

SOUTH CAROLINA,
Plaintiff,

vs.

No. 138

NORTH CAROLINA,
Defendant.

TELEPHONIC CONFERENCE
BEFORE SPECIAL MASTER KRISTIN MYLES
Monday, June 30, 2008

Reported by:
DANA M. FREED
CSR No. 10602
JOB No. 89252

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SOUTH CAROLINA,
Plaintiff,
vs. No. 138
NORTH CAROLINA,
Defendants.

Telephonic Conference before Special
Master Kristin Myles, beginning at 10:03 a.m. and
ending at 12:35 p.m. on Monday, June 30, 2008,
before DANA M. FREED, Certified Shorthand Reporter
No. 10602.

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Monday, June 30, 2008

10:03 a.m. - 12:35 p.m.

MR. FREDERICK: David Frederick, South Carolina.

MR. BROWNING: Chris Browning, Jennie Hauser
and Allen Jernigan for North Carolina.

MR. FREDERICK: I neglected to mention that I
have Scott Attaway and David Sarratt here with me in
my office.

MR. SHEEDY: Good morning, Susan Driscoll and
Jim Sheedy here for Catawba River Water Supply Project.

MS. SEITZ: Good morning. Virginia Seitz
here for Duke Energy. Carter Phillips will be joining
me shortly.

MR. COOK: Bob Cook, Parkin Hunter and
Childs Cantey.

MR. BANKS: Good morning. This is Jim Banks
for the City of Charlotte. And we have Mike Boyd from
the City Attorney's office on for Charlotte as well.

MR. GOLDSTEIN: Tom Goldstein with the
Catawba River Water Supply Project.

SPECIAL MASTER MYLES: Is Amy Tovar on?

MS. TOVAR: I am here.

SPECIAL MATER MYLES: Hi, Amy.

Okay. So I think everybody's here. Just

1 because there's so many folks, it always helps to
2 identify yourself before speaking for the court reporter.

3 Why don't we begin by setting an agenda. And
4 if people think we should go in a different order,
5 that's fine. But what we have on the agenda for
6 today, as I understand it, are two, is the case
7 management order, case management plan with two
8 discrete disputes related to that on the issues of
9 attendance at depositions and privilege log entries.

10 And then a broader dispute, which is part of
11 the case management plan, but has been briefed
12 separately which is part of the issue of what issues
13 go into Phase 1, Phase 2. And then related to that,
14 although not delineated, is the participation in
15 Phase 1 and Phase 2, I guess.

16 Then separately from that, we have the filing
17 of a motion for clarification or reconsideration as to
18 which I think we need to set a briefing schedule.

19 So does that encompass all the issues that
20 are supposed to be before us now?

21 MR. FREDERICK: This is David Frederick.
22 There would be one additional housekeeping matter
23 which would be to set a time for the September call.
24 I think we were set in August. To get on in
25 September, that would be helpful.

1 SPECIAL MASTER MYLES: Mr. Frederick, are you
2 on a landline?

3 MR. FREDERICK: Yes, I am on a landline. I
4 am on a speaker phone. Is that helpful if I get a bit
5 closer to the phone?

6 SPECIAL MASTER MYLES: Yes. At least for me.
7 Okay. So why don't we begin with the issue
8 of attendance at depositions.

9 MR. FREDERICK: Very well. This is
10 David Frederick for South Carolina.

11 The issue that we briefed relates to Appendix
12 B of the proposed case management plan. And our
13 proposal limited persons who could attend at
14 depositions to counsel of record, members and
15 employees at their firm, attorneys specially engaged
16 by a party for purposes of the deposition, the parties
17 or representative of the parties, including counsel,
18 respective attorneys general, counsel for the deponent
19 and expert consultants or witnesses.

20 I think the point of disagreement simply
21 boils down to whether there shall be a general rule of
22 exclusion of everybody else or a general rule of
23 inclusion of anyone who might possibly show up subject
24 to a case-by-case exclusion by order of the Special
25 Master.

1 And our position is that the ease of
2 administration would be that's facilitated if there
3 was a general rule that limited the attendees to the
4 list that we specified in our proposal subject to,
5 you know, somebody objecting, being able to raise
6 a matter with the Special Master assuming the parties
7 couldn't reach an agreement.

8 And our position is that that kind of rule
9 promotes efficiency, it allows everybody to know who
10 can attend, does not create any issues of somebody
11 showing up for a deposition that the parties and their
12 counsel do not know or are not familiar with what they
13 might say or take away from the deposition. And that
14 we will have pledged in our conversations with
15 North Carolina to be reasonable with any reasonable
16 request for some person not included on the list. But
17 that it's better to, you know, confine the list of
18 attendees so that the case can proceed more
19 efficiently.

20 SPECIAL MASTER MYLES: Let me ask you
21 something, Mr. Frederick. What specific people are
22 you concerned about? I can tell you my inclination is
23 not to impose that limitation. And my main reason is
24 that -- well, a few reasons. One, I don't think it's
25 proper to limit the intervenors in the manner that

1 you've suggested. Secondly, I don't think there's any
2 material likelihood that anybody from the press is
3 going to want to be at any of these depositions. But
4 those are usually handled -- that kind of press
5 concern is usually the sort of thing that get handled
6 on a case-by-case basis like when you have a
7 deposition of a, you know, CEO of a large company and
8 then the press wants to come. And then usually what
9 happens is there's an effort to limit access at that
10 point in time.

11 But the blanket prohibition seems to me to be
12 excessive, absent some particular concern that you
13 have. And one example that was discussed in the
14 briefs was the idea that the city attorney, one of the
15 affected cities, may want to attend. And I did not
16 see the reason why that could not occur. I don't see
17 the prejudice to South Carolina if that were to occur.

18 MR. FREDERICK: I think, Special Master
19 Myles, you know, the basis of your question regarding
20 the city attorney is one that we did address in the
21 briefs on the grounds that we would not be predisposed
22 to assert that such a person could be excluded upon a
23 reasonable request.

24 I think our concern that the time for
25 depositions is quite precious. And, under

1 North Carolina's insistence, quite brief. And we
2 would like the case to proceed as efficiently as
3 possible. And restricting, to the extent practicable,
4 those persons who don't have really concrete stake in
5 what happens in the depositions, is going to best
6 facilitate that efficiency.

7 SPECIAL MASTER MYLES: Is there any case that
8 you know of, other than New Jersey versus Delaware,
9 where a court imposed a blanket restriction of the
10 sort that you're asking for here?

11 MR. FREDERICK: I -- I can't give you a
12 specific citation other than that Special Master
13 Lancaster, when he imposed that order on the parties,
14 said he had modeled it on previous orders that he had
15 imposed and that Special Master McKusick, who had been
16 Special Master in several original actions in the
17 Supreme Court, had also imposed. But this was formula
18 language that he had, he and Special Master McKusick
19 had imposed on other occasions, but we have not gone
20 back to look at those orders to verify what he
21 represented to us in those cases.

22 SPECIAL MASTER MYLES: You were counsel in
23 the New Jersey case. Right?

24 MR. FREDERICK: That's correct.

25 SPECIAL MASTER MYLES: Was the issue

1 contested in that case?

2 MR. FREDERICK: No, it was not.

3 SPECIAL MASTER MYLES: Well, why don't I hear
4 from North Carolina? But my inclination is to, is
5 what, as I said, to leave this issue to be resolved,
6 if necessary, on a case-by-case basis. I also
7 think -- let me give you a chance to address one other
8 concern that North Carolina raised. That the, there's
9 two competing concerns: One, advanced disclosure of
10 who might be coming might unnecessarily reveal one
11 party's litigation strategy, on the one hand. On the
12 other hand, your concern raised in South Carolina's
13 brief that a failure to give advance notice or to know
14 who might be there, may be disruptive or prejudicial
15 in some way.

16 So those seem to be the competing litigation
17 concerns at stake. But I -- but I want to give you a
18 chance to say what those would be from South
19 Carolina's standpoint. Because at the moment, it's
20 difficult to visualize prejudice of a substantive
21 nature that would flow from such a lack of advanced
22 notice by South Carolina or to South Carolina.

23 MR. FREDERICK: Well, on the prejudice point,
24 I think that there is substantial prejudice when the
25 deposition is disrupted by interlopers who are not

1 known to the counsel taking the depositions. And who
2 are taking up valuable time by their mere presence,
3 and -- but objections or other statements to put on
4 the record.

5 But with respect to the litigation strategy
6 point, I think that that is an overstated concern by
7 North Carolina, because what we're really talking
8 about here, I think, are people that are supposed to
9 be spectators and not participants in the deposition.
10 And the concern that spectators, through their
11 actions, could -- to see if the process is a very real
12 one, whereas, the question about revealing case
13 strategies in advance of a deposition is not one that
14 I think ordinarily would be present by existence of
15 mere spectators to the depo.

16 SPECIAL MASTER MYLES: Let me ask you this.
17 Who are the spectators that are going to want to come?
18 I have a hard time imagining that there's going to be
19 a lot of spectators. In other words, people that
20 aren't there to assist in some way in the
21 deposition-taking process.

22 MR. FREDERICK: Special Master Myles, that
23 was a surprise to us, too, that North Carolina even
24 objected to this suggestion on our part. And that is
25 what gives us concern that we don't know who they have

1 in mind as people who might be coming to the
2 depositions. The examples that they've given do not
3 seem to us to be credible to the point of rising to
4 the point of having a general rule allowing
5 spectators.

6 And we're concerned. We didn't think this
7 would be a controversial suggestion on our part. And
8 the mere fact that they want to have the deposition
9 process open to third-party spectators is something
10 that does give us pause.

11 SPECIAL MASTER MYLES: Okay. Well, why don't
12 I let North Carolina address the issues and then hear
13 from anybody else that wants to speak. I don't object
14 to intervenors weighing in on this issue if they wish
15 to.

16 MR. BROWNING: Thank you, Special
17 Master Myles. This is Chris Browning. I will be very
18 brief. I think your inclinations are exactly right
19 that the Federal Rules of Civil Procedure have --
20 provide that a determination like this should be
21 taken -- should be conducted on a case-by-case basis.
22 That provision has been in the federal rules for
23 basically 70 years and it seems to have worked well in
24 Federal Court.

25 Mr. Frederick seems to be concerned that I

1 have something tucked up my sleeve, but I can assure
2 the Court that I do not. To me, the issue is a
3 practical one.

4 Kannapolis and Concord are not intervenors,
5 they're not parties in this lawsuit. But if a
6 deposition is taking place and it's helpful to me to
7 have either their city attorney, one of their counsel,
8 or the engineer for Concord or Kannapolis present at a
9 deposition and I can use that additional resource
10 during a break in a deposition, over lunch to discuss
11 strategy, that sort of thing, I should be entitled to
12 do that without South Carolina having the veto power.

13 So this is the sort of issue, attendance at
14 deposition, that really should be addressed on a
15 case-by-case basis if a problem develops.
16 North Carolina doesn't anticipate a problem, but we do
17 not want South Carolina to have a veto power, if I
18 choose, for strategy reasons, to bring with me someone
19 that is not on South Carolina's list of who might
20 attend the deposition.

21 MR. FREDERICK: May I respond to that
22 briefly, Special Master Myles?

23 SPECIAL MASTER MYLES: Yes, you may,
24 Mr. Frederick.

25 MR. FREDERICK: That very hypo is actually

1 encompassed within our proposed rule. We allow, under
2 our proposal, that in that circumstance the person who
3 would be representing a deponent would be allowed to
4 be at the deposition.

5 And so I think that the only example would be
6 one, to follow Mr. Browning where he's going with
7 this, if there's a former employee of Kannapolis or
8 Concord and the city attorney of those communities
9 wants to attend, I can stipulate that we would not
10 object to the attendance of such an attorney.

11 The hypothetical that they're giving is
12 actually encompassed within our proposed language.

13 SPECIAL MASTER MYLES: Well, I think that --
14 I did note your language encompasses the idea that if
15 the City of Kannapolis is actually deposed in some
16 form or another, then they can be represented at the
17 deposition by their counsel. Obviously, the witness
18 can have their counsel there.

19 But I think that the issue does go beyond
20 that. Former employees are a possibility, but also
21 supposing that a -- that a transfer relating to the
22 City of Kannapolis is at issue and a non-City of
23 Kannapolis witness is being deposed with respect to
24 that transfer, there may be a need to have a
25 representative there as a knowledgeable person. So

1 I'm not sure I totally see why that shouldn't be
2 permitted absent some showing of prejudice. And that
3 would not be encompassed, I don't think, within your
4 language.

5 MR. FREDERICK: I think that's correct,
6 Special Master Myles. But let me be clear that our
7 aim is not to exercise a veto power as Mr. Browning
8 puts it on. But there are a lot of citizens in both
9 states that are keenly interested in what happens in
10 this lawsuit, and it would seem to us to be more
11 prudent to have the discretion exercised on a
12 case-by-case basis in favor of exclusion if the
13 appropriate exceptions rather than the other way
14 around. And I think that's, you know, basically where
15 the disagreement lies.

16 SPECIAL MASTER MYLES: Okay. What I'm
17 inclined to do on that, and we can summarize at the
18 end of this call, is to -- to agree with
19 North Carolina and say that this -- the issue of
20 exclusion from depositions should be resolved on a
21 case-by-case basis as the need arises. And in
22 general, that the practice under the federal rules
23 should apply. That I do have confidence in the
24 parties' abilities to work out these kind of issues,
25 in that if there's a problem, if a problem develops

1 with just interested citizens showing up on a regular
2 basis at depositions or even on a
3 one-off basis, I think that's the sort of thing that
4 can be dealt with between the parties. I don't think
5 anyone has an interest in that occurring. I mean, by
6 interested citizens, I mean just somebody who happens
7 to be curious about the proceedings.

8 If that starts occurring or becomes an issue,
9 I think the parties should be able to work that out by
10 agreement, and can submit to me some sort of order
11 that can be directed to such people. But barring
12 that, I'm not inclined to have a rule of exclusion
13 wherein I would have to adjudicate requests for
14 exceptions to the rule of exclusion.

