No. 138, Original

IN THE

Supreme Court of the United States

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

Before Special Master
Kristin Linsley Myles

CITY OF CHARLOTTE'S OPPOSITION TO SOUTH CAROLINA'S MOTION FOR CLARIFICATION OR RECONSIDERATION OF ORDER GRANTING INTERVENTION

Having failed to justify her position that the City of Charlotte ("Charlotte") should be denied party status, South Carolina now moves to curtail Charlotte's participation to such a degree that she will have accomplished the same result. In the alternative, South Carolina asks the Special Master to reverse her own order granting Charlotte's motion to intervene. Charlotte urges the Special Master to deny both aspects of South Carolina's motion.

A. SOUTH CAROLINA'S MOTION FOR CLARIFICATION SHOULD BE DENIED.

The Special Master's Order of May 27, 2008, granted Charlotte's motion to intervene so that Charlotte can protect "its interest in defending the current inter-basin transfer regime, and its own permit in particular." Order Granting Motions for Leave to Intervene at 9-10 (hereinafter "Order").

In so doing, the Special Master found Charlotte's interest to be "compelling," "unique," and "concrete." Id. at 8, 9. The Special Master granted Charlotte's and the other intervenors' motions in full, not in part. See id. at 13.

South Carolina's motion for clarification now questions the scope and timing of the participation Charlotte must have in order to protect that interest. South Carolina argues that Charlotte may not participate in this litigation at this time, but rather must wait several years and then submit evidence to stave off an impending injunction invalidating Charlotte's inter-basin transfer (IBT) Certificate, if necessary. See Motion of South Carolina for Clarification or, in the Alternative, for Reconsideration of May 27, 2008 Order Granting Limited Intervention at 1-8 (hereinafter "SC Mot."). This is so, South Carolina asserts, because: (1) that Certificate is the only unique interest of Charlotte that South Carolina has attacked, and (2) Charlotte will not need to protect that interest until the latter stages of this action. Id. at 3, 7-8. Both assertions are wrong.1

1. South Carolina's Multi-Faceted Attack on Charlotte's Interests Justifies Charlotte's Full Participation in Defending Those Interests

South Carolina's Complaint is far from a model of clarity and specificity but, as the Special Master's Order recognizes, the Complaint does focus on Charlotte's IBT Certificate. See Order at 8. This focus caused North Carolina to conclude that South Carolina's allegations as to the causes of her

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1 South Carolina erroneously claims that "Charlotte's counsel expressly acknowledged that the Court 'can limit [its] intervention' and that Charlotte, moreover, would 'self-condition [its] participation in the case' to only those 'things that directly affect[it].'" SC Mot. at 5 (quoting Mar. 28, 2008 Tr. at 53). Counsel for Charlotte did **not** say that; counsel for CRWSP said that, and not in reference to Charlotte. Counsel for Charlotte made clear that the City "needs to have party status," not some limited status. Tr. at 75 (emphasis added).

injury were limited to IBTs. See Brief of the State of North Carolina in Response to Case Management Order No. 3 Regarding Scope of Pleadings at 4-5. South Carolina disclaimed such a narrow scope, and asserted that her incantation of the Court's phrase, "equitable apportionment," swept into the Complaint all water consumption in North Carolina in addition to specific water diversions to other river basins. See Reply Brief of the State of South Carolina in Response to Case Management Order No. 3 as to the Scope of the Complaint at 7-8. Thus, South Carolina maintains that causation will be judged by taking into account the cumulative water consumption occurring in North Carolina. See SC Mot. at 7. In other words, South Carolina attacks Charlotte's diversion of water under its IBT Certificate as a substantial, incremental addition to all other consumptive uses—the proverbial straw that broke the camel's back. See, e.g., SC Compl. ¶ 24 ("Such transfers exacerbate the existing natural conditions and droughts that contribute to low flow conditions in South Carolina and cause the harms detailed above.").

But many of the straws already loaded onto that camel—in the form of intra-basin consumption—are Charlotte's straws. Charlotte pointed out in its Motion to Intervene that Charlotte is, by far, the largest municipal water user within the Catawba River Basin, see Motion for Leave to Intervene of the City of Charlotte at 3, and that its water consumption within the Basin already exceeds its total IBT authority. Id. at 8. In 2007, Charlotte was responsible for 35 million gallons per day of consumptive use of water. Mar. 28, 2008 Tr. at 136. Charlotte accounts for sixty-four percent (64%) of all municipal consumptive use of Catawba River water in North Carolina. Id. South Carolina does not attack Charlotte's IBT Certificate in a vacuum; she claims that Charlotte's transfers to users outside the Basin are excessive in view of Charlotte's and others' existing consumptive uses within the Basin.

