

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

No. 138, Original

STATE OF NORTH CAROLINA,

Defendant.

TELEPHONIC CONFERENCE

BEFORE THE SPECIAL MASTER

HONORABLE KRISTIN L. MYLES

Friday, August 20, 2010

Reported by:

DANA M. FREED

CSR No. 10602

JOB No. 141733

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STATE OF NORTH CAROLINA,

Defendants.

Telephonic Conference before the
Special Master Honorable Kristin L. Myles, beginning
at 10:05 a.m. and ending at 10:58 a.m. on Friday,
August 20, 2010, before DANA M. FREED, Certified
Shorthand Reporter No. 10602.

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Friday August 20, 2010
10:05 a.m. - 10:58 a.m.

SPECIAL MASTER MYLES: Shall we get started?
Before we begin on the main topics, are there any
other developments in discovery or otherwise that we
should discuss?

Okay. I think that's a no.

So I think what we ought to do is turn then
to the issues of the structure of the case. And
hopefully moving forward with a case management order
as well, so we can get time lines in place for the
resolution of the case.

And I don't think -- what I'd like to do is
sort of tell you what I'm thinking and get a reaction,
and then hopefully I can write this up and issue it.

But I can tell you where my inclination is.
And I think the parties have made very good points, on
both sides, of both bifurcation and discovery. And as
well, we lapsed into the burden of proof in both -- on
both issues and I think that was probably inevitable,
because it's really difficult to discuss either
bifurcation or phase discovery without at least
touching on the burden of proof, because if you're
trying to draw a line in a rational way, which is what

1 we've all been trying to do, you need to know where to
2 draw it.

3 And it was that difficulty that led me to
4 think we can't bifurcate the case, because drawing a
5 line at some sort of threshold point where it was
6 unclear what the burden would be, to get past that
7 threshold point, was extremely difficult in light of
8 the -- in light of the disagreements of the parties
9 but also just in light of the law which isn't very
10 clear -- doesn't clearly delineate some sort of
11 threshold phase through which one must go in a way
12 that would lend itself to bifurcation.

13 So that's still my instinct on it -- on the
14 question of bifurcation, subject to one caveat. The
15 phasing has been phrased in terms of a threshold
16 showing or words to that effect.

17 And we had -- some of the cases that were
18 cited were, as South Carolina properly pointed out,
19 liability damages. But liability remedies cases where
20 you have a compact and the Special Master determined
21 whether there had been a violation of the compact.
22 And then, only if there was, moved on to the remedies
23 phase.

24 And that may ultimately be something we do
25 here. But it wouldn't resemble the phasing that we

1 had proposed earlier. Partly, because the parties
2 disagreed on the burden of proof. And so each party
3 had a different vision of what the phasing would be,
4 but neither of them fell neatly into the kind of
5 liability remedies model.

6 South Carolina had a very narrow view of what
7 it needed to prove that would have put everything else
8 into what the remedy would look like. That's assuming
9 there was a somewhat low threshold to get to the
10 question of remedy, whereas North Carolina has
11 consistently said there needed to be a very broad, a
12 much broader -- not broad, but broader than
13 South Carolina's vision of what the showing would need
14 to be to move forward.

15 And where I'm coming out looks more like
16 North Carolina's view in the sense that I don't think
17 that there is a -- if the question is solely when is
18 the complaining state entitled to a decree, then I
19 think there is a broader ranging inquiry that leads up
20 to that conclusion.

21 One doesn't just show injury in the abstract
22 or as South Carolina's defined it and then proceed
23 directly to the apportionment phase. One has to show
24 an entitlement to apportionment that is broader
25 ranging than that. At least that's how I read the

1 cases.

2 And the difficulty is that in this case, this
3 case has numerous differences from the other cases
4 that have been decided that make that, I think, a
5 broader set of questions. And this isn't meant to be
6 an exhaustive list. But for one, these are vicariant
7 states, not prior appropriation states.

8 In prior appropriation states, such as in
9 Nebraska, Wyoming, Colorado, New Mexico, it's easier
10 to say this river is over-apportioned. And it's not
11 over-apportioned in some in kind of conceptual way,
12 it's literally overproportioned (sic) where there are
13 claims that are on file for that, for that state, for
14 that river within the apportionment system of that
15 state that exceeds the supply of the river, however
16 defined that is. It may be a supply, a dependable
17 supply or literally the total supply.