15 Now, is that something that necessitates a
16 written order, or can we just take that and
17 incorporate it into the discussions over the case
18 management plan?

19 MR. FREDERICK: This is David Frederick.
20 Special Master Myles, I think maybe the easiest way to
21 do that would be to have North Carolina meet and
22 confer with us to kind of hammer out the final
23 language once you've resolved these remaining
24 disputes.

25 MR. BROWNING: Your Honor, I'm not sure --

1 this is Chris Browning. I'm not sure a meet and
2 confer is necessary. In the case management plan that
3 was submitted to you, there was proposed language by
4 North Carolina and proposed language by South Carolina.
5 I think the thing to do here would simply be to, as we
6 suggested, incorporate the applicable rule of the
7 Federal Rule of Civil Procedure and that would
8 effectively memorialize your ruling on that point.

9 SPECIAL MASTER MYLES: Let me just look here.
10 It's 4.1 on page 18 of the draft that I have here and
11 26, we just did 26(c)(1)(e). 26 is so long now. Used
12 to be so short.

13 Yeah, I think that's fine. Yeah, I do agree
14 with that. Why don't we just incorporate (c)(1)(e),
15 unless there's some reason to depart from that? I
16 think that encompasses what, what we've said already
17 here.

18 MR. FREDERICK: Exactly, Your Honor.

19 SPECIAL MASTER MYLES: All right. So why
20 don't we move on to the issue of privileged logs?
21 I've got the parties' positions on that. And I'd like
22 to hear from the parties, but the dispute does seem to
23 center around the possibility that there may be two
24 things, I guess. One is communications with counsel,
25 like about the litigation, which I don't think anybody

1 thinks ought to be on the privilege log. And
2 secondly, documents that don't lend themselves to the
3 type of specificity that South Carolina wants.

4 Now, as to the former, I think we can deal
5 with that specifically in some fashion. I don't think
6 South Carolina disputes that. So the real question
7 becomes whether there ought to be this very specific
8 itemization that South Carolina is asking for or
9 whether we can go with the more general language of
10 the rule, which from the history of it is intended to
11 be somewhat flexible on the form in which the
12 information's presented.

13 And I guess it would help to know what
14 specific kinds of documents North Carolina is talking
15 about that would lend themselves not as well to the
16 more specific itemization, other than communications
17 with counsel about the litigation, I think, which are
18 kind of not disputed.

19 MR. BROWNING: Your Honor, this is Chris Browning.
20 You know, our point is that in some situations, and
21 the example that I gave was communications between
22 attorneys, or attorneys' communication with the client
23 after the complaint was filed, that in some cases it
24 will be appropriate to give an objection by category
25 as opposed to a blanket order that requires specific

1 information for each and every communication. And if
2 that is incorporated in the case management order,
3 that principle of having the flexibility where needed
4 to object by category or into the case management
5 order, North Carolina would be fine with that.

6 SPECIAL MASTER MYLES: Just so I'm clear, was
7 there a category other than communications with
8 litigation counsel that would fall into that?

9 MR. BROWNING: No, Your Honor. I mean,
10 I think that is the one that certainly comes to mind
11 is attorney/client communications. Certainly, to the
12 extent that there are communications pursuant to a
13 joint defense agreement, that would fall in the same
14 sort of category as well.

15 SPECIAL MASTER MYLES: And I think you had
16 said in one of your submissions, communications
17 relating to specific transfer applications. Or maybe
18 that's not the right word but.... Not just this
19 litigation but prior proceedings.

20 MR. BROWNING: Your Honor, it wasn't -- if I
21 made use of such an example, I can't think of it off
22 the top of my head.

23 SPECIAL MASTER MYLES: Hold on. Let me take
24 a look at your opening brief, because that's I think
25 where it was.

1 All right. You referred to attorneys at the
2 North Carolina Department of Justice who have been
3 involved in defending the case.

4 MR. BROWNING: That essentially I don't need
5 to put down in a privilege log all of my
6 communications with Jim Gulick, or someone else within
7 my office, in connection with defending this matter.
8 And to that extent, to the extent that we can object
9 by category, that is what the Federal Rules of Civil
10 Procedure contemplate. And I think you have
11 recognized that that is, that there would be an
12 opportunity to object by category like that.

13 SPECIAL MASTER MYLES: With that particular
14 category, I think the answer is yes. The general
15 category of litigation-related communications between
16 counsel involved in the litigation, I think is itself
17 a legitimate category.

18 MR. BROWNING: All right.

19 SPECIAL MASTER MYLES: There may be reasons
20 to test that. I don't know what they would be. But
21 as long as that's identified and --

22 MR. BROWNING: Your Honor, if I could give
23 another example. In addition to this litigation,
24 there's also a related matter in the Office of
25 Administrative Hearings concerning the interbasin

1 transfer of Concord and Kannapolis. Obviously --

2 SPECIAL MASTER MYLES: That's what I thought
3 you had mentioned in one of your letters.

4 MR. BROWNING: Yeah. And obviously, to the
5 extent that our attorneys are involved in defending
6 that litigation, internal communications or
7 communications with the client in connection with
8 that, it would be extremely burdensome for us to try
9 to identify every single paper in a -- every single
10 internal communication involving attorney work product
11 in a substantial litigation matter such as that.

12 SPECIAL MASTER MYLES: Mr. Frederick, do you
13 have any problem with excluding as a, as categories
14 those categories of communications? The two that
15 we've identified: One, litigation-related
16 communications such as between you and your client
17 relating to this litigation. And secondly, what
18 Mr. Browning just identified, the inhouse, that is to
19 say, internal communications among the lawyers and
20 client relating to the Kannapolis transfer.

21 MR. FREDERICK: Yeah, we have no objection to
22 those categorical exclusions.

23 SPECIAL MASTER MYLES: Okay. Well, with
24 that, with those exceptions then, Mr. Browning, would
25 you object to applying, then, the general rule that

1 South Carolina is proposing, which is setting out the
2 name, date?

3 MR. BROWNING: Your Honor, I think the types
4 of information that South Carolina lists as a general
5 rule would be fine. We don't have a problem with
6 that. It's just, as I indicated, in some
7 circumstances there might be a category.

8 I will note that South Carolina, in their
9 list title of the author, recipient, anyone who
10 received the document. And obviously, sometimes when
11 you're going through and preparing a privilege log,
12 you have to apply a reason, a rule of reason and that
13 might not be at a particular party's fingertips as the
14 privilege log is being prepared. But I feel confident
15 we can work with South Carolina on issues like that.

16 MR. FREDERICK: I have no disagreement with
17 that last statement, Special Master Myles. I do want
18 to say that we understand that you just said as a
19 category to be internal communications within the
20 North Carolina Department of Justice relating to its
21 legal advice to administrative entities in connection
22 with specific transfers, and that that would not
23 necessarily include, you know, any external
24 communications that otherwise would not be privileged.

25 SPECIAL MASTER MYLES: I don't think it

1 should include nonprivileged information. We can't
2 sweep in nonprivileged information in an exception to
3 a privileged log.

4 MR. BROWNING: Special Master Myles, this is
5 Chris Browning. Mr. Frederick, as I understood his
6 last statement, was completely internal. That is
7 within the North Carolina Department of Justice. But
8 as I understood your earlier statement that to the
9 extent that I, as the counsel of record for
10 North Carolina in this matter, after the lawsuit has
11 been filed, I'm communicating with the governor's
12 office, I don't need to list that correspondence where
13 I am communicating with the client for purposes of
14 litigation. And the same in connection with the
15 interbasin transfer litigation that's pending before
16 the Office of Administrative Hearing.

17 SPECIAL MASTER MYLES: If you, in connection
18 with the transfer litigation, are communicating with
19 your client; correct?

20 MR. BROWNING: Yes, Your Honor.

21 SPECIAL MASTER MYLES: But not communicating
22 with, say, the City of Kannapolis who presumably is
23 not your client. If you, the counsel for the State,
24 are communicating with counsel for the City,
25 for example, I'm not, I'm assuming for the moment that

1 that's not a privileged communication.

2 MR. BROWNING: Well, Your Honor, that's
3 probably not the best example, because they are, there
4 would be a joint defense agreement in place. And then
5 that leads into the second question, communications
6 between counsel concerning pending litigation pursuant
7 to a joint defense arrangement, would those need to be
8 separately itemized?

9 MR. FREDERICK: Special Master Myles, our
10 position would be that that latter category would be
11 things that ordinarily would show up on a privilege
12 log. And there would be the possibility for questions
13 about the reasonableness of the exercise for the joint
14 defense privilege that's subject to a whole different
15 area of law. And that those kinds of communications
16 ought to be captured on a privilege log.

17 Here, you know, the North Carolina, of course
18 in that instance where Mr. Browning gives the example,
19 North Carolina is the adjudicator of the Concord and
20 Kannapolis permit applications. He can't also, we
21 would submit, be in a joint defense situation and also
22 be an impartial decision-maker.

23 So our position would be that in that
24 instance, those communications ought to be put on a
25 privilege log. That's not to say we necessarily would

1 challenge those communications, but that we would have
2 the opportunity at least to see the information that
3 would be captured on a privilege log with the
4 opportunity at some point perhaps to question whether
5 or not a particular communication in fact is
6 privileged or not.

7 MR. BROWNING: Your Honor, I would propose
8 that in a situation like this where North Carolina is
9 in ongoing litigation with various parties concerning
10 interbasin transfer, there is a joint defense
11 agreement involving North Carolina, the Environmental
12 Management Commission, and the municipalities involved
13 in that lawsuit, it should be sufficient to identify
14 those communications by category. Then if
15 Mr. Frederick wants to probe that further, we can
16 address it at that time.

17 But it seems like it's going to be a
18 tremendous amount of drain on resources if we have to
19 go through a very massive litigation file, identify
20 every single correspondence and communication made
21 pursuant to a joint defense agreement where the issue
22 in that case is going to be whether that joint defense
23 agreement gives rise to a protection against
24 disclosure. And that can be adjudicated without
25 having to put in the massive amount of hours and time

1 into preparing a privilege log where the issue can be
2 resolved without the necessity of that privilege log.

3 SPECIAL MASTER MYLES: There's an existing
4 lawsuit; is that right?

5 MR. BROWNING: Yeah, in the Office of
6 Administrative Hearings.

7 SPECIAL MASTER MYLES: And who's the
8 plaintiff in that lawsuit?

9 MR. BROWNING: The Catawba River Keeper is
10 the plaintiff in that lawsuit.

11 SPECIAL MASTER MYLES: I'm sorry, who?

12 MR. BROWNING: And if you don't mind, let me
13 defer to Jennie Hauser who is one of the attorneys
14 actually defending that proceeding.

15 MS. HAUSER: This is Jennie Hauser. And the
16 petitioners in the OAH case are the Catawba River
17 Keeper Foundation, that's one case. The second case
18 is the Catawba, Protect the Catawba Coalition. And
19 that is a group comprised of a number of
20 municipalities from North Carolina and Rockhill,
21 South Carolina. And they are suing the North Carolina
22 Environmental Management Commission over its issuance
23 of interbasin transfer certificates to Concord and
24 Kannapolis.

25 SPECIAL MASTER MYLES: So it's suing the

1 North Carolina Environmental Management Commission.

2 Is that the only defendant?

3 MS. HAUSER: That is currently the only
4 defendant. Yes, Your Honor.

5 SPECIAL MASTER MYLES: And so then is there a
6 formal joint defense agreement?

7 MS. HAUSER: There is, Your Honor, between
8 the attorneys for Concord and Kannapolis and the
9 attorneys representing the Environmental Management
10 Commission.

11 SPECIAL MASTER MYLES: Okay. Well, my
12 anecdotal experience has been that when there are
13 parties to a joint defense agreement such as when
14 there are codefendants in a lawsuit represented by
15 different law firms, that ordinarily one does not log
16 those communications among, say, counsel for --
17 counsel for the various defendants in a lawsuit.

18 However, there has to be a basis to challenge
19 the joint, the validity of the joint defense
20 agreement, because it's the joint defense agreement
21 that protects the communications that otherwise,
22 you know, on a one-off basis might not be thought to
23 be privileged.

24 So it seems that the procedure that
25 North Carolina has identified, that Mr. Browning

1 identified, should be available. And that is that in
2 some fashion, South Carolina needs to be able to
3 determine whether that claim of privilege is -- a
4 joint privilege is valid. And if it is, who's within
5 the scope of it.

6 So I think that probably makes more sense to
7 try to resolve that rather than trying to log all the
8 communications that might be subject to it in the
9 first instance. And try to resolve, if there is going
10 to be a dispute over the validity of the joint
11 defense, then just go directly to that issue rather
12 than trying to log all the documents.

13 Are those the only two categorical exceptions
14 to what otherwise might be an agreed-upon procedure or
15 set of contents for privilege log entries?

16 MR. BROWNING: Your Honor, those are the only
17 ones that come to my mind.

18 SPECIAL MASTER MYLES: Okay. I do agree with
19 also with the general proposition. With respect to
20 some documents, it's just not practical. Obviously,
21 if you don't know or have access to the current
22 employment information or other information that's
23 being sought about a particular recipient or author,
24 then you don't have it. You can't put in that
25 information.

1 But otherwise, I think that if the parties
2 can agree on the general category subject to these
3 exceptions, that that's probably what ought to happen.
4 And what ought to probably happen is specific
5 exceptions to it. One, communications with client and
6 co-counsel on this case. And two, joint defense
7 communications in the other case.

8 MR. BROWNING: And, Your Honor, that is
9 exactly what I was anticipating the response to any
10 discovery request would look like. That it would be
11 clearly noted in the responsive document, and that way
12 if it needs to be done in the absence of a privilege
13 log being prepared.

14 SPECIAL MASTER MYLES: Okay. Can that be
15 worked out between counsel on how to memorialize that
16 in the case management plan?

