No. 138, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA,

Plaintiff

v.

STATE OF NORTH CAROLINA,

Defendant

OFFICE OF THE SPECIAL MASTER

Case Management Order No. 8
Regarding Scope of the Complaint

September 24, 2008

This Order addresses an issue raised by the State of North Carolina regarding the scope of the pleadings. North Carolina contends that the factual allegations in South Carolina's Complaint should limit the scope of this action—and permissible discovery—to harms caused by interbasin transfers authorized by North Carolina pursuant to a state statute, to periods of reduced flow caused by drought, and to the portion of the Catawba River basin upstream of Lake Wateree. During a Telephonic Conference on May 23, 2008, as explained further in a Telephonic Conference on August 22, 2008, the Special Master ruled that there was not a basis at this time for limiting discovery to these specific issues. The present Order constitutes the Special Master's formal ruling on North Carolina's request.

To summarize the ruling, North Carolina's assertions about the scope of the specific factual allegations in South Carolina's Complaint have substantial merit, as does North Carolina's observation that South Carolina's proposed discovery to date appears to extend beyond those specific factual allegations. As North Carolina asserts, interbasin transfers are the clear and central focus of South Carolina's Complaint, which alleges that transfers of water from the Catawba River, authorized by the North Carolina statute, are causing an impermissible reduction in the amount of water available for use by South Carolina. This same focus on interbasin transfers pervades South Carolina's motion for leave to file the Complaint, as well as the preliminary injunction motion it filed while the former motion was pending before the Court. North Carolina also is correct that the specific factual allegations of the Complaint speak primarily to the effect of these transfers during times of drought, and to harms experienced in the portion of the Catawba upstream of Lake Wateree. Although the Complaint includes a general prayer for an equitable apportionment, and recites facts documenting a general shortage of water in the Catawba, it contains few specific facts regarding uses by North Carolina or harms to South Carolina that would inform the proposed equitable apportionment, other than those concerning the challenged transfers and the specific harms alleged in the upper portion of the river.

At the same time, several considerations weigh against limiting the scope of the case, and of discovery, at this time and in the manner that North Carolina requests. Most importantly, the Complaint clearly states—albeit in conclusory form—that South Carolina seeks an equitable apportionment of the Catawba River. It includes this request both in the introductory paragraphs of the Complaint, and in the Prayer for Relief, and it is clear that North Carolina understood the request at the time it opposed South Carolina's motion for leave to file the Complaint (*see* Brief of the State of North Carolina in Opposition, August 7, 2007, at 8). South Carolina's request for equitable apportionment necessarily requires consideration of a broader set of factors than the interbasin transfers that dominate the Complaint. It is significant that the Court granted South Carolina's motion for leave to file the Complaint despite the generality of the prayer and despite North Carolina's position that the Complaint did not contain sufficient allegations of specific harm to justify the invocation of the Court's original jurisdiction. North Carolina's current position that the Complaint lacks specificity except as to the three specific areas identified above is accurate, but the Court appears to have found the Complaint sufficient to support granting leave to file and invoking the Court's original jurisdiction with respect to South Carolina's general request for relief.

It also is significant that this case is in a preliminary stage, and the case management process that already has begun will include mechanisms to refine the parties' positions. Under the case management structure as currently contemplated, South Carolina will be required to provide greater specificity as to the precise harms it alleges and the relief it seeks in a manner sufficient for North Carolina and any other adverse parties to formulate their defense. The parties also may have recourse through motions to clarify the pleadings or for summary treatment of particular factual or legal contentions, as well as motions for appropriate protective orders in the context of specific discovery requests.

In sum, although South Carolina's Complaint contains few facts bearing upon equitable apportionment beyond those specifically alleged—namely transfers, in times of drought, affecting the upstream portion of the river—the present request by North Carolina is not the most effective means of achieving clarity and specificity.

I.