18 But either way, you're looking at concrete
19 apportionments that allow the Court to move rather
20 quickly through what we've been calling the injury
21 phase, but what I would call the
22 entitlement-to-a-remedy phase.

23 Secondly, there's no specific diversion
24 that's at issue, unlike in Connecticut/Massachusetts,
25 and unlike New Jersey versus New York, where there was

1 a specific diversion. So then you can say, Okay,
2 let's look at that and see what harm that diversion
3 will cause, in which case one can simply look at the
4 status quo now, and it's a relatively straightforward
5 process to project what effect that specific diversion
6 will have going forward.

7 Unlike in the general case where looking
8 forward has a speculative nature to it that can be
9 problematic as in Connecticut versus Massachusetts
10 itself. The looking-forward aspect of it caused some
11 problems where it wasn't clear what the State's plans
12 were or whether there were concrete plans, and this
13 Court was hesitant to make a ruling on the basis of
14 anything that was other than fairly concrete.

15 But with that caveat, the specific diversion
16 cases are easier to manage at that stage. Here that's
17 not the case. Here there are a host of questions
18 about causation that -- that will necessarily, I
19 think, need to be considered before we would move into
20 the phase of what a remedy would look like.

21 There is -- and I don't know that the parties
22 could agree now or ever would agree on what that would
23 entail. But I think there's some force to the
24 argument that it would be a broad-ranging inquiry,
25 because you would need to decide: Is this -- is this

1 situation, viewed as a whole, one in which the court
2 should inject itself by way of issuing an equitable
3 decree enjoining the actions of one or both states.

4 So that leads me to believe that the best
5 solution here is two things. One, we have a trial on
6 the question of entitlement to a remedy, but we don't,
7 in that trial, actually shape the remedy. But that
8 trial would include any and all issues that either
9 party thinks are relevant, subject to obviously
10 relevance objections and motions, you know, on that
11 subject. But each party would come forward with what
12 it thinks is relevant to that stage.

13 And if South Carolina thinks its burden is
14 very light, then that's what it will put in. But that
15 may not, you know, be sufficient at the end of the day
16 to carry the burden of proof.

17 And in connection with discovery, I think
18 that ends up naturally shaping what discovery looks
19 like as well, because each side can discover the
20 issues it believes will go into that entitlement
21 inquiry, excluding any issues that would go solely
22 to the question of shaping a decree. And if there
23 are -- again, if there's a need for intervention on
24 some particularly oppressive form of discovery, then
25 that can be done.

1 But -- and obviously, there's a summary
2 judgment phase which we would like to have. And it
3 may be that after summary judgment, it becomes easier
4 to further define what we do going forward by way of
5 trial. One would think that if we can cut off issues
6 at summary judgment, cut off portions of the river --
7 which we've already done to some extent by agreement,
8 I think -- or cut off other issues, then we may be
9 able to narrow the scope of the trial in useful ways.

10 And I'd like to try to use a summary judgment
11 process as a means of doing that. So that's where I'm
12 coming out. So I'd like people's reaction to that or
13 things I haven't taken into account that I should.

14 MR. FREDERICK: Special Master Myles, this is
15 David Frederick for South Carolina. I just want to
16 make sure I understand the two points.

17 The first is, as I understood it, a trial on
18 the question of entitlement for a remedy. And then
19 the second would be the shaping of a decree.

20 Do I have those two points right, or was
21 there a different second point that when you said the
22 best solution would have two points to it? I just
23 want to make sure, because my notes are not --

24 SPECIAL MASTER MYLES: Yeah, I think that's
25 right. Yeah.

1 MR. FREDERICK: Okay. Well, as to that, we
2 believe that that proposal comports with the way we
3 understand these equitable apportionment cases to have
4 been decided by the Court. That the part about how a
5 decree gets shaped, in terms of what the river flow
6 that needs to go to the downstream state is
7 ordinarily, as we read the cases, done separately from
8 the decision about the harm the downstream state
9 suffers and what the equitable apportionment factors
10 lead in terms of each state's respective entitlement
11 to parts of the river.