17 MR. FREDERICK: This is David Frederick. We
18 certainly will be happy to talk to North Carolina
19 about crafting the language. And further, to your
20 other point that instances where it's not possible
21 from the document to fill in a category, you know,
22 putting in not applicable is certainly a reasonable --

23 SPECIAL MASTER MYLES: The only other point
24 that I'd make, and I will say I do have a couple of
25 questions about other parts of the case management

1 plan, so I'm not just -- I will be somewhat proactive
2 in mentioning my own concerns rather than just
3 receiving the disputes.

4 One thing I noticed about South Carolina's
5 language that I thought wasn't as good, frankly, as
6 what's in the general language, is F, Nature of
7 Privilege Claimed. Whereas, the general language says
8 that the information would enable other parties to
9 assess the claim. The difference between these two
10 things is more of a pragmatic one that if you just put
11 down attorney/client privilege, doesn't necessarily
12 tell the other party why that claim is applicable.

13 For example, on a log, it helps to say who's
14 the attorney that's involved. Then you might -- then
15 attorney/client privilege may be sufficient, just
16 nature of privilege claimed. But in some
17 circumstances, it's not that -- it's not that
18 straightforward because one of the recipients may not
19 be an attorney. If it is an attorney, it should be
20 identified on the log. That way we don't have to
21 wonder about why there's a claim of privilege.

22 But if it's anything other than what's
23 self-evident, then something should be included as to
24 why there's a claim of privilege. Otherwise, it's
25 really difficult for the person assessing the claim.

1 The main thing that person has to decide is whether to
2 challenge the claim of privilege. There should be
3 sufficient information to give that person at least
4 the preliminary information needed to determine
5 whether to challenge the claim of privilege, which
6 hopefully could be done in a meet-and-confer fashion
7 to get more information as needed.

8 But sometimes, privilege logs are so sparse
9 that it's impossible to determine why a party is
10 claiming privilege over particular things. And
11 sometimes the claim of privilege can be somewhat
12 attenuated. For example, it helps to know if it's
13 legal advice being provided. The presence of an
14 attorney in a meeting or a communication does not
15 itself make that communication privileged. So I'm not
16 saying that that's the case here. Sometimes people
17 try to shroud what are really business-related
18 discussions by having a lawyer there or by copying
19 a lawyer on it.

20 So I just say these things to say that I
21 think the general language also ought to apply that
22 there be some -- whatever information is needed to
23 allow the other side to assess the claim of privilege.

24 MR. FREDERICK: This is David Frederick. And
25 we'll make that adjustment to the language in that.

1 SPECIAL MASTER MYLES: Okay. Well, I'm happy
2 to run through quickly my other thoughts on the case
3 management plan which were very few. Partly just to
4 make sure you've thought through these. I don't
5 really want to supersede anybody else. Most of these
6 are really for the parties to decide.

7 Discovery materials on page 3. I think one
8 question I had, unless I missed something, is that it
9 doesn't really deal with the issue of submitting
10 documents. I assume that was intentional, that you
11 didn't want to include documents in this prohibition.
12 But I wasn't sure why.

13 And the second question is, you say they
14 could be -- discovery materials could be submitted for
15 a dispositive motion for a ruling on discovery. It
16 struck me that there may be other nondispositive
17 motions that would still require the submission of
18 interrogatory responses or other discovery materials.
19 So I wasn't sure why it had to be a dispositive
20 motion. But again, if that's something that you all
21 thought through and think that's an important
22 limitation, I certainly don't mind things being
23 submitted -- for example, if there were an issue about
24 the scope of bifurcation, for example, down the road
25 and somebody wanted to put in a document, I don't see

1 why, or again, documents don't seem to be covered.
2 But put in a request, response to a request for an
3 admission or something, I'm not sure why that would be
4 a problem.

5 MR. BROWNING: Your Honor, this is Chris
6 Browning. I think those suggestions certainly are
7 fine by North Carolina, and they make sense to modify.
8 And I'll be glad to work with South Carolina to modify
9 this 2.2 accordingly.

10 SPECIAL MASTER MYLES: Now, is there a reason
11 why documents are excluded, or does responses, the
12 word "responses" include documents?

13 MR. BROWNING: Your Honor, I think this
14 language came exactly from Special Master Lancaster's
15 previous order. And I can't say that North Carolina
16 has given it, has focused on this language the way you
17 have and maybe Mr. Frederick has. But I think you're
18 right that it should address documents the same way it
19 does all other discovery responses.

20 SPECIAL MASTER MYLES: Mr. Frederick, do you
21 have a thought on that?

22 MR. FREDERICK: Yes. I think that the
23 concern was that documents that would not have been
24 entered into evidence, and then they would be referred
25 to in later submissions as though they were evidence

1 without having met, you know, requirements for
2 admission. And that by becoming part of the record,
3 if you will, formally, that that would be something
4 that could create problems down the road. I think
5 that's how Mr. Lancaster viewed it. But I don't have
6 a strong feeling about that with our clients.

7 And the point about dispositive motion,
8 I think it's certainly easy to delete that word. So
9 I don't think we have any substantial objection, but
10 I think that's where Mr. Lancaster was coming from.

11 SPECIAL MASTER MYLES: Well, I will leave it
12 to the parties. I certainly don't see a problem with
13 someone putting in a document if it's authenticated,
14 you know, with whatever way one usually does on a
15 motion, even if it's not admitted into evidence.
16 I don't think the attachment of it and the placement
17 of it in a motion would have a bearing on whether it's
18 part of the record. As an evidentiary matter, it
19 wouldn't be unless it's formally admitted into
20 evidence.

21 So I'm not totally sure why that's a problem.
22 It seems unduly restrictive if there's a motion as to
23 which a document may have a bearing. Where
24 admissibility into evidence isn't really a
25 prerequisite for its relevance to the motion, I'm not

1 sure why we'd have to have that rule, so.... But I
2 leave it to you. It just may cause problems down the
3 road for motions.

4 MR. FREDERICK: We will certainly work that
5 out with North Carolina. I do think that the, I think
6 the difference was a sense that a dispositive motion
7 is a summary judgment motion is distinguished by most
8 of the other motions which would be discovery
9 disputes. I'm trying to think now of what other
10 motions other than discovery disputes would be formal
11 motions that would not be a dispositive motion in some
12 fashion. But I think that it will be easy enough to
13 clean this up with North Carolina counsel.

14 SPECIAL MASTER MYLES: Yes. What's odd about
15 it now is as written, it doesn't prohibit anyone from
16 putting documents into the Court at any time, because
17 it doesn't address documents. It has a prohibition on
18 the submission of interrogatories, requests for
19 production of documents, requests for admission
20 responses and reply. So it has -- it doesn't even
21 speak to the issue of documents. So that was one
22 point. And then the other point is just that it
23 wasn't clear why, if you were going to allow stuff in,
24 why it wouldn't be allowed in on a regular,
25 nondispositive motion.

1 So that was -- maybe I wasn't clear when I
2 said why people might want to put in documents. This
3 doesn't speak at all to documents, so there's actually
4 no prohibition at all. But I would assume that the
5 parties meant to include documents. But if you did
6 mean to include documents, then -- the way you -- I'm
7 sorry, I'm not being very clear.

8 As you cast what Mr. Lancaster's concern was,
9 it was as though there's an absolute prohibition on
10 the submission of documents. But in fact, this
11 language doesn't address documents at all. So if
12 there were to be an absolute prohibition, I'd be
13 concerned about that. But that's not what, that's not
14 what it says.

15 So if this is his language, then he didn't
16 accomplish his own objective by keeping documents out.
17 Am I making any sense?

18 MR. FREDERICK: This is David Frederick for
19 South Carolina. We have no objection to making the
20 suggestion that -- the amendment that you are
21 proposing, Special Master Myles.

22 SPECIAL MASTER MYLES: So would that be to
23 include documents as part of the prohibition but then
24 to allow them for these purposes?

25 MR. FREDERICK: Yes.

1 SPECIAL MASTER MYLES: Okay, all right.

2 All right. Sorry we've spent so long on that.

3 I wondered why Rule 27 didn't apply.

4 I thought that was a little odd, but.... Rule 27
5 relates to the preservation of depositions for the
6 preservation of evidence, which is rarely used. But
7 I didn't know why it wouldn't be used if there was
8 a reason to.

9 MR. BROWNING: Your Honor, this is Chris
10 Browning. My recollection is that that provision
11 contemplating a deposition taking place before the
12 action has been filed. And here, since the action is
13 already pending, it really shouldn't come into play.
14 In the event that there is a scenario that would
15 arise, I'm sure North Carolina and South Carolina
16 would work together to bring that to the attention of
17 the Special Master to have appropriate adjustment made
18 in the case management order.

19 SPECIAL MASTER MYLES: Okay. That makes
20 sense.

21 MR. FREDERICK: And an example might be if
22 North Carolina were to enter into compact negotiations
23 with South Carolina, if might be pertinent to incur
24 someone's testimony by deposition. But we can address
25 that in the event that kind of eventuality occurs.

1 SPECIAL MASTER MYLES: Okay. That sounds
2 fine.

3 Now, I had one question about -- on page 6
4 about Rule 32(a)(4)(b), which is Unavailable
5 Witnesses. We dispensed with the 100-mile rule as to
6 Rule 45 on the subpoena power which creates, what do
7 they call it, universal service for subpoenas. But we
8 keep the 100-mile rule for what constitutes an
9 unavailable witness. But the unavailable witness
10 provision says that the witness is more than 100 miles
11 from the place of hearing or trial.

12 Now, I don't know if we need to resolve in
13 advance a location from which the 100 miles should run
14 or if we should leave that to trial. Is there a need
15 to resolve that in advance? I don't know. Because
16 right now, we don't know where the trial will be. And
17 it may not matter because we may not need to apply
18 this rule until we have a trial. But I just wanted to
19 raise that issue with people.

20 MR. FREDERICK: This is David Frederick. We
21 kept this, I think, out of North Carolina's concern
22 that there could be burdens placed on witnesses. And
23 we had proposed that we not use this rule, and that we
24 have something similar to what we had with 4.3.9.
25 And we conceded to North Carolina, based on its

1 objection about this rule. So we do not feel strongly
2 about dispensing with this rule. But I think
3 North Carolina did have objections and the language
4 here reflects our concession to North Carolina on this
5 point.

6 MR. BROWNING: Your Honor, this is Chris
7 Browning. It is something that we feel very strongly
8 that a -- neither a witness at trial nor a deponent
9 should be drug more than 100 miles from their location
10 either for the deposition or for the trial. To me,
11 even though it would be very convenient to both the
12 parties, we don't think it's necessarily fair to have
13 somebody to be forced to make that sort of travel. If
14 they're willing to do it by agreement for trial, that
15 would be great. But their testimony can certainly be
16 preserved by videotape as well.

17 So even though it might be more convenient to
18 North Carolina and South Carolina to drag people
19 around the country for depositions or for trial, as a
20 sovereign entity, we in North Carolina believe it's
21 important not to use the privilege that the rules
22 would allow us and that the 100-mile limit makes
23 sense.

24 SPECIAL MASTER MYLES: Okay. That makes
25 sense. And the parties have agreed on it. So I don't

1 think I need to -- we don't need to debate the merits
2 of the underlying rule. I do think that the purpose
3 of the rule then, if it seems that if there are going
4 to be depositions of people who are out of state, if
5 you will, then -- and therefore, at the time the
6 deposition is taken, we know that that person will be
7 someone who -- unless they agree to come, is
8 unavailable, it may affect how people take the
9 deposition. You take it as a trial deposition instead
10 of as a discovery deposition.

11 So then it seems from that, that it would be
12 helpful to know in advance where the 100 miles runs
13 from. So therefore, it may be useful to pick a place,
14 a point. Since we don't have a trial location as of
15 yet, the options for trial could include, but not be
16 limited to, Richmond, Atlanta. I think there was a
17 suggestion made early on that we might alternate
18 locations within the two states, Charlotte,
19 someplace -- cities within the two states if we could
20 alternate. I think at one point there was a
21 suggestion of Washington D.C. since the Supreme Court
22 is there. So all of those are potential locations.
23 I'd like to say San Francisco. That might not be the
24 most convenient location for everybody else.

25 But if we could pick a point and make that

1 100 rule -- 100-mile rule run from that point, that
2 might be the best approach. One point would be just
3 the geographic point, you know, on the border between
4 the two states. I'm open to suggestions on what ought
5 to be done, but I think we need to have it 100 miles
6 from something.

7 MR. BROWNING: Your Honor, this is Chris
8 Browning. My preference would be to leave it
9 open-ended at this point. And then adjust accordingly
10 when we have a definitive determination as to where
11 the trial will be. And I think I feel comfortable
12 that South Carolina and North Carolina would work
13 together that if there were a crucial witness that was
14 going to be more than a 100 miles away from the place
15 of trial, if need be, we could work out doing a
16 de bene esse deposition to, even though there had
17 already been a discovery deposition, having a shorter,
18 more abbreviated deposition be used for trial.

19 But as a practical matter, I think that's
20 going to be -- rarely be the need because I recognize
21 your point that sometimes a deposition might be done
22 differently for discovery purposes versus trial
23 purposes. I think that's -- that's a crucial
24 distinction when you have a jury and you're having to
25 play the deposition for a jury. I'm not sure that's

1 going to be as crucial a consideration when it's a
2 matter to be resolved.

3 SPECIAL MASTER MYLES: Okay. Well, I'm fine
4 leaving it open if the parties are fine leaving it
5 open.

6 Is that you, Mr. Frederick?

7 I can't hear you.

8 MR. FREDERICK: Yes. Well, somebody seems to
9 be typing. And they're -- I hear a typing when I
10 speak and it isn't from our end. But we have no
11 objection to Mr. Browning's proposal to keep it open.

12 SPECIAL MASTER MYLES: Okay. Let me just see
13 if there's anything else. The only other question I
14 had was on page 13, I believe. No, maybe I have
15 another. No, I guess I had two other questions.
16 One's on page 13 relating to the failure to timely --
17 to timely -- or timely to respond to discovery
18 requests.