This proceeding began in June 2007 when South Carolina, pursuant to Supreme Court Rule 17.3, filed a motion for leave to file a Complaint, along with a brief and evidence in support of the proposed filing. North Carolina opposed the motion. In August 2007, while South Carolina's motion for leave to file the Complaint was pending, South Carolina moved for a preliminary injunction. North Carolina opposed that motion as well. On October 1, 2007, the Court granted South Carolina's motion for leave to file the Complaint, and directed North Carolina to file an Answer. The Court denied South Carolina's motion for a preliminary injunction.

The Complaint alleges that the Catawba River Basin is the most densely populated river basin in the two states—encompassing, for example, the Charlotte-Gastonia-Rock Hill Metropolitan Statistical Area, which spans both states and has nearly 1.6 million inhabitants, and the Catawba River Corridor in South Carolina, which contains nearly 300,000 inhabitants and is expected to experience significant growth over the next decade. According to the Complaint, the Catawba River Basin includes portions of eight South Carolina counties—"most of Chester, Kershaw, Lancaster, and York Counties, the eastern third of Fairfield County, and portions of Sumter, Lee, and Richland Counties." Complaint ¶ 10.

South Carolina alleges that the Catawba River serves a wide variety of water uses in both states. Complaint ¶ 11. It cites a 1995 report of the North Carolina Division of Water Quality stating that population growth in surrounding areas may jeopardize the water quality of the Catawba in various respects. *Id.* ¶ 12. It also refers to a multi-stakeholder negotiation process before the Federal Energy Regulatory Commission—specifically, proceedings relating to an application by Duke Energy Carolinas, LLC, for a renewal of its 50-year license issued by the Federal Power Commission, and a resulting Comprehensive Relicensing Agreement among Duke and other stakeholders—in which the parties agreed that the minimum continuous flow that South Carolina should receive is about 711 million gallons per day. *Id.* ¶ 14. South Carolina alleges that the Catawba is subject to severe periodic fluctuations in water level, and that there are periods during

which the average daily flow into South Carolina is as low as 85 million gallons per day. *Id.* ¶ 15. South Carolina alleges that it and its citizens have suffered harms as a result of drought conditions. *Id.* ¶ 17.

As regards specific complained-of uses by North Carolina, the Complaint alleges that the harms to South Carolina from reduced flow in the Catawba River have been exacerbated by a North Carolina statute, enacted in 1991, that requires a person wishing to transfer 2 million or more gallons of water per day from a river basin, including the Catawba, to obtain a permit from the North Carolina Management Commission ("EMC"). Complaint ¶ 18, citing N.C. Gen. Stat. § 143-215.22G(1)(h). South Carolina alleges that this statute "implicitly authorize[s]" transfers of less than 2 million gallons "without regulation by the EMC." *Id.* South Carolina alleges that the EMC has granted at least two permits under this statute that have resulted in the transfers of tens of millions of gallons of water per day from the Catawba to the Rocky River Basin—specifically, a March 2002 permit issued to the Charlotte Mecklenburg Utilities to transfer up to 33 million gallons per day, and a January 2007 permit issued to the Cities of Concord and Kannapolis to transfer up to 10 million gallons per day. *Id.* ¶ 20. South Carolina also points to an existing authorization to Union County to transfer at least 5 million gallons per day, and a pending application by Union County to increase that authorization by 13 million gallons per day. South Carolina alleges that it does not know the extent to which the North Carolina statute has "implicitly permitted" transfers under 2 million gallons a day, or the extent to which entities have taken advantage of an exception to the permitting requirement for transfers up to the full capacity of facilities that were existing or under construction as of July 1, 1993. *Id.* ¶¶ 22-23.

South Carolina alleges that these interbasin transfers from the Catawba have reduced the amount of water flowing into South Carolina, and have exacerbated the existing natural conditions and droughts that contribute to low flow conditions in South Carolina. South Carolina claims that the transfers also "are in excess of North Carolina's equitable share of the Catawba River." Complaint ¶ 24.