12 And then once that basic inquiry is done,
13 then there is a separate phase typically where the
14 experts get together and say: All right, in these
15 conditions, a certain number of cubic feet per second
16 need to be allowed to pass to the downstream state.

17 So to that extent, we agree with your
18 summary. And that's consistent with what we
19 understand the cases to hold as well.

20 MR. GULICK: Special Master, this is Jim
21 Gulick in North Carolina. Is your vision of this that
22 the balancing of harms and benefits would occur in the
23 first trial or the second trial?

24 SPECIAL MASTER MYLES: Well, that's a good
25 question. And, you know, some of these questions, I'm

1 thinking anyway of kind of a free-market approach to
2 them, which is I could certainly imagine a set of
3 circumstances in which one would argue that the
4 balancing of harm could take place in the first phase,
5 in the sense that if -- supposing the evidence came
6 in, you know, I'm thinking of like Connecticut,
7 Massachusetts, the way they kind of analyzed all the
8 facts and -- or, or, you know, the second version of
9 Missouri versus Illinois.

10 And looking at the evidence, I could imagine
11 one of the -- one state arguing: Well, gee, the use
12 that they're complaining about, which is, say, some
13 recreational use or something, is offset against our
14 need for this diversion, which is important because it
15 relates to, say, some important interest of the state.
16 That's, you know, say, drinking water or something.

17 I think -- there could be a qualitative
18 argument made that that meant that the complaining
19 state really wasn't entitled to relief, because it was
20 apparent on the evidence that the complaining state,
21 the harm the complaining state suffered, albeit it's
22 viewed in isolation, might be important or
23 significant, was insubstantial in comparison to the
24 use of the diverting state.

25 I could see that being part of what one might

1 argue in Phase 1. I'm not saying -- I'm not saying it
2 would be, but it could be. I mean, some of the cases
3 involving Colorado, I forget which one, but seem to be
4 doing that. Comparing the important and valuable uses
5 that have been made of the upstream water to the
6 claims, needs of the downstream state in a qualitative
7 way.

8 I'm not saying one way or the other, but I
9 think that that would be open to someone -- open to,
10 say, North Carolina to argue that.

11 Now, if you don't choose to do that, that's
12 fine. And then you wouldn't choose to take discovery
13 on that and you'd save that until a remedies phase.
14 But the -- but the first phase, the liability, would
15 be entitlement to a remedy. So if there were value
16 judgments to be made, some of them might be made at
17 that stage.

18 MR. FREDERICK: Special Master Myles, this is
19 David Frederick again. Do you anticipate, in your
20 conception of the Phase 2, to be principally hydrology
21 experts who are able to say the water at a certain
22 point in the river needs to be a certain number of
23 cubic feet per second in order to achieve a water
24 level downstream that would satisfy whatever findings
25 you would have recommended based on the first trial,

1 for first-phase trial?

2 Or do you anticipate the Phase 2 remedy part
3 having more of a fact witness-type component to it?

4 SPECIAL MASTER MYLES: Well, it's really
5 going to be for the parties to shape what it looks
6 like. And there may be both as part of what decree
7 would be appropriate. And there may be overlap
8 between the two.

9 In other words, some of that may already have
10 been developed as part of proving that South Carolina
11 either is or isn't entitled to a remedy. Some of the
12 fact witnesses may have already been testifying. And
13 maybe they don't need to testify again. You could
14 just use the testimony they've already given.

15 But if it's found that there needs to be an
16 allocation, then presumably that would be quite a bit
17 of expert work at that point. There could be factual
18 issues that bear on it.

19 MR. GULICK: Special Master Myles, this is
20 Jim Gulick again. Our conception of the threshold
21 showing of whether or not there's been proof of the
22 causation of harm is different from the question of --
23 which is then in the balancing of equities, I think
24 that the situation you were positing relating to
25 remedy is that even if there had been a showing of

1 harm, in that there had been a showing that
2 North Carolina had caused harm to some recreational
3 use in South Carolina, just for example, that then
4 North Carolina might still be able to show --
5 theoretically, of course, we're just talking a
6 hypothetical here -- that the benefits to
7 North Carolina, say for drinking water use or
8 whatever, outweighed the harm that had been caused
9 South Carolina. And therefore, there might be no --
10 there might be no remedy accorded to South Carolina in
11 any event for that reason. Is that how you see that?
12 Am I missing --

13 SPECIAL MASTER MYLES: Yeah, I think I do.
14 Yeah. Where I differ from what parties have, what has
15 sort of been the assumption all along, is that there
16 was some sort of threshold test that could be met or
17 not met on the basis of which one would either drop
18 the case or go forward.