19 MR. FREDERICK: We'll clean up the split
20 infinitive.

21 SPECIAL MASTER MYLES: I can't stand split
22 infinitives.

23 But on page 12 it says, "Before bringing a
24 discovery dispute to the attention of the Special
25 Master, the parties shall confer in the attempt to

1 resolve the dispute." But then under 9.1.1, there
2 seems to be an exception to that, which I understand
3 but I just want to make sure that if there's a failure
4 to respond that we won't have a meet and confer; is
5 that right? Because the party will prompt, the party
6 who proposed, who propounded the discovery would
7 promptly file a motion to compel without first
8 conferring with the other side. Is that -- am I
9 reading that correctly? Because that's how it seems
10 to read.

11 Mr. Frederick, do you have any thoughts on
12 that?

13 MR. FREDERICK: Could you repeat the
14 question, please?

15 SPECIAL MASTER MYLES: The question is just
16 as I read 9.1.1, it doesn't seem to call for meeting
17 and conferring in the event somebody misses a
18 discovery deadline. And I wasn't sure if that was
19 intentional. I understand that meeting and conferring
20 can't cure a default. On the other hand, it seems a
21 little excessive to have a motion to compel
22 automatically filed every time someone misses a
23 deadline. Obviously, we shouldn't miss deadlines,
24 but....

25 MR. FREDERICK: We have no objection to

1 putting into 9.1.1 a meet and confer requirement in
2 the event of a default, if that's the suggestion that
3 you're making.

4 SPECIAL MASTER MYLES: I think it is. It's
5 already in the general language of 9 in the first
6 sentence. But the way 9.1.1 is worded, as
7 distinguished from the way 9.1.2 is worded, 9.1.2
8 expressly reiterates the meet and confer requirement
9 whereas 9.1.1 doesn't. You kind of go straight to the
10 motion to compel. And if that's not necessary, I'd
11 probably want to avoid that.

12 MR. FREDERICK: Well, instead of the word
13 promptly file in 9 point -- the discovery should seek
14 to meet and confer before filing a motion to compel.

15 SPECIAL MASTER MYLES: Right, yeah.
16 Obviously, a default can't be cured by meeting and
17 conferring, but it may not be material and the other
18 side may not care. In other words, it may not be
19 material to the proponent of the discovery. So I just
20 think it's probably better to meet and confer before
21 filing the motion.

22 All right. And then my final question, just
23 again is just a question, I don't have a stake in this
24 one, is page 15, paragraph 11. "Under no
25 circumstances shall any party refuse to continue

1 participating in a deposition, because of the
2 unavailability of the Special Master to resolve a
3 dispute telephonically." I have never seen a
4 provision like that. And I just wondered, it wouldn't
5 preclude a party from terminating a deposition for the
6 ordinary reasons, right? I mean, sometimes people
7 terminate the deposition for reasons needing to file
8 a motion to compel, for example, or needing a
9 protective order.

10 I think it's correct to say that just because
11 I'm not available, that wouldn't be a reason unto
12 itself. But I don't think it should preclude people
13 from terminating a deposition for otherwise proper
14 reasons. But you can deal with that as you wish, if
15 the parties don't -- aren't concerned about that.

16 MR. FREDERICK: Why don't Mr. Browning and I
17 confer on that?

18 SPECIAL MASTER MYLES: Okay. That makes
19 sense. Is that okay, Mr. Browning?

20 MR. BROWNING: That would be fine, Your Honor.

21 SPECIAL MASTER MYLES: Okay. All right.
22 Well, why don't we move to Phase 1 and Phase 2? And
23 then we should also discuss the timing of the motion
24 for reconsideration and clarification. I think we
25 need to have a briefing schedule for that. Why don't

1 we start there? I'd like to -- just looking at my own
2 calendar, it would be, the one day that would work
3 well for a hearing on the reconsideration motion would
4 be Friday, the 18th of July.

5 So I was looking at the 18th for a possible
6 hearing on the motion for reconsideration. The
7 following week is not great for me for a hearing, the
8 week of the 21st. Thursday the 17th would also be
9 fine. But I just wanted to put it as late as possible
10 before the week of the 21st. If you do have it then,
11 one possible briefing schedule would be something like
12 an opposition on the 10th, which would give --
13 wouldn't interfere, I don't think too much, with the
14 Fourth of July weekend. And then having a reply due
15 on the 15th which is a Tuesday.

16 MR. FREDERICK: Special Master Myles, this is
17 David Frederick. We have, in my calendar, a call
18 already set for 2:00 on July the 17th.

19 SPECIAL MASTER MYLES: Oh, you're right, we
20 do.

21 MR. FREDERICK: And if maybe we can extend
22 that for some period of additional time to address
23 this motion, that could be a very advantageous
24 possibility.

25 SPECIAL MASTER MYLES: Well, we could extend

1 it to the 18th.

2 MR. FREDERICK: Well, the 18th, I'm traveling
3 all day that day and we set this for the 17th to
4 accommodate travel issues that I have from the 7th to
5 the 25th.

6 SPECIAL MASTER MYLES: Well, can we set it to
7 the 17th then at 11 o'clock a.m., because we have our
8 calendared meeting, you're right, that day at 11:00
9 a.m. my time. And then we could have the briefs due
10 on the 10th and the -- I still think I could live with
11 the reply being filed on the 15th, if it's filed
12 sometime early in the day. And then we could have the
13 hearing on the 17th. Would that work? I mean,
14 obviously everyone -- all the intervenors have a stake
15 in this and should be allowed to participate and be at
16 the hearing. So we have to check everybody's
17 calendars, I think.

18 MR. GOLDSTEIN: This is Tom Goldstein,
19 Special Master Myles, on behalf the Catawba Water
20 Supply Project. That schedule would work for us.

21 SPECIAL MASTER MYLES: Okay. What about
22 Charlotte?

23 MR. BANKS: This is Jim Banks for the City of
24 Charlotte. We can make that.

25 SPECIAL MASTER MYLES: Is Mr. Phillips on?

1 MR. PHILLIPS: I am on, Special Master Myles.
2 I'm actually going to be in Europe at that time.
3 I think at that specific time, I am supposed to be on
4 a flight from Geneva to Brussels. If there's another
5 time during the day, I think I could probably try to
6 squeeze around it, but....

7 SPECIAL MASTER MYLES: In other words, the
8 17th at 11:00 Pacific time, that's the time you'll be
9 on a flight?

10 MR. PHILLIPS: Wait. I was thinking 11:00
11 Eastern time.

12 SPECIAL MASTER MYLES: It's 2:00 Eastern
13 time.

14 MR. BROWNING: I think that's 8:00 p.m.
15 Geneva time.

16 MR. PHILLIPS: I think if it were slightly
17 later in the day, it would be better for me in terms
18 of when I get into Brussels. Or about an hour later
19 would be better for me.

20 SPECIAL MASTER MYLES: So, okay. That's fine
21 with me. Is that okay with Mr. Banks, Mr. Goldstein?

22 MR. BANKS: This is Jim Banks. That's fine
23 with me.

24 MR. GOLDSTEIN: Same for Tom Goldstein.

25 SPECIAL MASTER MYLES: What about

1 South Carolina and North Carolina?

2 MR. FREDERICK: For South Carolina, that is
3 fine.

4 SPECIAL MASTER MYLES: Okay. Mr. Browning?

5 MR. BROWNING: North Carolina is fine as
6 well, Your Honor.

7 SPECIAL MASTER MYLES: Okay. So what we'll
8 do is the following, we'll have the hearing on the
9 motion for clarification or reconsideration to be held
10 at noon Pacific time, 3:00 Eastern time on the 17th of
11 July. South Carolina's briefs and reply will be due
12 on the 15th of July by noon -- by noon Pacific time.
13 And any oppositions to the
14 reconsideration/clarification motion should be filed
15 by close of business on Thursday, July 10th. And
16 those can come from any interested party, the
17 intervenors or North Carolina.

18 Now, regarding Phase 1 and Phase 2, I'd like
19 to first clarify what the differences are between
20 North Carolina and South Carolina. There seems to be
21 agreement that there should be bifurcation, which
22 makes sense. There seems to be agreement on what the
23 substance of Phase 1 would be, although the parties
24 phrase it somewhat differently. So I want to make
25 sure that we're -- that there is agreement. And if

1 there isn't, I can resolve the issue of what exactly
2 will be in Phase 1. South Carolina emphasizes its
3 need to show, as a threshold matter, its injury.
4 North Carolina emphasizes that plus the need to show
5 that the injury is caused by particular activities
6 occurring within or at the behest of North Carolina.

7 So my first question is whether
8 South Carolina agrees with that somewhat more expanded
9 articulation of Phase 1 than what it had in its
10 briefs.

11 MR. FREDERICK: This is David Frederick. Our
12 position is that the burden on South Carolina is to
13 show the cumulative consumption in North Carolina that
14 caused the injury. It is not our burden under the
15 course cases to point to a specific consumptive use or
16 a specific transfer as the cause of harm in
17 South Carolina. But that we agree that we need to
18 show injury and that we need to show the injury was
19 caused by activities occurring in North Carolina. But
20 that it would be more of a cumulative.

21 SPECIAL MASTER MYLES: Well, that's really
22 not an issue of the contents of Phase 1 or Phase 2.
23 That's an issue of what you need to do to carry your
24 burden in the case.

25 MR. FREDERICK: That's correct. But what we

1 show in Phase 1 is that the cumulative consumption in
2 North Carolina is causing specific harms in
3 South Carolina.

4 SPECIAL MASTER MYLES: But if you're wrong
5 about that, then you lose on the merits at the end of
6 Phase 1.

7 MR. FREDERICK: That's correct.

8 SPECIAL MASTER MYLES: You proceed on that
9 theory at your peril, because I'm not sure that
10 North Carolina would agree that a mere showing of
11 cumulative harm is sufficient. I'm not sure.
12 Whatever that burden is that you have to show will be
13 the contents of Phase 1.

14 MR. FREDERICK: Phase 1 has to show injury in
15 South Carolina. That injury must stem from cumulative
16 acts in North Carolina.

17 SPECIAL MASTER MYLES: What case supports
18 that proposition? And more specifically, what case
19 supports the proposition that South Carolina -- that
20 is sufficient to show cumulative use and that
21 accordingly South Carolina isn't required to show
22 specific uses?

23 MR. FREDERICK: I think Colorado versus
24 New Mexico stands for that proposition where the
25 appropriated river, the subject of a -- of a base

1 where the injury flowed from any withdrawal of water
2 from Colorado, as the Court framed the issue, and our
3 position is that the harms in South Carolina can be
4 specifically shown but that water is, if you will,
5 fungible. That water that might be taken for one
6 purpose in North Carolina need not be specifically
7 traceable to a specific injury in North -- in
8 South Carolina. But that on the whole, if you take
9 North Carolina's consumptive uses or its actions, they
10 must be shown to cause the injuries of which South
11 Carolina's complaining.

12 SPECIAL MASTER MYLES: Okay. I don't want to
13 be quoted against myself on this, so this is just an
14 observation but not, I'm not passing on the merits
15 because we aren't really addressing the merits of what
16 will be sufficient to meet South Carolina's burden
17 tend of Phase 1 or at the end of the case, for that
18 matter. But I would note that Colorado, I thought
19 Colorado versus New Mexico was somewhat sui generis,
20 because as I understood the facts of the case, the
21 water was fully appropriated in New Mexico.

22 And therefore, I think the rationale seemed
23 to be that because of that, any diversion by Colorado
24 would cause specific injury in New Mexico. But I'm
25 not entirely sure that that principle would apply in

1 every case. It was sort of an odd set of facts, I
2 thought.

3 MR. FREDERICK: Well, I think that the
4 principles that Colorado -- and that is the clearest
5 expression where the Court talked about the injury.
6 And the cases the Court has tended to have a portion
7 of cases that have lasted for a very long time, and so
8 it has not addressed these issues with the same kind
9 of analytical clarity that we are seeking with
10 North Carolina.

11 But, for instance, if we could show that the
12 Catawba is a fully used river, and that no more
13 additional consumptive uses can river, that would be
14 tantamount to showing injury. If we can show that
15 during periods of low flow, as in some of the Rocky
16 Mountain cases, that would be sufficient to show
17 injury, if the flow, the river is not a dependable
18 flow. And there are a range of different ways that we
19 can establish our injury under the Court's cases.

20 And I don't mean by my expression here to
21 confine us in any way. But we do accept the
22 proposition that we have to show injury and we accept
23 the proposition that that injury has to be traceable
24 to actions occurring in North Carolina.

25 I think the difference is we understand

1 North Carolina to be saying it is our burden in Phase
2 1 to show that a specific transfer is causing a
3 specific harm and because water is a fungible
4 commodity, if you will, we don't think we have that
5 burden. That is a direct causation burden that we
6 don't think is required under the Court's cases.

7 SPECIAL MASTER MYLES: I didn't really read
8 North Carolina to be saying that. Mr. Browning, could
9 you just elaborate on North Carolina's position?

10 MR. BROWNING: Yes, Your Honor, I will try
11 to. From our perspective, saying that South Carolina
12 clearly needs to identify the harm that's giving rise
13 to this lawsuit and to establish causation in Phase 1.
14 And that's part of our fundamental disagreement with
15 South Carolina is that for North Carolina to have a
16 fair chance of defending this lawsuit, we have to know
17 what South Carolina is complaining about.

18 And as, as you're well aware, when we went to
19 the bill of complaint, North Carolina fully understood
20 that this lawsuit to be about interbasin transfer and
21 if you look at our opposition brief, that is the
22 nature of the issue that we are focused on in
23 opposition.

24 Then subsequent to the filing of the bill of
25 complaint and the Court accepting it, we didn't have a

1 full understanding as to what South Carolina is really
2 trying to put at issue. So we asked them. And during
3 that first conference call of February 6th,
4 North Carolina raised the issue as to whether
5 South Carolina intended to put at issue anything other
6 than interbasin transfers.

7 And a month later, South Carolina responded
8 in writing that -- that South Carolina cannot, without
9 gaining a more complete picture of the consumptive
10 uses of the Catawba River, say that interbasin
11 transfer is the only consumptive uses that contribute
12 to North Carolina's overuse of the Catawba River.