For its prayer for relief, South Carolina asks that the Court enter a decree "declaring that the North Carolina interbasin transfer statute cannot be used to determine each State's share of the Catawba River and equitably apportioning the Catawba River." South Carolina further seeks a decree "enjoining North Carolina from authorizing transfers of water from the Catawba River, past or future, inconsistent with that apportionment, and also declaring that the North Carolina interbasin statute is invalid to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment as determined by this Court's decree." Complaint at 10; *see also id.* at ¶4.

II.

For purposes of the present Order, three general observations may be made about South Carolina's pleading.

First, North Carolina is correct that the Complaint, as it relates to specific challenged uses by North Carolina and specific harms to South Carolina, focuses nearly

exclusively on interbasin transfers, and almost as exclusively on periods of drought or reduced flow and on harms to South Carolina upstream of Lake Wateree. The central and clear focus of the Complaint—as well as South Carolina's motion for leave to file the Complaint, the materials submitted in support, and the preliminary injunction motion—is South Carolina's contention that North Carolina has authorized and may continue to authorize the transfer of large volumes of water from the Catawba River basin in North Carolina to other river basins, thereby exacerbating the reduced flow of water into South Carolina. Throughout the Complaint and its other papers, South Carolina challenges the North Carolina statute, N.C. Gen. Stat. Ann. § 143-215.22G(1)(h), and its alleged use by North Carolina to authorize the challenged interbasin transfers, including the permits granted to the Charlotte Mecklenburg Utilities and the Cities of Concord and Kannapolis, and the existing and proposed authorizations to Union County detailed above.

Second, notwithstanding the limitations on South Carolina's underlying factual allegations, the prayer for relief is not so limited, but rather encompasses a general request for an equitable apportionment of the Catawba River. As noted above, the relief sought by South Carolina includes a decree "equitably apportioning the Catawba River." Complaint at 10 (Prayer for Relief, ¶ 1). South Carolina repeats this request at the outset of its Complaint, stating that "South Carolina brings this Complaint for this Court to adjudicate the parties' dispute, to determine (with the assistance of a Special Master) the equitable apportionment of the Catawba River, and to enjoin North Carolina from authorizing past or future transfers inconsistent with that apportionment." *Id.* ¶ 4. Thus, although the clear and nearly exclusive focus of the Complaint is the use of North Carolina's interbasin transfer statute, N.C. Gen. Stat. Ann. § 143-215.225G-I, to divert water from the Catawba, the request for relief logically encompasses a broader inquiry, because it presupposes there will be some apportionment to which any use of North Carolina's statute must conform. The Court has made clear that an equitable apportionment requires the consideration of many factors: "In determining whether one State is using, or threatening to use, more than its equitable share of the benefits of a stream, all of the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted." *Colorado* v. *Kansas*, 320 U.S. 383, 393-94 (1944). *See also Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945). Even if North Carolina is correct that the body of the Complaint recites only harm from interbasin transfers—and entirely apart from what substantive standards will govern South Carolina's request for an equitable apportionment, or what burdens of proof South Carolina must meet and when—the Court would have "reasonably anticipated when [it] granted leave to file the initial pleadings" that South Carolina's prayer for an equitable apportionment would encompass issues beyond interbasin transfers. *Nebraska v. Wyoming*, 515 U.S. at 8.

Third, in addition to its broad prayer for relief, South Carolina has included some allegations indicating that the relief it seeks is not limited to drought conditions, *see* Complaint at ¶ 17, and its broad definition of the "Catawba River Basin" to include three

counties downstream of Lake Wateree, *id.* at ¶ 9, suggests that some of the harms it asserts may have occurred at least as far downstream as those counties.[1]

III.

With the above general observations in mind, the question remains whether North Carolina has shown a basis for limiting discovery at this time. North Carolina's primary attack is on the level of specificity provided by South Carolina's pleading. North Carolina contends that the Complaint—to the extent it purports to challenge uses beyond interbasin transfers, or harms other than those relating to times of drought or the upper portion of the river—lacks the specificity that should be required for original jurisdiction cases.

