the drought that ended in 2002, South Carolina citizens suffered five types of harms: closure of boat ramps; foul tap water; reduction in hydroelectric power generation; business losses due to inadequate dilution of locally produced pollution; and localized creek flows that consisted of treated wastewater. Compl. ¶ 17. Paragraph 17 does not allege that water consumption in North Carolina caused these drought-related harms. Second, in paragraph 18, South Carolina alleges that a North Carolina statute has exacerbated harms in South Carolina that were themselves caused by "reduced flow in the Catawba River"—

presumably by reason of the "prolonged droughts" referenced in the immediately preceding paragraph. Id. ¶ 18. South Carolina specifically complains about two interbasin transfers authorized by North Carolina officials under that statute in 2002 and 2007 (see paragraph 20), neither of which approvals resulted in flow reductions during the 2002 drought or the harms discussed in paragraph 17. Id. ¶ 20. Finally, South Carolina alleges in paragraph 24 that transfers of water out of the Catawba River Basin approved by North Carolina "exacerbate the existing natural conditions and droughts that contribute to low flow conditions in South Carolina and cause the harms detailed above." Id. ¶ 24.

As South Carolina acknowledges, its Phase I burden under the Court's precedents is to demonstrate that water consuming activities in North Carolina have caused "real or substantial injury or damage" and that such harm is of "serious magnitude." S.C. Brief at 4 (citing Colorado v. New Mexico, 459 U.S. 176, 187 n. 13 (1982); Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931)). Given this standard, it cannot seriously be argued that South Carolina would meet its Phase I burden simply by proving the allegations noted above. Even if actions in North Carolina have "exacerbated" drought-related harms, a fact South Carolina must prove, there remains a substantial question of degree. Are the drought-related harms themselves of a "serious magnitude" in the Basin, or are they localized injuries of the sort found insufficient by the Court to carry a downstream State's burden? See, e.g., Kansas v. Colorado, 206 U.S. 46, 117 (1907). If those harms are serious and widespread, did any proven exacerbation of them caused by North

Carolina's activities add significantly, or only marginally, to those harms? South Carolina's complaint does not apprise the Court of the magnitude or geographical extent of its alleged harms, let alone demonstrate that activities in North Carolina had caused such harms or significantly exacerbated them. At most, it may be said that South Carolina alleged types of harms recognized by the Court in prior cases and, in conclusory fashion, blamed North Carolina for causing them or making them worse. Nothing more may be gleaned from the Court's exercise of jurisdiction in this case.

B. South Carolina Has Mischaracterized Its Phase I Burden

In misplaced reliance upon a highly unusual case, Colorado v. New Mexico, 459 U.S. 176 (1982), South Carolina asserts that "the downstream State may show injury by proving that river flows are insufficient to support the existing uses made by the downstream State's water users." S.C. Brief at 8. In Colorado v. New Mexico, because existing downstream users in New Mexico had fully appropriated the Vermejo River's flow under the prior appropriation doctrine, it was logical for the Court to decide that any new upstream use by Colorado would cause some degree of harm by reducing flow into New Mexico. 459 U.S. 187 n.13. What South Carolina fails to point out, however, is that the term "fully appropriated" in Colorado v. New Mexico meant that the entire flow of the Vermejo River was consumed by users in New Mexico, as a result of which the River virtually ran dry, placing an extraordinary burden on Colorado to justify even a modest amount of upstream consumption. 459 U.S. at 180. But Colorado's request was far from modest. Its

proposed diversion of 4,000 acre-feet annually constituted nearly half of the 8,262 acre-feet of flow downstream in New Mexico during especially dry years. See Colorado v. New Mexico, 467 U.S. 310, 324-25 (1984) (Stevens, J., dissenting). South Carolina's position in this litigation comes nowhere near the extreme circumstances reflected in Colorado v. New Mexico. Finally, far from relying on the simple conclusion that harm is demonstrated when upstream uses reduce downstream flows, as South Carolina proposes to do here, New Mexico commissioned independent economists to study the economic impact of downstream flow reductions, and then presented that evidence to the Special Master as a key part of New Mexico's successful effort to carry her burden. Id. at 322.