13 And now, when we read their reply brief,
14 South Carolina is appearing to put at issue discharge
15 of pollutants by the City of Charlotte. So what we
16 have appears to be an ever-changing theory that
17 South Carolina is pursuing, and what we think is
18 necessary is some sort of identification at the outset
19 as to what South Carolina's position is. What it is
20 the harm is that they're trying to put in play so we
21 can adequately defend ourselves.

22 When you look at their reply brief at page
23 16, South Carolina states that they should not be
24 required to, quote, identify the harms before all of
25 the evidence has been produced in discovery and before

1 South Carolina's experts have had a chance to model
2 relevant data.

3 I think this is the issue that you were
4 struggling with, Your Honor, at the hearing in
5 Richmond is, is there a mechanism for determining what
6 this case is about? I think our proposal is a
7 reasonable approach to doing that. In one of these
8 previous conference calls, Mr. Frederick said he's
9 going to need nine months of discovery to get his
10 hands around what this lawsuit is about and what he's
11 going to claim to be his harm. And that's fine. Give
12 him nine months and give us nine months, the same
13 amount of time to probe the injury that he's alleging.
14 Right now, we just don't know what he's alleging.

15 When you look at the changing nature of what
16 South Carolina has really complained about in the
17 various conference calls, the bill of complaint, its
18 various briefs before the Special Master, it is a
19 constantly changing target. Let's figure out how long
20 it takes them to put together what they are trying to
21 complain about in this lawsuit and then give us
22 adequate time to respond to that.

23 MR. FREDERICK: Special Master Myles,
24 Mr. Browning, I don't think he answered your question.
25 If I could respond to a number of their points because

1 he covered really the waterfront on a whole range of
2 things. In our complaint itself, he talked about
3 impairment due to pollution, that's paragraph 12 of
4 our complaint. These were things that the
5 North Carolina Division of Water Quality itself had
6 identified in 1995, because of the water quality of
7 the Catawba River.

8 And the conclusion of the point about the
9 discharges of effluent go directly to the amount of
10 water in the river. The more water in the river, the
11 greater the assimilative capacity of the river; the
12 less water in the river, the greater the toxicity of
13 the chemicals that have been discharged and the
14 greater, therefore, the effect.

15 So pollution in the river is directly tied to
16 the equitable apportionment principles that we have
17 long been talking about and that North Carolina has
18 now been on notice of for 14 months. So I think that
19 there becomes a point where the dog just doesn't hunt
20 anymore and North Carolina ought to move on on its
21 generic complaints that it doesn't know what the
22 complaint says because it's right there in clear
23 language.

24 But I think that the answer to your question
25 might not to be established by South Carolina with

1 respect to the kinds of specific causality points that
2 we understood North Carolina to be making. If they're
3 not -- if they're not making that argument, and I
4 think that we are in agreement in what needs to be
5 shown for Phase 1.

6 Now, let me address his point about the
7 nine months. And I do take exception to his
8 characterization of my comment. I never said that it
9 will take us nine months to get our arms around the
10 facts, and I don't think that the record reflects that
11 I ever said that.

12 What I did say was that because of the
13 complexity of this river system and the degree to
14 which the harms that we described in the complaint are
15 of a nature that will require specific investigation,
16 it will take some time in which to do that. But
17 North Carolina offers no precedent, no support for
18 this notion of a nine-month fact discovery period for
19 a report, that then they get nine months to pick
20 apart.

21 This case, they have long insisted, should be
22 governed by the federal rules of procedure. There is
23 nothing in the federal rules about a nine-month period
24 for the plaintiffs and a fact report at the end of
25 that. There is nothing in the federal rules expert

1 provisions that they have called for. And there is no
2 reason why the normal principles don't apply.

3 If North Carolina, at the conclusion of
4 discovery doesn't think that there is a disputed issue
5 of fact, they move for summary judgment and you decide
6 the summary judgment motion. That's how litigation
7 like this works.

8 But the weight that I want to stress is that
9 in Phase 1 there are issues that are going to be
10 focused principally on the South Carolina side of the
11 boundary in terms of showing injury, but that
12 North Carolina has all the data as to its consumptive
13 uses on the north side of the boundary. So when it
14 complains about -- or when it says that our experts
15 supposedly have had all this time to work on their
16 reports, that's false.

17 We just now, because of North Carolina's
18 objections to discovery, only recently last week,
19 pursuant to the last call, were able to get discovery
20 requests out to North Carolina and we have not yet
21 gotten any documents or data that our experts have to
22 work with. And our experts will be modeling
23 consumption on the North Carolina side of the
24 boundary. But there is no reason why North Carolina's
25 experts can't simultaneously be modeling

1 North Carolina's consumptive uses on the
2 North Carolina side of the boundary.

3 And so the implementation of Phase 1 of one
4 where we are offering a traditional way of litigating
5 the case and North Carolina is coming up with new
6 proposals that don't appear to have any basis in any
7 legal source that they've cited to us.

8 MR. BROWNING: Your Honor, this is
9 Chris Browning. Let me just say that I agree with the
10 aspect of what Mr. Frederick has said which is my dog
11 doesn't hunt and that's because I just can't get a
12 scent here.

13 Every time South Carolina seems to be
14 changing what's at issue in this case and he started
15 off by relying upon paragraph 12 of the bill of
16 complaint. And if you don't mind, if I could just
17 read that. It starts off, As the North Carolina
18 Division of Water Quality noted in 1995, the water
19 quality of the Catawba River may be jeopardized by
20 growth in the surrounding area.

21 As of that year, 16 of the Catawba River's
22 basins, nearly 3,000, 3100 miles of free-flowing
23 rivers and streams were considered impaired due to
24 pollution.

25 It is that sentence, buried within his

1 complaint that makes a reference to something, a
2 report in 1995 that has a reference to pollution that
3 is supposed to clue me in as to what he's ultimately
4 going to be relying upon to prove his case. We just
5 can't do that. We can't do the complicated
6 groundwater of the surface water modeling with trying
7 to speculate as to where South Carolina is coming
8 from.

9 And I think it's important in this case to
10 figure out a mechanism to give South Carolina an
11 opportunity to put forward what it's complaining about
12 and then North Carolina an opportunity to respond.
13 That is what is traditionally done in complex
14 litigation, particularly environmental litigation.
15 That's the sort of mechanism that should be put in
16 place here.

17 MR. FREDERICK: Ms. Myles, Mr. Browning, I
18 think, omitted some key paragraphs or subparagraphs of
19 paragraph 12. And I don't want to belabor the point
20 because I'm sure Mr. Browning didn't mean to leave
21 them out intentionally. But we do talk about the
22 water quality issues in the basin defined as the
23 Catawba River basin as --

24 SPECIAL MASTER MYLES: Mr. Frederick, I don't
25 know if you're with someone in your office, but

1 there's been a problem with sometimes you were missing
2 words that you were saying and I'm not sure if the
3 court reporter is getting the word. But --

4 MR. FREDERICK: I'm sorry, by the next call,
5 I'll change phones. But this is the only phone that I
6 have in my office.

7 SPECIAL MASTER MYLES: Are you able to pick
8 up the phone and not be on speaker?

9 MR. FREDERICK: Yes, is that better?

10 SPECIAL MASTER MYLES: Yes, that's better.

11 MR. FREDERICK: And if the parties don't
12 mind, I'll ask my colleagues to call in and join from
13 a different phone.

14 SPECIAL MASTER MYLES: Yeah.

15 MR. FREDERICK: So that they can at least
16 hear the proceedings. The point I was making was that
17 we go through a range of environmental harms from the
18 lack of assimilative capacity, health concerns with
19 fecal coliform bacteria, toxicity from heavy metals.
20 The discharges of effluent are directly tied to the
21 amount of water because it all goes to assimilative
22 capacity of the river which is what we talk about in
23 paragraph 12.C. And I think that it is important to
24 keep in mind that when we're looking at equitable
25 apportionment and we're looking at the capacity of the

1 river to handle additional discharges and additional
2 withdrawals as a result of what North Carolina's
3 environment agency identified 13 years ago, we are
4 talking about directly the issues of equitable
5 apportionment that South Carolina has put into issue
6 in the case.

7 And certainly if North Carolina, through the
8 discovery process, does not think we've met our burden
9 or that there's a real issue, they'll move for summary
10 judgment and we'll have to respond accordingly.

11 SPECIAL MASTER MYLES: Okay. Mr. Browning,
12 do you have any other thoughts?

13 MR. BROWNING: Your Honor, I just really
14 don't want to leave this paragraph 12 that
15 Mr. Frederick has relied upon. Yes, it makes specific
16 reference to things like lack of assimilative capacity
17 for oxygen-consuming waste and streams. But this is
18 his summary of a 1995 report. And apparently, based
19 upon that one paragraph in the complaint, I'm supposed
20 to recognize that what's at issue is wastewater
21 discharges by Charlotte which could have been pursued
22 under the Clean Water Act if South Carolina really had
23 an issue with those waste water discharges.

24 And again, there just needs to be some
25 mechanism so we can figure out what South Carolina is

1 going to be relying upon at the end of the day. And
2 if that comes at either the close of discovery or when
3 they provide their expert reports, North Carolina
4 would be at a substantial disadvantage because we're
5 not going to have the means to challenge or attack
6 that if we don't know what South Carolina is relying
7 upon until the very 11th hour of Phase 1 of this
8 lawsuit.

9 MR. FREDERICK: And if I could respond to
10 that, Ms. Myles. There are mechanisms in the rules
11 that allow for contention interrogatories and other
12 interrogatories to be propounded and for parties to
13 supplement their answers upon the discovery of
14 additional information. We're not going to be trying
15 to play hide the ball here.

16 We -- we think that our complaint has
17 set forth the allegations and that during the
18 discovery process, we will obtain the evidence that
19 proves the allegations in the complaint. But
20 North Carolina does not need to extend the process by
21 a year when its experts can be looking at the
22 consumptive uses on the North Carolina side and can be
23 taking whatever discovery they think they need to take
24 on the effects of overconsumption in North Carolina on
25 the South Carolina side of the boundary.

1 MR. BROWNING: Special Master Myles, this is
2 Chris Browning again. The key word in all of that is
3 supplement. And we have tried to ask in the nature of
4 contention interrogatories at the outset of this, this
5 is what is set out in Mr. Frederick's letter to you of
6 May 12th where we ask what -- is the harm limited to
7 interbasin transfers?

8 And again, that's the language that I was
9 referring to previously is South Carolina's response
10 is going to be: South Carolina cannot, without
11 gaining a more complete picture of the consumptive
12 uses of the Catawba River, answer this.

13 And we're going to have that throughout
14 discovery. And then at the end of discovery, we're
15 going to have a supplementation and we're not going to
16 have any opportunities to challenge that. That's the
17 problem that we're facing with South Carolina's vague
18 nature of their allegations.

19 MR. BANKS: Special Master Myles, this
20 is Jim Banks for Charlotte. I was wondering if we
21 might be heard on this point.

22 SPECIAL MASTER MYLES: Sure.

23 MR. BANKS: We were, like North Carolina,
24 surprised to learn that South Carolina intended to
25 both seek discovery and raise as a category of harm

1 pollution discharges in North Carolina. We don't see
2 that adequately pled in the complaint.

3 More importantly, as Mr. Browning pointed
4 out, this is an issue -- pollution control, water
5 pollution control, is an issue that can only be
6 decided under federal statutory law, not common law as
7 will be applied in this case. Back in 1981, in the
8 case of Milwaukee versus Illinois, the Supreme Court
9 decided that the Federal Clean Water Act has
10 completely occupied this field and has preempted what
11 was thought to be the federal common law in pollution
12 control such that our view is, consistent with
13 North Carolina, that South Carolina has the
14 opportunity through a number of mechanisms in the
15 Clean Water Act, to raise issues about water
16 pollution, but not in this case.

17 SPECIAL MASTER MYLES: What was the case you
18 said how the Clean Water Act --

19 MR. BANKS: The specific case is Milwaukee
20 versus Illinois, 451 U.S. 304 1981.

21 MR. FREDERICK: And Special Master Myles, the
22 issue that's important to keep clear is that where
23 you're talking about the assimilative capacity of the
24 river pollution is a recognized harm as we've cited
25 the cases in our papers in an equitable apportionment

1 case.

2 It is true that specific statutory remedies
3 of the type that are set out in a Clean Water Act
4 would be subject to a Clean Water Act action. But
5 that does not mean that this Court has held that in an
6 equitable apportionment case, the lack of water in a
7 river which leads to greater pollution effects cannot
8 be redressed under an equitable apportionment decree.

9 And we are not saying that a point of
10 discharge would be subject to some fine or something
11 like that under the Clean Water Act. What we're
12 saying is that in periods of low flow, pollution
13 effects are exacerbated. And that is an analytically
14 distinct question that an equitable apportionment case
15 is perfectly suited to resolve. If more water flows
16 down the Catawba River, by virtue of fewer consumptive
17 uses on the North Carolina side, the assimilative
18 capacity of the river is going to be enhanced.

19 MR. BANKS: This is Jim Banks for the City of
20 Charlotte. I don't think anyone disputes that if
21 water consumption or diversion upstream is reducing
22 the assimilative capacity in South Carolina such that
23 South Carolina pollution discharges are fouling the
24 river in South Carolina, that that's not an object of
25 this case. But what we are now talking about is South

1 Carolina's attempt to discover and make an issue of
2 pollutant discharges in North Carolina. Those are not
3 reductions in the flow. Those are additions to the
4 flow of this river in North Carolina. And there's not
5 a case that I know of since 1931 when the Supreme
6 Court entertained in an original action a question of
7 sewage or pollution control.

8 MR. FREDERICK: Ms. Myles, this is David
9 Frederick again. I think we're getting so far off
10 topic, that I wonder whether it's productive to carry
11 on in this vein. If, when we propound discovery to
12 Charlotte, they have specific objections to any of the
13 categories of documents that we seek, they can make
14 the appropriate motion and we can debate that at the
15 relevant time.