Surely Charlotte's interest in protecting its IBT Certificate includes an interest in debunking South Carolina's claim that her camel already suffers under a load of too many straws.

Moreover, South Carolina now has added a discrete attack on Charlotte's unique interests that also warrants Charlotte's participation apart from other citizens and creatures of North Carolina. In her June 23, 2008 Reply Brief, South Carolina continues her post-pleading expansion of the case by asserting that yet another specific cause of her injuries is "substantial sewage spills into the Catawba River Basin near the state boundary by the City of Charlotte." Reply Brief of the State of South Carolina Concerning Phase One and Phase Two Issues and Timing at 5 (hereinafter "SC June 23 Reply Br."). No other sources of alleged pollution are called out by South Carolina; only Charlotte.

As time passes, South Carolina continually expands the targets of her case—from Charlotte's IBT Certificate, to Charlotte's intra-basin consumptive uses, to Charlotte's sewage spills. While purporting to invoke the principles of equity in this action, South Carolina contends that her Complaint must be read expansively, whereas Charlotte should be limited to addressing only one of the causation factors actually being attacked by South Carolina. The Special Master should reject South Carolina's inequitable proposal to limit Charlotte's ability to defend itself. As Charlotte looms ever larger in South Carolina's crosshairs, so too must Charlotte's defense be allowed to proceed accordingly.

2. Charlotte Must Be Permitted to Mount a Complete Defense to Plaintiff's Case, Including Participating in Phase One

As an Intervenor-Defendant, Charlotte must be permitted to mount a complete defense to the Plaintiff's case. No defendant may be required to sit idly by while a plaintiff proves its case. Charlotte's defense against the relief sought vis-a-vis Charlotte includes an effort to show that South Carolina is entitled to no relief; indeed, Charlotte's defense must emphasize that effort in order to be effective.

South Carolina argues that Charlotte's "limited purpose" in this case must be served only during the latter stages of the two-phase proceeding being considered by the Special Master. See SC Mot. at 6-8. This argument defies logic and common sense. As South Carolina concedes, she deserves no opportunity to attack Charlotte's water transfers, water consumption or sewage spills unless she demonstrates by clear and convincing evidence that those activities, among others, have caused "real or substantial injury or damage" and that such harm is of "serious magnitude." Brief of the State of South Carolina Concerning Phase One and Phase Two Issues and Timing at 4 (citing Colorado v. New Mexico, 459 U.S. 176, 187 n.13 (1982); Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931)). Charlotte can protect its interests most effectively by showing, in Phase I, that: (i) South Carolina's evidence is neither clear nor convincing; (ii) South Carolina's alleged injury is not caused by activities in North Carolina; or (iii) South Carolina's injury is insubstantial or far short of a serious magnitude. Charlotte's interests are protected completely if it prevails on any of these fronts.

To phrase the matter in South Carolina's terms, if Charlotte succeeds in Phase I, South Carolina cannot obtain any relief affecting Charlotte's interests, and Charlotte need not justify or support the importance of its

water uses relative to South Carolina's injury. This is the very essence of Charlotte's purpose of "showing why 'relief against [it] individually should not be granted.'" SC Mot. at 7 (quoting Order at 9) (emphasis added by South Carolina).

South Carolina herself demonstrates the logical deficiency of her argument. First, she asserts that any decree in this case will limit the total quantity of water to be used in North Carolina, "leaving it to North Carolina to allocate that reduced volume of water among the competing users in that state." SC Mot. at 8. In the next breath, she contends that Charlotte will have the opportunity during Phase II to argue that its "particular water usage should be preserved or obligations should not be altered. . . ." Id. If South Carolina is correct in her first assertion, then her second surely is incorrect, for the Special Master and the Court will not consider Charlotte's contentions about the benefits of its water uses separately from the overall limits South Carolina seeks to impose on all water uses north of the state line. South Carolina's argument lays naked her real objective—to ask the Special Master to reconsider and reverse the intervention Order through artificial and unjustified limitations on Charlotte's participation.