The parties have devoted much of their briefing to the question what pleading standards apply in an original action. North Carolina contends that "notice pleading" rules should not apply and that South Carolina should be required to allege with specificity the particular consumptive uses and harms of which it is complaining. It asserts that such a rule is essential to preclude a complaining state from expanding the Court's original jurisdiction (and the authority of an appointed Special Master) beyond what the Court specifically authorized when it allowed a complaint to be filed. Applying this rule to the present case, North Carolina contends that the only allegations that South Carolina has alleged with the necessary specificity are those relating to interbasin transfers, drought conditions, and harms in the upstream portion of the Catawba.

As an initial matter, it is unclear what pleading standard the Court would apply if the issue were presented upon an initial motion for leave to file a complaint under Supreme Court Rule 17.3. Supreme Court Rule 17.2 states that in an original action, "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed," and that "[i]n other respects, those Rules and the Federal Rules of Evidence may be taken as guides." But the Rule does not indicate whether the "form" of pleadings includes the required level of specificity, such that the "short and plain statement" standard set out in Rule 8 of the Federal Rules of Civil Procedural would be mandatory, or whether some narrower meaning is intended. North Carolina contends that the reference must be to Federal Rule 7(b)(2) and Federal Rule 10, which are the only Federal Rules that explicitly refer to the "form" of motions and pleadings. More substantive pleading requirements such as those set out in Federal Rules 8 and 9 would not be included because they do not refer to the "form" of pleadings in this narrow sense. North Carolina contends that its reading would leave appropriate room for heightened pleading rules in original actions so that the issues in dispute, and thus the scope of the Court's grant of original jurisdiction, could be clearly framed at the commencement of the action.

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[1] Although it is far from clear that the areas "beyond where the Catawba River Basin joins the Congaree River Basin to form the Santee River Basin" are encompassed by the reference to "Catawba River Basin," as South Carolina contends, that appears to be a matter better addressed through discovery or other motions, as discussed more fully in the text below.

Although North Carolina's argument is not without force, it is not the only plausible reading of Rule 17.2. At a minimum, that rule might be read to incorporate Federal Rules 7(a) and 7(b)(1), which do not literally refer to the "form" of the pleading or motion—a word that Federal Rule 7 uses only in subsection (b)(2)—but would seem logically included in the reference to "form" in Rule 17.2 in the sense of the *types* of pleadings authorized and the need, in motions, for a specific statement of the grounds for the motion and the relief sought. For similar reasons, the requirements of Federal Rule 8 that a party asserting a claim must set out a "short and plain statement" of the claim and a demand for the relief sought, and that the responding party state in short and plain terms its defenses and admit or deny the allegations, could be construed as matters of "form" encompassed by Rule 17.2, even though Federal Rule 8 does not use the word "form."

The few precedents cited by the parties do not specifically address what is included in the word "form" in Rule 17.2. The one case that bears upon the issue suggests that Rule 8 applies, but does not indicate whether it does so on a mandatory basis as a question of "form," or simply as a "guide." In *Arizona* v. *California*, 530 U.S. 392 (2000), the Court rejected a res judicata defense asserted by certain state parties because the defense was not alleged in the pleadings or otherwise timely raised. *Id.* at 392-93 & n.4. The Court noted that the parties could have raised their defense in a supplemental pleading "in compliance with Rule 8(c)," which prescribes the specific defenses, including res judicata, that must be stated affirmatively in a responsive pleading. *Id.* at 393 n.4. This reference—albeit without analysis—would be consistent with the view that Rule 8 automatically applies by operation of Supreme Court Rule 17.2, but it also could reflect the Court's understanding that Rule 8 would have been a "guide" for the hypothesized supplemental pleadings. Either way, the reference does reflect the assumption that Rule 8(c) has some application to pleadings in original actions. And if Federal Rule 8(c) is within the scope of the rules of "form" intended by Rule 17.1, or otherwise is an appropriate "guide" on such matters, the same should be true of Federal Rule 8(a), because the two subsections address similar subjects—namely the level of detail that must be included in a pleading (short and plain statement of claim, demand for relief sought, and affirmative identification of specific defenses).