16 Here all we're talking about is the general
17 framework of what Phase 1 is to look like. And I
18 think that the parties are basically in agreement as
19 to what Phase 1 should be about. Now, there are
20 disagreements as well with what Phase 2 ought to look
21 like. I think those can be safely deferred.
22 North Carolina seems to suggest that there be a
23 trifurcated kind of proceeding even though they agreed
24 to bifurcate the case. And I think that we can leave
25 to Phase 2, after we have shown injury, exactly what

1 the contours of Phase 2 can look like. But that might
2 be a year and a half or two years away, finding on
3 what dates get entered by the Special Master in the
4 order.

5 SPECIAL MASTER MYLES: I wasn't clear on what
6 the trifurcation is. What's that?

7 MR. FREDERICK: Well, if I understand
8 North Carolina's argument, that once we have met our
9 burden of showing the injury, they have the burden of
10 showing that their consumptive uses are more valuable
11 than South Carolina's consumptive uses and that if
12 they need their burden and we're still not entitled to
13 an apportionment decree, our submission is that the
14 weighing of the equities goes hand in hand with a
15 determination of how much of the river each state gets
16 in an equitable apportionment.

17 We're not familiar with any case, and
18 North Carolina doesn't cite any, that says that you
19 don't handle the weighing of the equities in
20 conjunction with an ordering of a decree apportioning
21 the river.

22 SPECIAL MASTER MYLES: But wouldn't you
23 have -- I mean, wouldn't you have to determine -- I'm
24 not sure it bears on the issue of whether there's two
25 phases or three. But whether there's a decree or not

1 may be affected by whether the defendant state shows
2 that their uses are superior or to be preferred over
3 the other state.

4 Just to be simplistic about it, certainly if
5 the complaining state meets its burden and the other
6 state meets its burden of showing that nothing should
7 happen, then there won't be a decree. There will be
8 an order dismissing the developed complaint, I assume,
9 or something akin to that. There wouldn't be a decree
10 of equitable apportionment, because the responding
11 state's meeting its burden would defeat the claim for
12 an equitable apportionment.

13 MR. FREDERICK: Well, I think if you were to
14 use the river as a resource that will allow
15 North Carolina to consume everything on its side of
16 the boundary and allow nothing to go through, that
17 would be inconsistent with the Court's decision --

18 SPECIAL MASTER MYLES: But I don't think
19 that's what the cases say. The cases don't say
20 either, as I read them, I mean, again, this is really
21 an issue for what South Carolina's burden is and what
22 North Carolina's burden is on the merits. But I don't
23 read the cases as saying that the complaining state
24 can just show, well, gee, you know, there's not enough
25 water coming our way. We don't have to say why. We

1 just say, we're measuring how much water is coming in
2 and it's not enough for us, or it's less than there
3 used to be.

4 And then -- and then the other state -- I
5 don't view that as what the correct statement of the
6 complaining state's burden, first of all. But again,
7 don't quote me on this because, you know, this is not
8 the phase at which we're resolving the merits. I'm
9 just observing that I'm not sure South Carolina is
10 right in making it that simplistic. And I may be
11 oversimplifying.

12 But likewise, I don't see the cases as saying
13 that, either that one state gets to take -- that the
14 upstream state gets to take all it wants. That's not
15 the rejoinder to that. The rejoinder is the existing
16 uses or the proposed uses by the upstream state, for
17 whatever reason based on the merits and the facts are
18 to use, for lack of a better word, superior to or not,
19 you know, that the upstream state has shown its uses
20 to be beneficial under whatever burden of proof
21 applies. I'm not addressing the issue of clear and
22 convincing evidence for either phase of those, either
23 of those showings.

24 But at that point, as I understand it, there
25 may not -- if that showing is made, sufficiently,

1 under whatever burden of proof is applicable by the
2 upstream state, then there may not be a decree which
3 doesn't mean the upstream state then gets to take all
4 the water. If there's a change in what the upstream
5 state is doing, then that becomes the subject of a new
6 analysis if there's a need for a new case.

7 MR. FREDERICK: Well, and that's why I do
8 think that it is premature to be going too far down
9 the road of defining what constitutes a Phase 2
10 proceeding. Particularly, in a river system that has
11 such wide variations in flow as the Catawba River.
12 Because some of the statements that have been made
13 today I think are somewhat speculative as to what
14 Phase 2 might look like given the injuries that
15 South Carolina has suffered. And that we can have a
16 conference at the beginning of Phase 2 to define how
17 best to understand what the equities are and how they
18 should be proved and what would flow from proof on the
19 equities in terms of what a decree would look like.

20 SPECIAL MASTER MYLES: Okay. Well, I don't
21 disagree that Phase 2 is something we're not really
22 addressing today. I hadn't anticipated addressing the
23 contents of Phase 2 today. Did North Carolina have a
24 different view?

25 MR. BROWNING: No, Your Honor. We would

1 agree that for Phase 2, we clearly have a dispute with
2 South Carolina as to how that would proceed. But now
3 is probably not the best time to try to resolve those.

4 SPECIAL MASTER MYLES: Okay. And you
5 shouldn't feel the need to quote my comments back at
6 me, because obviously that analysis is going to be
7 based on a much more carefully considered briefing and
8 analysis of the cases, et cetera.

9 I'm just trying to get the context of the
10 present dispute. And with some observations that I
11 would like to make and then perhaps a proposal for a
12 solution to the issues that have been raised.

13 Number 1 is that I just sort of reiterate
14 that I think there is going to be a dispute on what
15 the parties' respective -- what South Carolina's
16 burden is at the end of Phase 1. I'm just seeing that
17 coming from what I'm hearing today. I don't think
18 there's going to be agreement on that.

19 And so that is something that I think sets a
20 background for what discovery will need to happen and
21 it may also bear out the various predictions that at
22 some point North Carolina may want to bring a summary
23 judgment motion. Because if South Carolina has one
24 perception of what its burden is and North Carolina
25 has a different perception, then the parties need to

1 be able to proceed with discovery that's consistent
2 with the more expansive version of what the burden of
3 proof is, meaning the more fact-intensive version.

4 And certainly the cases contemplate that
5 there's going to be an identification of both the harm
6 to the complaining state and perhaps that does take
7 the form of, you know, modeling of flows, et cetera.
8 But also, the cases seem to contemplate that there's
9 going to be an identification of what particular
10 actions of the -- of the upstream state are causing
11 the harm.

12 And I don't think there's any -- you know,
13 the cases don't really address the issue of linking
14 one particular cause to one particular harm. And
15 obviously, water is fungible in the sense that you
16 can't necessarily link one particular diversion to a
17 particular downstream user's harm.

18 But that being said, it's still the case that
19 the party who's defending the lawsuit needs to have
20 some facts and details and itemization of what -- what
21 activities and harms are causing the downstream
22 reduction in flow. And I think it's not sufficient to
23 point to the complaint in part, because the complaint
24 does not give very much specificity. And further, the
25 complaint doesn't identify the, who, what, when, where

1 and how of these generalized allegations of harm.

2 I think it's a fair point that the issue of
3 pollution wasn't really -- it wasn't really the
4 subject of our earlier briefing on the scope of the
5 complaint. I don't know if it needs to be addressed
6 in some other form, but I think for now we can address
7 it through objections to discovery and see how it
8 plays out. But if there's a need, we may just have to
9 tee that up for resolution whether the complaint
10 sufficiently alleges environmental harm. I mean,
11 you know, pollution. And if so, is it alleging
12 pollution simply as a subset of flow problems like,
13 all right, the more water that's flowing, the less the
14 pollution is an issue? Or is there some complaint
15 about a need to remediate in which case the issues
16 about the Clean Water Act may come into play? Those
17 are issues that I feel like we hadn't necessarily teed
18 up for resolution today.

19 But the bottom line on the complaint, I
20 think, is that you can't just fall back on the
21 complaint. North Carolina needs to know what it's
22 doing that is being challenged. And it's not
23 sufficient to say, well, we're just not getting enough
24 water down here. I don't think that works. Because
25 that makes it impossible for North Carolina to defend

1 itself in the case, if its version of the burden of
2 proof at the end of Phase 1 is correct. And as I
3 think there needs to be a mechanism to flesh out in a
4 fairly particularized way what South Carolina is
5 complaining about. And if South Carolina doesn't
6 think that's necessary for its burden of proof, then
7 again it proceeds at its peril in that viewpoint to
8 the end of Phase 1. And I'm not sure who's right
9 about it. But it's a risk that South Carolina would
10 be taking.

11 But North Carolina still has the right to
12 proceed with its discovery, which is the defense of
13 particular allegations of harm, so -- but on the other
14 hand, I think the idea of having that all in an expert
15 report and then beginning an entirely new 9-month
16 phase of discovery triggered by the expert report may
17 not be necessary and probably unduly stretches out the
18 case.

19 So what I would propose for comment is that
20 there be some discovery-based mechanism like a
21 contention interrogatory. We set a time for that to
22 be responded to which would give sufficient time for
23 South Carolina to develop its facts, to work with its
24 experts, to come up with something that is fairly
25 definitive by a certain date in response to specific

1 interrogatories, but that wouldn't necessarily need
2 the full nine months to develop final expert reports.

3 So I was thinking three or four months for
4 South Carolina to do that. But then the product would
5 be something that would be clear, definitive, and
6 complete. It could be supplemented, but there would
7 be somewhat of a presumption against supplementation
8 rather than in favor of it, in terms of particularized
9 theories of harm. And I kind of have to leave it to
10 the parties and to North Carolina in particular, to
11 ask the questions in the right way.

12 But is North Carolina complaining about
13 transfers and if so, what are they, which particular
14 transfers? Is North Carolina complaining about
15 pollution and if so, what are the specifics of it? By
16 whom? Where? Et cetera.

17 Because otherwise, North Carolina is -- is
18 going to be flailing at something that is not -- can't
19 be found. It will be just -- and therefore, it's
20 impossible for it to know what it's defending against.
21 Now, that may cut against the grain of what
22 South Carolina thinks it has to prove at the end of
23 Phase 1. But I think South Carolina may have to just
24 modify its expectations of what it has to prove in
25 order to accommodate the necessary discovery within

1 the range of potential substantive burdens of proof at
2 the end of Phase 1.

3 So what I would suggest is that there be a 3-
4 or 4-month deadline, and we can talk about whether
5 that works, in which for South Carolina to come up
6 with these definitive interrogatory responses, if
7 that's the best mechanism.

8 And then that gives -- and then there will
9 be -- then the discovery period will continue. And
10 I'd be inclined to extend it by, perhaps by the same
11 number of months so that North Carolina would have an
12 adequate opportunity to address those claims of harm.
13 And then we'd have a summary judgment phase, if that's
14 warranted.

15 So any comments on that?

16 MR. FREDERICK: This is David Frederick,
17 Special Master Myles. We object to that. That so
18 greatly constricts our ability to do discovery in the
19 case that I think it basically so greatly restricts
20 what we could do to prove our case that we -- we would
21 strongly object to that proposal.

22 I think, you know, the notion that we
23 basically have three or four months to come up with
24 the evidence that would support contention
25 interrogatories that would be the basis of our entire

1 case is something I've never heard of in an equitable
2 apportionment case or any original action. And to
3 that extent would be unprecedented and highly
4 prejudicial to the state.

5 And I would also object the characterization
6 that if the cumulative effects of North Carolina's
7 consumption and its increasing consumption, it's
8 growing consumption, by virtue of things like the
9 building of water parks and other proposed uses be
10 shown on a cumulative basis to have downstream effects
11 would be quite devastating to the citizens of
12 South Carolina.

13 And so I am quite concerned that without a
14 clear articulation of the precedent for that kind of
15 approach, South Carolina is going to be highly
16 prejudiced by the entry of such an order. That's not
17 to say we're not going to be prepared to move as
18 expeditiously as we can to clarify with the degree of
19 specificity that everybody this is warranted to allow
20 North Carolina an opportunity to defend the case.

21 But I think that the approach that you
22 suggested today is one that is without prejudice and
23 would be highly prejudicial to our case. And we would
24 object to that.

25 SPECIAL MASTER MYLES: Let me ask you a

1 couple things about it, let me respond in a couple of
2 ways and then I'll let North Carolina speak.

3 One is I wasn't saying that South Carolina
4 would have to disclose all its evidence at this phase.
5 What I'm saying is that it would be like
6 particularized pleading for fraud. You'd have to
7 identify particular transfers or particular uses that,
8 that are the claimed harm that South Carolina is, is
9 seeking to prevent or that is causing South Carolina's
10 injury.

11 MR. FREDERICK: But --

12 SPECIAL MASTER MYLES: You don't have to
13 identify all the documents and all the -- all the
14 witnesses and all the testimony that supports that
15 claim. But you would have to be -- you'd have to
16 particularize your claim of harm.

17 And then with respect to cumulative effects,
18 again, I don't think that goes to the burden of proof.
19 Can South Carolina prove its case by showing the
20 accumulative effect of uses in North Carolina on the
21 water flow into South Carolina? I don't know. I'm
22 not passing on that. That's a question that goes to
23 the burden of proof. But as to the discovery that is
24 authorized, what goes into those cumulative effects
25 presumably would be the subject of discovery, because

1 it would be, it would be -- at a minimum, it would be
2 reasonably calculated to lead to the discovery of
3 admissible evidence of what the cumulative effect is.

4 So you can make -- if you could make a
5 cumulative showing, doesn't the other side have the
6 right to discover what goes into that cumulative
7 showing?

8 MR. FREDERICK: And the difficulty, Special
9 Master Myles, is all that evidence is in
10 North Carolina. We don't have access to the modeling
11 that Duke has done, the information that
12 North Carolina agencies have taken on what water gets
13 taken out of the Catawba River. And there is no way
14 that we can get all of that information within three
15 to four months. And those are the specific pieces of
16 evidence of cause that lead to the harms in
17 South Carolina that we understand we will be required
18 to prove in Phase 1. And we have been --

19 SPECIAL MASTER MYLES: The problem, then,
20 that you're not really addressing then is -- what
21 you're addressing now is the amount of time it would
22 take for South Carolina through discovery to get that
23 information necessary to create this particularized
24 statement of South Carolina -- of the activities in
25 North Carolina that are causing South Carolina harm.