South Carolina offers a prime example of this objective in her criticism of Charlotte for "going so far as to file a brief—despite the fact that the Special Master sought briefs on the phasing of this case only from the party States." SC Mot. at 5. The Special Master indicated on May 23, 2008, that briefs should be submitted on the phasing question, and noted specifically that the briefing schedule would post-date the intervention ruling. See May 23, 2008 Tr. at 19. A discussion of possible due dates ensued, with all participants referring to briefing by "the parties," which at that time included only the States. Id. at 20-24. Four days later, on May 27, 2008, Charlotte

was made a party, see Order at 9-10, and soon thereafter began behaving like a party by briefing an issue pending before the Special Master.

Why should Charlotte have no say as to the structure of a case to which it has just been admitted? Why would Charlotte not seek to protect its interest by urging the Special Master to adopt a structure under which Charlotte can expose the flaws in the South Carolina's case against it? South Carolina offers no explanation, and none is apparent.

Finally, Charlotte's need to participate is highlighted by South Carolina's repeated mischaracterization of her burden in Phase I. South Carolina focuses single-mindedly on the array of categories of harm she is entitled to show, with scant attention to her burden to demonstrate that actions in North Carolina caused those harms. See, e.g., SC Mot. at 6. South Carolina's theory appears to be that she can succeed in Phase I by: (1) demonstrating any of the types of harm previously recognized by the Court in prior cases (even when they were *not* alleged in South Carolina's Complaint), see SC June 23 Reply Br. at 5; and (ii) demonstrating that water is consumed, diverted or polluted in North Carolina; but (iii) never needing to connect those first two demonstrations. But South Carolina has not been harmed by actions in North Carolina unless this connection is established—quantitatively, qualitatively, temporally and spatially.

Two examples illustrate the point. If South Carolina alleges that Charlotte's sewage spills caused or contributed to a water quality problem at a downstream location, Charlotte should be in a position to question—in Phase I—whether those spills were of the type that could cause that harm, and whether they occurred at a time and at a location and in sufficient quantity to travel the requisite distance downstream and, after undergoing biological degradation along the way, still cause the type and degree of harm

alleged at the time and place it supposedly was experienced in South Carolina. Similarly, if South Carolina claims that Charlotte's consumptive uses and water transfers, together with other uses and transfers in North Carolina, caused low reservoir levels in South Carolina and prevented recreation during a certain time period, then Charlotte should be entitled to show—in Phase I—that those upstream uses would not account for any significant drop in South Carolina's reservoir levels, with natural drought conditions or other hydrologic factors accounting for the alleged injury. That such injuries may be deemed "of a serious magnitude" does not mean Charlotte or other North Carolina users caused even a significant portion of them. Raising such questions, through discovery or direct testimony during Phase I, is precisely the type of involvement Charlotte must have in order to defend against South Carolina's attack on its interests.

B. SOUTH CAROLINA'S MOTION FOR RECONSIDERATION SHOULD BE DENIED.

South Carolina moves the Special Master to reconsider and reverse the decision to permit intervention by Charlotte, CRWSP and Duke, but she cites no case law on the appropriate standard for granting reconsideration of an intervention order. SC Mot. at 9. Absent better guidance, the Fourth Circuit's test for reconsideration under Fed. R. Civ. P. 59(e) may be instructive as to the factors the Special Master should consider in reviewing South Carolina's motion for reconsideration. The Fourth Circuit has recognized the following three reasons justifying reconsideration under Fed. R. Civ. P. 59(e): (1) to accommodate an intervening change in controlling law; (2) to account for the availability of new evidence not previously available; or (3) to correct clear error of law or prevent manifest injustice. Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). A motion for reconsideration

under Rule 59(e) "is not intended to allow for reargument of the very issues that the court has previously decided . . . and is not intended to give an unhappy litigant one additional chance to sway the judge." Woody v. North Carolina, 2007 WL 3530513, at *1 (E.D.N.C. Nov. 9, 2007) (internal citations and quotations omitted).

Here, South Carolina does not assert that there has been an intervening change in controlling law, or that she has become aware of new evidence. And South Carolina has not demonstrated that the Special Master's order granting intervention was based on an erroneous understanding of the applicable law or would result in manifest injustice. Instead, South Carolina recycles the same arguments that she employed unsuccessfully in opposing the intervention motions.

First, South Carolina repeats her objection that the Special Master must avoid being drawn into an "intramural dispute" over water allocation within the State of North Carolina. SC Mot. at 9. She never explains why South Carolina has a legitimate concern over such a possibility, or why South Carolina should be entitled to raise this concern when North Carolina has not. Moreover, South Carolina points to no basis in Charlotte's intervention papers, its Answer, or elsewhere in the record to suggest even the hint of such a dispute.