Ultimately, whether Rule 8(a) is mandatory or is a "guide" to which the Court may look when appropriate, the fact remains that the Court in this original action granted leave to file the Complaint in its present form, including a prayer for relief that sweeps far more broadly than the specific factual allegations in the pleading. Whether the Court, in its discretion, might have required additional detail to support the broad prayer, it did not do so at the initial filing stage. That decision is consistent with Federal Rule 8, whether the Rule is viewed as a guide or as the sole operative standard for assessing pleadings in original matters. It also comports with the general admonition that, in original actions, the Court will be "liberal in allowing full development of the facts." *United States* v. *Texas,* 339 U.S. 707, 715 (1950).

IV.

Based upon the allegations of the Complaint and the above analysis, there does not appear to be a basis at this time for the broad limitations on discovery that North

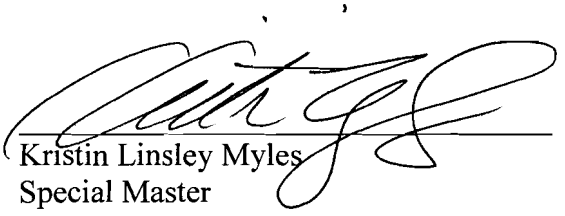
Carolina proposes. Rather, given the broad nature of the inquiry in an equitable apportionment case, South Carolina should have some latitude to develop the facts to support a claim that specific uses by North Carolina have caused specific harms in South Carolina.

That said, North Carolina and any other parties whose interests are at stake must have means to narrow and clarify the issues in the case—particularly given the breadth of the prayer for relief, the expansive uses and harms that potentially could be at issue, and the very limited guidance provided by the factual allegations in the Complaint. The case management process already under discussion contemplates that South Carolina will be required to provide specificity as to the uses and harms of which it is complaining, so that North Carolina and the other parties may prepare their defenses. The discovery process also will allow motions for appropriate protective orders to address specific discovery requests that are overbroad or unsupported by the pleadings. *See*, *e.g.*, note 1, *supra*.

The parties also may have recourse, following some factual development, to more substantive motions directed either to the pleadings or to the evidence. The cases make clear that the Court has broad power to control the pleadings and the issues to be decided in an original case after taking jurisdiction of the matter. For example, the Court has strongly suggested that a defendant may challenge the sufficiency of an original jurisdiction complaint even after the Court has allowed the complaint to be filed. In *Nebraska v. Wyoming*, 295 U.S. 40 (1935), Wyoming brought a motion seeking to dismiss a bill of complaint filed by Nebraska, by leave of the Court, requesting an equitable apportionment of the North Platte River. Although the Court rejected Wyoming's argument that the complaint was vague, indefinite, and failed to state a proper cause of action, *id.* at 44, the Court did not suggest that the original decision to allow the pleading precluded subsequent challenges to the adequacy of the pleading. *See also Wyoming v. Colorado*, 286 U.S. 494, 510 (1932) (overruling motion to dismiss because, *inter alia*, allegations in bill of complaint were sufficient to state a claim). More generally, the Court has emphasized that there is a strong interest in original actions in narrowing and resolving issues early in the proceedings, *see Ohio* v. *Kentucky*, 410 U.S. 641, 644 (1973), and that it has discretion to adopt procedures that will allow it to manage its own original jurisdiction and get quickly to the merits, *see Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995); *Ohio* v. *Kentucky*, 410 U.S. at 644.

This case is no exception. To reiterate, the case management and discovery procedures that the parties already have begun to put in place can and should be used to identify the specific uses and harms of which South Carolina is complaining in order to allow North Carolina and any other party defendants to prepare their defenses. Substantive motions are available to present issues for early resolution and otherwise narrow the case as appropriate. The only conclusions reached in the present Order are that South Carolina's Complaint cannot be read to encompass only the three issues that North Carolina has identified, and that there is no basis for a blanket limitation of discovery to those specific issues.

Dated: September 24, 2008



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