1 That I understand. And we can discuss what length of
2 time is necessary. But if that's going to be the
3 first time that South Carolina comes forward with the
4 particular things that it's complaining about, then
5 North Carolina needs to be given time to discover,
6 take discovery on those claims. You -- it's almost
7 like you can't have it both ways.

8 MR. FREDERICK: Yeah, I don't seek to have it
9 both ways, Special Master Myles. I do think, though,
10 that there's a clear differentiation between
11 identifying downstream effects that South Carolina
12 will be showing as its injury and getting access to
13 information about how much water is being taken out on
14 the North Carolina side of the boundary for which we
15 have no access or source of information other than the
16 discovery process.

17 And I may have misheard, and if I did I
18 apologize for that. But I thought that you were
19 asking us to show, with answers to contention
20 interrogatories within the next three to four months,
21 that the harms identified in South Carolina are
22 traceable to actions in North Carolina for which we
23 are only now serving discovery, because North Carolina
24 refused to engage in discovery until two, three weeks
25 ago. And I would submit to you that that is unduly

1 prejudicial.

2 If the need is to provide additional time for
3 North Carolina, we would certainly accommodate any
4 reasonable request. We don't think that nine months
5 is necessary for expert discovery on the
6 North Carolina side, because they have modeled what
7 their consumptive uses are. And they are aware of
8 what their consumptive uses are by virtue of reports
9 made to the state. We just don't happen to have
10 access to those reports.

11 Now, what they do need to get information
12 about, and we would acknowledge that, is what's going
13 on on the South Carolina side of the boundary. And
14 that's where the need for a discovery and some
15 reasonable amount of time would be appropriate given,
16 you know, what North Carolina contends it doesn't know
17 what harms it's causing in South Carolina. But....

18 SPECIAL MASTER MYLES: There's somewhat of a
19 disconnect because you're correct that North Carolina
20 may have access to its own consumptive uses. But I
21 also think that there's an issue, there's a problem
22 with South Carolina's position being we challenge all
23 consumptive uses. I think that is probably too broad
24 at the end of the day, in that it's going to be a
25 legitimate -- there's going to be a legitimate basis

1 for South Carolina to have to be pinned down and say,
2 well, you can't be challenged, you can't be saying all
3 consumptive uses are a problem. You may have to say
4 which particular ones are a problem.

5 MR. FREDERICK: Well, Special Master Myles,
6 let me address that this way. And that is that you
7 are, you know, you're undoubtedly correct that there
8 will be many consumptive uses in North Carolina about
9 which we do not complain at all. But our position is
10 that it certainly, in periods of low flow, the river
11 has a limited capacity for additional consumption.

12 And to the extent that North Carolina has
13 engaged in additional consumption or is proposing to
14 engage in additional consumption or is transferring
15 water out of the river, then those consequences have
16 very real effects downstream and those need to be
17 addressed because they are causing harm, particularly
18 in periods of low flow.

19 And the Supreme Court's cases have
20 acknowledged that equitable apportionment decrees may
21 take into account that in periods of low flow, or in
22 periods of the year when the water is not dependable,
23 that there can be restrictions imposed on how much can
24 be taken out of the -- of the water. But, I mean, how
25 much water can be taken out of the river.

1 But it is not correct, we would submit, to
2 say that we, it is our burden to say that the City of
3 Charlotte's consumption is more harmful to us than the
4 City of Concord or Kannapolis's consumption. Because
5 if the water, you know, is in the river, it doesn't
6 matter whether it's not being consumed by Concord
7 citizens or Charlotte citizens. It's still water in
8 the river.

9 SPECIAL MASTER MYLES: Yeah, but I think the
10 problem with that is that there -- is that -- the
11 problem with that is that if you're permitted to make
12 the standard just there's not enough water coming over
13 the border for us, then the other state can't defend
14 that case.

15 So I think what needs to happen here is that
16 I need to ask you to assume for the moment that that's
17 not going to be sufficient to sustain your burden of
18 proof for Phase 1. And I'm not passing on that one
19 way or the other. I think you have to make the
20 assumption that South Carolina is going to have to
21 identify the specific, general categories of harm
22 including transfers to particular cities, et cetera,
23 as the basis for its complaint. And that it is going
24 to -- and that North Carolina is going to have to be
25 permitted to take discovery or develop discovery on

1 those particular claims of harm, if you will.

2 MR. FREDERICK: May I --

3 SPECIAL MASTER MYLES: We need a mechanism,
4 then, if we're going to proceed on that assumption,
5 for South Carolina to identify what those are.
6 Because it has not done that to date. It has
7 identified in a -- in the complaint in a pleading
8 that, you know, satisfies notice pleading
9 requirements. It's not a pleading issue. It's beyond
10 a pleading issue. It's an identifying particular harm
11 issue or particular agents of harm. We need a
12 mechanism for South Carolina to do that. And -- and
13 we need a mechanism then for North Carolina to be able
14 to address those issues.

15 MR. FREDERICK: May I make a comment on the
16 first part of what you said, which is that ultimately
17 I think the concern that you expressed is a Phase 2
18 concern, which is whether the equities of consumption
19 in Concord and Kannapolis, how they weigh versus the
20 consumption in Rockhill or another South Carolina
21 community. But that that consumption as between
22 Charlotte and Kannapolis is an intramural water
23 dispute that North Carolina needs to work out among
24 its self based on the fundamental principle that the
25 two states have an equal right to the river and that

1 does not mean that they have an equal amount of water
2 from the river, but they have an equal right to get
3 access to the river. And that fundamental principle
4 which has long been recognized from the very beginning
5 of the Court's equitable apportionment cases, gives us
6 a right to show we have been injured by
7 overconsumption and then the burden shifts to looking
8 at the relative equities of that consumption. But
9 that's a Phase 2 question.

10 SPECIAL MASTER MYLES: But you have to
11 identify what the overconsumption is.

12 MR. FREDERICK: Sure.

13 SPECIAL MASTER MYLES: That's the problem.

14 MR. FREDERICK: Sure.

15 SPECIAL MASTER MYLES: And that, in turn,
16 says, well, how, you say we're being injured by
17 overconsumption, so then the next natural question
18 that gets asked of you is, well, what is the
19 overconsumption? Where is it? Please identify for us
20 in what areas we're taking too much water.

21 MR. FREDERICK: There is also a burden,
22 though, on North Carolina to conserve what it has.

23 SPECIAL MASTER MYLES: Sure.

24 MR. FREDERICK: And that's why --

25 SPECIAL MASTER MYLES: That's definitely a

1 Phase 2 issue, isn't it?

2 MR. FREDERICK: Well, I think that it is part
3 of Phase 1 if the injury that South Carolina is
4 sustaining is a result of a lack of appropriate
5 conservation in North Carolina. That's where the
6 overconsumption comes into play and that's why the
7 Court's cases have said -- and I'm thinking of the
8 Wyoming and Colorado as well as Kansas and Colorado --
9 that if the upstream state doesn't conserve
10 appropriately or doesn't take into account the
11 reservoir capacities that can conserve water, then
12 they are taking more than their fair share. And those
13 issues are part and parcel of what this case is about.

14 SPECIAL MASTER MYLES: But aren't those
15 issues that would need to be the subject of discovery?
16 If you're -- if you're now saying that part of Phase 1
17 should be whether North Carolina is making sufficient
18 efforts to conserve water in various ways, then isn't
19 that something you need to identify for them, so that
20 they can show through discovery or -- that they are
21 taking sufficient efforts to share water. I would
22 have thought that was a Phase 2 issue. But if you're
23 right that it really is part of -- potentially part of
24 Phase 1, then that would be something that you would
25 need to identify.

1 MR. FREDERICK: Well, I think that the, the
2 question of overconsumption is one that's going to be
3 modeled that there are hydrology experts that are
4 going to be modeling the river and they're going to
5 give us a sense of where the water is being taken out
6 and what it's being used for. And until we get that
7 picture, which is exclusively within North Carolina's
8 control, we are not going to be able to characterize
9 what is happening in North Carolina.

10 SPECIAL MASTER MYLES: Okay. Well, that's
11 fine. As long as you give them sufficient time, after
12 you do that, after you make that identification, to
13 take discovery. I don't -- your -- your proposed
14 schedule is one that is like -- it is akin to how much
15 time do people need to prepare their expert reports?
16 So you have 90 days, I mean, nine months and then one
17 party prepares their expert reports. And then the
18 other party has a certain amount of time to respond to
19 the expert report, 90 days or whatever it might be.
20 That presupposes that the party who is doing the
21 responsive report has had sufficient time during the
22 nine months of discovery to determine what the first
23 party is complaining about. But if the first
24 disclosure of what the first party is complaining
25 about comes in the expert report, then I think that

1 North Carolina has a legitimate basis to say, well,
2 then we need some real discovery time, not just the
3 time to prepare our report from discovery that's
4 already been taken.

5 So maybe we can -- we can use the expert
6 report as the initial disclosure. And jettison my
7 idea of having an interrogatory -- interim general
8 disclosure through interrogatory responses as the
9 triggering event. But then you would have to give
10 them a lot more months of discovery at the end. It
11 may be partly your choice which mechanism you want to
12 use. But I think somehow, we have to have a mechanism
13 that gives -- that both identifies South Carolina's
14 particular claims of overconsumption by North Carolina
15 and then gives North Carolina a chance to respond.

16 MR. FREDERICK: Well, we -- I appreciate your
17 suggesting an alternative to the three- to four-month
18 contention interrogatory. This is, I think, obviously
19 a question of great fundamental importance to the --
20 to the case. And I would appreciate the opportunity
21 to consult with our clients and the state. Would it
22 be possible to submit a brief letter in which we would
23 outline an amendment to this particular facet of the
24 case management order? We do not have an interest in
25 precluding North Carolina from a fair opportunity to

1 defend this suit. And that is not where we're coming
2 from in our proposals. But we also would like a fair
3 opportunity to prove our case without having to do so
4 prematurely and without having a full opportunity to
5 get discovery.

6 SPECIAL MASTER MYLES: Right. I think that's
7 fine. If you want to respond further by letter, I
8 think that's fine because I sort of proposed some
9 questions for you and I think it's fine if you want to
10 go back and consult and think about those more.

11 I think part -- part of the reality I'm
12 trying to impose and you might want to discuss with
13 your -- with your client, is that I think there needs
14 to be -- unless we're going to have a substantive
15 phase in which we resolve precisely the burdens of
16 proof at the end of each discovery phase, then I think
17 there needs to be a recognition that the parties are
18 probably going to disagree on the burden of proof.

19 So by having, giving, by setting up this kind
20 of mechanism, I don't think South Carolina would be
21 conceding that it -- what its burden of proof is at
22 the end of Phase 1. It's just recognizing this is
23 necessary for North Carolina to have the discovery
24 that it needs.

25 MR. FREDERICK: And I think at that point,

1 you know, the question of whether North Carolina
2 really needs nine months in response or whether it
3 could be accommodated to a shorter time period,
4 six months. Because we anticipate that North Carolina
5 will also be serving discovery and conducting
6 discovery during the phase while we are developing the
7 evidence on injury.

8 SPECIAL MASTER MYLES: Right. I don't
9 disagree with that. In fact, I was going to make that
10 point. That if we go with a mechanism of disclosures
11 through the expert report, I agree it's not
12 necessarily the case that North Carolina must have
13 nine months. Six months may be enough. I was going
14 to say the exact same thing.

15 It also -- it also is true that even if we go
16 with that mechanism of disclosure, that doesn't
17 preclude North Carolina from serving contention
18 interrogatories, nor would it relieve South Carolina
19 of the obligation to respond to those in good faith
20 with whatever information it has in the usual way we
21 do. We don't just say, well, we can't tell any of
22 that until discovery is complete. You have to proceed
23 in good faith to give what information you have at
24 that time, with the recognition that you're going to
25 have to give specific information at some point

1 anyway.

2 So yes, that may be a way of reducing the
3 discovery period for North Carolina after the report.

4 MR. SHEEDY: Special Master Myles, this is
5 Jim Sheedy on behalf of Catawba River Water Supply
6 Project. It seems to me that this same reasoning
7 applies with equal force to the intervenors, that they
8 too should be given an appropriate period of time
9 after there's been some specification of the harms
10 alleged against it within which to put together their
11 defense of the claims against them.

12 So I'm not chiming in to suggest that there's
13 a different mechanism but to, I guess, make it clear
14 for the record that like North Carolina, this
15 intervenor would like to have a reasonable period of
16 time to put together its defense, whether it's
17 cumulative effect or it's the specification of harms,
18 however the Court ultimately rules on that, that we
19 have an opportunity, a reasonable period of time
20 within which to secure our experts and do the
21 necessary studies that are nonoverlapping with
22 whatever North Carolina feels that it needs to do in
23 order to address things that are particular to
24 Catawba.

25 SPECIAL MASTER MYLES: Mr. Phillips or

1 Mr. Banks, do either of you have anything to add to
2 that?

3 MR. PHILLIPS: This is Carter Phillips.
4 I mean, obviously, I agree with that. There is going
5 to be a substantial amount of discovery done of
6 materials that Duke has and it will be useful.
7 I mean, we obviously know some aspects of what's going
8 on with the river system.

9 But once we know precisely what it is that
10 South Carolina is complaining about, it's going to
11 take us awhile to be able to figure out whether we
12 think that's good, bad, or indifferent or how it
13 squares with the expand agreement or use and it does
14 seem to me to be necessary to have some time to digest
15 it and respond appropriately.

16 MR. BANKS: And this is Jim Banks for
17 Charlotte. We certainly agree with that. I would add
18 one other thought and that is I think the discussion
19 today has been somewhat imprecise as to what it is
20 South Carolina needs to tell the defendant and the
21 intervenors. We have confused or we've switched back
22 and forth between harms and causes. And our view is
23 that South Carolina at some early stage needs to
24 identify with specificity what are the injuries that
25 are caused by consumption in North Carolina, so that

1 if, for example, pollution in South Carolina is an
2 issue that they believe contributes to their basket of
3 harm, we have the opportunity to contest that and not
4 learn about it later.