Next, South Carolina seizes on a phrase from New Jersey v. New York, 345 U.S. 369, 373 (1953), in which the Court described a successful intervenor's interest as "compelling," and then asserts that Charlotte cannot have a compelling interest in this action. SC Mot. at 10. South Carolina reaches that result by claiming that, to be "compelling," Charlotte's interest in its IBT certificate under North Carolina law must be "conclusive." Id. at 10-11. Because this action will be decided under the federal common law and

Charlotte's interest under State law therefore cannot be conclusive, South Carolina asserts that Charlotte's interest "cannot be compelling as a matter of law...." Id. at 11. But neither precedent nor logic is offered to support this assertion. Nowhere has the Court said that a "compelling" interest must be one that is conclusive. Indeed, if that were the standard, State laws would preempt the federal common law, a result South Carolina opposes vehemently. Id. at 10.

Third, South Carolina maintains that Charlotte's IBT Certificate does not set it apart from other water users in North Carolina. See SC Mot. at 13. According to South Carolina, this follows from two propositions: (1) that the Court does not use State law to resolve interstate water disputes; and (2) that South Carolina will allege harm based upon the cumulative effects of all water uses in North Carolina. Id. South Carolina's conclusion does not follow. Charlotte's interest is in taking water from the River to meet customer needs within the Basin and elsewhere. Charlotte had that interest long before the North Carolina IBT statute was enacted and will have it for a long time to come. While South Carolina frequently attempts to couch this action as an attack on the North Carolina statute, it is, in fact, an attack on Charlotte's interest in diverting, using and consuming water. Those are the activities called out specifically in South Carolina's pleading and motions that could, hypothetically, lead to the alleged downstream injuries. South Carolina's mere mention of other users who transfer de minimis amounts needing no specific approval by North Carolina comes nowhere near undermining the Special Master's conclusion that "what makes Charlotte's interest in this case compelling . . . is that South Carolina has focused its claims on a small number of permits granted by North Carolina for transfers from the Catawba, including the one held by Charlotte." Order at 8. Indeed,

as explained above, South Carolina now has focused her claims on Charlotte's sewage spills as well.

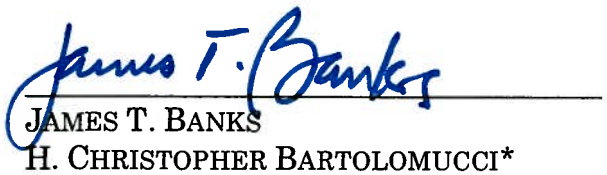
Finally, in reliance on New Jersey v. New York, South Carolina re-argues her position that Charlotte must show inadequacy of representation by North Carolina in order to intervene. SC Mot. at 14-15. The Special Master's Order considered this issue at length, and not only rejected South Carolina's position but provided a thorough explanation for so doing that South Carolina now ignores. Order at 3-7. Drawing on a wealth of Supreme Court case law, the Special Master distilled an appropriate rule under which Charlotte has demonstrated that, as an authorized agent of the alleged harm, it has a direct stake in the outcome of this action sufficient to justify its participation. Id. at 7-9.

Specifically rejecting South Carolina's "inadequate representation" argument, the Special Master pointed out the critical distinction in New Jersey v. New York between the cities of New York and Philadelphia. South Carolina's proposed barrier might well prevent additional plaintiff/victim entities (such as Philadelphia) from joining and expanding an action "to the dimensions of ordinary class actions," see Order at 4, but that barrier and its rationale lose all force and logic when applied to a defendant (such as New York) accused specifically of carrying out actions which threaten injuries to the plaintiff State. Id. The Special Master quite correctly analogized Charlotte's status to the position occupied by the City of New York, and explained thoroughly why the "general principles" South Carolina would derive from New Jersey v. New York need not apply, and have not been applied by the Court in other appropriate circumstances. Id. at 3-4.

CONCLUSION

For the foregoing reasons, the Special Master should deny South Carolina's motion for clarification or reconsideration of the Special Master's Order granting intervention, and allow Charlotte to fully participate in all phases of this case to defend its interests in this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to be served have been served. On July 10, 2008, I caused copies of Charlotte's Opposition to South Carolina's Motion for Clarification or Reconsideration of Order Granting Intervention, to be served by first-class mail, postage prepaid, and by electronic mail (as designated) on those on the attached service list.

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