South Carolina must do far more in Phase I of this litigation than show that existing downstream users could utilize more water than tends to be available during low-flow periods. She must make the type of demonstration outlined in North Carolina's opening brief, showing that consumptive uses in North Carolina -- and not other factors -- have caused harm of "serious magnitude." See Brief of the State of North Carolina Regarding Issues for Phase I, at 4-8. And like New Mexico's effort in Colorado v. New Mexico, she must demonstrate this conclusion by rigorous hydrologic and economic analysis in order for this litigation to proceed beyond Phase I.

C. Intervenors' Participation in Phase I.

South Carolina's fundamental error in defining her preferred scope of the Phase I inquiry leads to her illogical assertion that Charlotte's role in Phase I

should be limited to producing documents sought by South Carolina. S.C. Brief at 15-16. As noted, South Carolina acknowledges that she must show North Carolina consumption has seriously harmed her. The Special Master permitted Charlotte's intervention because Charlotte is the "authorized agent" of a significant part of South Carolina's claimed injury—the central architect of that alleged injury. As such, Charlotte has a compelling interest and a direct stake in the controversy. See Order Granting Motions for Leave to Intervene at 8. Accordingly, the Special Master concluded that Charlotte "therefore 'should have suitable opportunity to show the nature of [its] interest and why the relief against [it] individually should not be granted.'" Id. at 9 (quoting Kentucky v. Indiana, 281 U.S. 163, 173-74 (1930)).

In order to protect its interest against South Carolina's attack, Charlotte must be permitted to contest all elements of South Carolina's case against it. Charlotte therefore has a strong interest in showing that South Carolina cannot carry her burden of demonstrating: (i) any non-localized harm of a serious magnitude; and (ii) any causal link between the alleged harms and Charlotte's water uses. These are essential ingredients of South Carolina's Phase I showing -- ingredients South Carolina omits or minimizes in its simplistic analysis based on Colorado v. New Mexico, as discussed above.

As South Carolina acknowledges, Charlotte and the other Intervenors must "participate to the extent their own withdrawals are threatened...." S.C. Brief at 16. Charlotte's withdrawals were threatened when South Carolina filed this action and targeted those withdrawals specifically as the cause of South Carolina's harms.

Charlotte cannot defend its actions against South Carolina's attack unless it has the "suitable opportunity" to which the Special Master determined it is entitled. See Order Granting Motions for Leave to Intervene at 9. Contrary to South Carolina's assertion that Charlotte should not be a participant in the Phase I trial and should have no, or a very limited, role in deposing witnesses during Phase I, see S.C. Brief at 16, this means Charlotte must have unfettered opportunities to participate in all aspects of Phase I that relate to South Carolina's effort to demonstrate harms allegedly caused by Charlotte.

Charlotte has no intention of duplicating others' discovery. Rather, Charlotte intends to cooperate with all parties to cause discovery to proceed smoothly. If South Carolina should contend in the future that Charlotte is acting otherwise, we assume South Carolina will bring that contention to the Special Master's attention.

Conclusion

For the foregoing reasons, Charlotte respectfully requests that the Special Master adopt North Carolina's position on the issues for Phase I and decline to limit Charlotte's participation in Phase I unless and until a need to do so should arise. Charlotte wishes to be heard on these issues at the June 30, 2008 conference call with the Special Master.

Respectfully submitted,

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June 23, 2008

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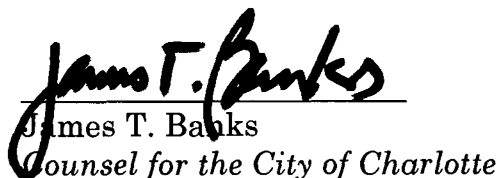
CERTIFICATE OF SERVICE

Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to be served have been served. On June 23, 2008, I caused copies of Charlotte's Response to Brief of the State of South Carolina Concerning Phase One and Phase Two Issues and Timing, to be served by first-class mail, postage prepaid, and by electronic mail (as designated) on those on the attached service list.



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