5 MR. FREDERICK: This is David Frederick for
6 South Carolina. I think that that problem is one that
7 can be addressed through, once we've allowed the
8 experts to do their -- their thing to provide
9 sufficient time for responses to that. But part of
10 what the experts are going to be modeling is
11 assimilative capacity, effects of discharges, the
12 whole range of hydrological conditions on the river
13 system. And that that -- it would be premature to
14 impose too great a requirement of specificity as to
15 certain things before the experts have spoken, because
16 that's what the experts are expert in.

17 SPECIAL MASTER MYLES: But again, I don't
18 think that principle would relieve South Carolina of
19 responding in good faith to interrogatories as we go
20 along. There are certain things that are obvious.
21 Right? Some of them are alleged in your complaint.
22 Those should be disclosed. As additional less
23 obvious, but also significant causes, if you will,
24 become evident, they should also be disclosed.

25 So I don't think the pendency of such an

1 expert report relieves South Carolina of providing the
2 information that it has. But to address, I think,
3 Mr. Banks' point, we are trying to speak about both,
4 the injuries in South Carolina, number 1, and what
5 activities in North Carolina are being complained
6 about.

7 MR. BANKS: This is Jim Banks. That was
8 precisely my point. We do need to cover both and at
9 an early stage of the case.

10 MR. FREDERICK: But the issue ultimately of
11 fair representation is why North Carolina can't cover
12 the issue of injury. And that's the subject of the
13 motion that is going to be briefed and argued on
14 July 17th. There's never been any showing that
15 North Carolina's inadequate to represent itself with
16 respect to Phase 1 injury showings and we'll brief
17 that and argue that. But a fundamental deficit in all
18 of the intervenors' position is that they can't show
19 North Carolina's insufficient to try to disprove
20 injury in South Carolina. And this is just piling on
21 to allow intervenors to engage in additional points on
22 injury.

23 MR. BROWNING: Your Honor, this is Chris
24 Browning. I'm a bit confused. I thought we agreed at
25 the outset that there would be a briefing schedule and

1 arguments on the intervention and that wasn't
2 necessary to do it at this point. So I'm a little bit
3 puzzled by Mr. Frederick's comments just now. But we
4 have been listening to the discussion for quite some
5 time now. And I just wanted to say that I think you
6 have recognized what North Carolina's needs are in
7 this case, which is a mechanism to see what's truly at
8 issue and then an opportunity to respond.

9 I gather that what the Court was doing was,
10 or that the next step would be for Mr. Frederick to
11 send some sort of letter to the Court after he has a
12 chance with his client. I'm not sure what time frame
13 we would be on for doing that, and whether you wanted
14 North Carolina to respond after we receive that
15 letter.

16 SPECIAL MASTER MYLES: What time do you need
17 to write the letter, Mr. Frederick?

18 MR. FREDERICK: We would certainly expect to
19 have a letter in by the end of this week, if not
20 sooner. But we would like an opportunity to consult
21 with the South Carolina officials.

22 SPECIAL MASTER MYLES: Okay. By the end of
23 this week would be --

24 MR. FREDERICK: And I appreciate July 4th is
25 Friday. But I would expect we would have this in

1 before July 4th.

2 SPECIAL MASTER MYLES: Okay. And then if
3 North Carolina can respond by the 11th, that will work
4 for the hearing that we have already. If we need to
5 discuss it further at that time, we can.

6 MR. BROWNING: Your Honor, I will be out all
7 of that week, but we will make some arrangements for
8 someone in my office to respond to South Carolina's
9 letter. So July 11th is when you need a response by
10 North Carolina?

11 SPECIAL MASTER MYLES: I think that would
12 work, yes.

13 MR. PHILLIPS: Special Master Myles, this is
14 Carter Phillips. Are the intervenors entitled to
15 respond as well?

16 SPECIAL MASTER MYLES: You mean in the
17 letter?

18 MR. PHILLIPS: Yes.

19 SPECIAL MASTER MYLES: Yeah. Well, it's
20 funny because obviously, I understand people being
21 unhappy with South Carolina's having raised this issue
22 at the eleventh hour. But they are obviously related
23 issues, and so -- and I have given a briefing schedule
24 on the motion for reconsideration/clarification. And
25 either of the outcomes that South Carolina is seeking

1 in that motion would preclude the intervenors from
2 being involved at all at this phase.

3 MR. PHILLIPS: Right.

4 SPECIAL MASTER MYLES: So obviously, that
5 would affect the outcome on participation in Phase 1
6 generally. But since the motion hasn't been granted,
7 and it's still subject to briefing, my inclination
8 would be to proceed on the assumption, without
9 prejudice to South Carolina, that the motion will be
10 denied. Because the motion is an effort to affect the
11 status quo. And I certainly didn't, in the order,
12 address what could or couldn't be done in Phase 1 by
13 intervenors, although South Carolina argues the
14 implications of what I said.

15 But that is the subject for another day. So
16 I don't see any harm in, at the moment, hearing from
17 intervenors on these issues, which could affect them
18 if I deny South Carolina's motion.

19 Does that make sense? So we'll proceed on
20 the assumption that intervenors are welcome to
21 respond. And then hopefully, we'll resolve the motion
22 for reconsideration. That's why I wanted to resolve
23 it promptly, because I just don't want to have this
24 issue in limbo, because it raises precisely this kind
25 of issue as to what extent will intervenors be part of

1 Phase 1.

2 MR. PHILLIPS: Well, that's very clear.

3 Carter Phillips. Thank you.

4 SPECIAL MASTER MYLES: But as Mr. Banks and
5 Mr. Sheedy were saying, if they are to be part of
6 Phase 1, then we have to address the question of their
7 participation when North Carolina weighs in, you know,
8 down the road in Phase 1. All of that needs to be
9 spelled out once we deal with the motion for
10 reconsideration.

11 So why don't we have intervenors responding
12 at the same time as North Carolina would be if they
13 have anything to say about South Carolina's proposal,
14 whatever it is, in the letter.

15 MR. PHILLIPS: That's fine.

16 MR BROWNING: Your Honor, could I make a late
17 request? Rather than sending that to you at the very
18 end of the day on the 11th, would it be possible to
19 send it first thing in the morning East Coast time on
20 the 14th? That will at least give me the chance, when
21 I return from vacation, to work that weekend on it.

22 SPECIAL MASTER MYLES: I don't have an
23 objection to that. Does anybody? Because that still
24 gives us, that still gives us three days to look at
25 the responses. And of course, the intervenors can put

1 in theirs on the 11th, if they want to.

2 MR. BROWNING: Okay. I will send in my
3 response by 9:00 a.m. West Coast time on July 14th, if
4 you wouldn't mind indulging that request.

5 SPECIAL MASTER MYLES: That's fine with me.

6 MR. BROWNING: With the intervenors serving
7 on the 11th.

8 MR. PHILLIPS: That's fine. This is Carter
9 Phillips with Duke. That would be fine with us.

10 MR. FREDERICK: And I don't know that there
11 will be a need for us to respond, but if we do --

12 SPECIAL MASTER MYLES: Okay. I think that's
13 everything except the scheduling a call for September.
14 Is that right?

15 MR. BROWNING: There's one other housekeeping
16 matter. And that is can the parties proceed as though
17 the case management plan is in effect except for those
18 elements that are not -- that need to be tidied up.

19 SPECIAL MASTER MYLES: That seems sensible to
20 me. Does anyone object to that?

21 MR. SHEEDY: This is Jim Sheedy on behalf of
22 Catawba River Water Supply Project. And in fairness
23 to Mr. Frederick, there really is no reason that he
24 would know this, nor is there any reason that
25 the Court would know this apart from an intervenor

1 making the Court and Mr. Frederick aware, the
2 intervenors have been having discussions about the
3 case management plan, and are at the point too,
4 Your Honor, where we are approaching North Carolina
5 and hopefully South Carolina about some very minor
6 points, albeit important to us, with respect to the
7 case management plan.

8 And we would hope that the Court would be
9 accommodating and allow us to maximize the possibility
10 of resolving all of that among ourselves, not having
11 to burden the Court anymore. But we still would like
12 the opportunity to complete that process if we could.

13 SPECIAL MASTER MYLES: Well, it seems like
14 there might be a coincidence of objectives in the fact
15 that we're going to have a hearing on the 17th, in
16 which hopefully we'll resolve the issue of
17 intervention, we'll resolve the issue of Phase 1
18 versus 2 on the question of intervention, intervenors.
19 And that in turn will bear directly on the issue of
20 whether intervenor, whether the case management order
21 needs to be changed or modified or supplemented to
22 accommodate both the existence of intervenors and
23 specific comments intervenors have on the plan.

24 So we may be able to sort of resolve it -- we
25 may be able to reach these points of resolution all at

1 once on or about the 17th.

2 MR. SHEEDY: This is Jim Sheedy again on
3 behalf of Catawba. And our hope, Your Honor, would be
4 that between now and the 17th, irrespective of the
5 agenda for hearing on the 17th, that we could
6 communicate among each other, identify these areas,
7 and dependent upon the court's ruling, present
8 the Court with a case management plan that doesn't
9 require any further judicial examination.

10 SPECIAL MASTER MYLES: Uh-huh.

11 MR. SHEEDY: So I would like to express that
12 hope. And certainly it's Catawba's intentions to
13 speak with North Carolina and with South Carolina
14 after the intervenors have reached some consensus
15 among them.

16 SPECIAL MASTER MYLES: Okay. I think that's
17 fine. And South Carolina, Mr. Frederick, did you have
18 any particular aspects of the order that you want to
19 proceed with? I don't want to preclude you from going
20 forward because I did say discovery should proceed.
21 And if there's any particular aspect of the case
22 management plan that you want to be able to operate
23 under, maybe you could identify it so that we can make
24 sure that nothing that's being proposed would
25 jeopardize that.

1 MR. FREDERICK: Sure. There are at least a
2 couple of things. We would like to proceed with
3 discovery as we had been granted permission to do
4 earlier. And specifically, with respect to
5 discussions with experts, there is proviso that those
6 discussions would not be discoverable and we would
7 like that to be carried forward so that we can --
8 you know, we're going to have, obviously, have a lot
9 of work to do very quickly with our experts under the
10 discussions that have occurred today.

11 SPECIAL MASTER MYLES: That's an excellent
12 point. Does anyone on the phone know -- does any
13 party or intervenor anticipate proposing to change
14 that provision of the expert report disclosure section
15 of the plan? Just in case no one's read it, it
16 resolves an issue that frequently arises in litigation
17 and often people try to resolve it by agreement, which
18 is what treatment is given to materials generated by
19 experts. It's one of those things that it's good to
20 resolve in advance in talking to your experts and the
21 two parties here have resolved it in favor of making
22 those materials generally not discoverable.

23 So if someone is going to object to that,
24 they should probably speak now. Otherwise, I think
25 the answer is yes, that the parties can proceed on the

1 assumption that those materials won't be discoverable.

2 MR. SHEEDY: Jim Sheedy on behalf of Catawba
3 River. No objection, Your Honor.

4 MR. PHILLIPS: This is Carter Phillips at
5 Duke. Same.

6 MR. BANKS: This is Jim Banks for Charlotte.
7 We have no objection.

8 SPECIAL MASTER MYLES: Okay. Anything else,
9 Mr. Frederick?

10 MR. FREDERICK: Not at this time. Thank you.

11 SPECIAL MASTER MYLES: Okay. Good enough.
12 Then what date in September do we want to talk?
13 I think what we had scheduled -- we had scheduled a
14 call on the 22nd of August, I believe, at 10:00 a.m.
15 Pacific time. How about the 26th of September, which
16 is a Friday?

17 MR. FREDERICK: Would it be possible to do
18 2:00 Eastern time that day?

19 SPECIAL MASTER MYLES: So 11:00 Pacific.
20 That's fine with me. What about others on the phone?
21 North Carolina?

22 MR. BROWNING: This is Chris Browning.
23 2:00 p.m. on Friday, September 26th, works for us.

24 SPECIAL MASTER MYLES: Okay. And Duke?

25 MR. PHILLIPS: This is Carter Phillips.

1 That's fine.

2 SPECIAL MASTER MYLES: Catawba?

3 MR. SHEEDY: Your Honor, Jim Sheedy.

4 Although I will be in Phoenix, I'm inclined to
5 accommodate. And that's fine.

6 SPECIAL MASTER MYLES: Okay. And Mr. Banks.

7 MR. BANKS: Yes, this is Jim Banks for
8 Charlotte. We're fine with that.

9 SPECIAL MASTER MYLES: Excellent. So that's
10 been resolved. Is that everything for today? We've
11 covered a lot of material, so I appreciate everybody's
12 responsiveness. I think this was a helpful
13 conference, I hope. So we'll look forward to the
14 letters and speaking on the 17th.

15 MR. BROWNING: Thank you, Your Honor.

16 MR. FREDERICK: Thank you, Your Honor.

17 SPECIAL MASTER MYLES: I will issue an order
18 putting in all these dates just to -- so there is no
19 more ambiguity over what is due when because we've had
20 a lot of dates covered today.

21 MR. BROWNING: That's great, thank you.

22 MR. SHEEDY: Thank you, Your Honor.

23

24

25

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby
3 certify:

4 That the foregoing proceedings were taken
5 before me at the time and place herein set forth; that
6 any witnesses in the foregoing proceedings, prior to
7 testifying, were duly sworn; that a record of the
8 proceedings was made by me using machine shorthand
9 which was thereafter transcribed under my direction;
10 that the foregoing transcript is a true record of the
11 testimony given.

12 Further, that if the foregoing pertains to
13 the original transcript of a deposition in a Federal
14 Case, before completion of the proceedings, review of
15 the transcript [] was [] was not requested.

16 I further certify that I am neither
17 financially interested in the action nor a relative or
18 employee of any attorney or party to this action.

19 IN WITNESS WHEREOF, I have this date
20 subscribed my name.

21
22 Dated:

23
24 _____
25 DANA FREED
CSR No. 10602