19 And although there's language to that effect
20 in some of the cases that, you know, there needs to be
21 the showing of injury, and that's stated in quite a
22 number of the cases, it's not done as a threshold
23 matter in the sense that there's like an initial
24 inquiry and then the trial happens. That's all done
25 after all the evidence is in. And in a way, it's an

1 evaluation of the proof at the end of the trial,
2 putting aside remedies again. But at the end of what
3 you might call a liability phase.

4 And -- but -- and so in the cases where that
5 question, again at the end of the evidence, at the
6 close of evidence, ended up being dispositive,
7 the Court didn't go any further. Obviously, the Court
8 didn't need to go further. There was no injury and
9 therefore the Court wasn't going to go forward.

10 But I expect that to say if the Court -- if
11 then there was a showing that even though there was
12 some trivial or minor injury or even a substantial
13 injury -- I guess trivial or minor wouldn't get them
14 over the substantial test.

15 So even if they cleared the substantial
16 injury threshold, there still could be a showing that
17 no decree should issue, because that injury is
18 outweighed by the value of the use on the other side
19 of the border. I would think that would be open to --
20 one could show that.

21 MR. GULICK: This is Jim Gulick again. I'm
22 just following up to make sure I'm understanding.

23 So that the -- the causation of harm issue
24 you see as a distinct issue, but not one that
25 necessarily means the case is over or not. It depends

1 on how it was decided, but that it would be heard as
2 part of the trial of which you were referring to as
3 your first trial that you were contemplating.

4 SPECIAL MASTER MYLES: Right. Exactly.
5 Whether there ought to be, with the ultimate question
6 being, I think, whether there ought to be a decree.
7 And then you would have injury, however defined, and
8 causation however defined.

9 Again, the causation question is not clear.
10 It's clear that it isn't as obvious as in a diversion
11 case. That is clear. But how -- how it then plays
12 out when you don't have a diversion is less clear.
13 But I do think that would all be in whatever you call
14 that phase, the liability phase.

15 MR. FREDERICK: And I presume -- this is
16 David Frederick again. And I presume that this first
17 phase would also weigh current existing uses versus
18 future contemplated uses, in terms of understanding
19 harms and benefits?

20 SPECIAL MASTER MYLES: I think it would have
21 to, yes. There again, there's the caveat on future
22 projected uses that comes from -- mainly from
23 Connecticut versus Massachusetts. It's hazardous,
24 once you're looking into the future and saying, this
25 is what's going to happen. But -- which is why some

1 of these cases get dismissed without prejudice to
2 something happening in the future that's more
3 concrete.

4 But I think you would -- in order to
5 determine whether a decree is appropriate, I think you
6 would have to look at uses, whether a decree is needed
7 to preserve uses, to protect protectable uses, or not.

8 MR. GULICK: Special Master Myles, this is
9 Jim Gulick. Just on that, I won't belabor it or
10 obviously our position in North Carolina is that, to
11 the extent we're looking to the future, it's a
12 question of presently threatened, I think is the word
13 that was used by the Court, so that was -- as
14 opposed -- well, we don't need to belabor that right
15 now.

16 SPECIAL MASTER MYLES: I think that is,
17 obviously -- it's a caveat that's built into the
18 Court's case law for good reason, because, you know,
19 the Court wants to be withholding its equitable powers
20 until there's something concrete to be remedied.

21 MR. FREDERICK: And I presume that we will
22 brief that and argue that in due course at the
23 appropriate time. Because I don't think the parties
24 necessarily agree about what the right legal standard
25 is for that question.

1 MR. GULICK: No doubt.

2 SPECIAL MASTER MYLES: Right. I think that's
3 right. And I'm not surprised the parties don't agree.
4 And sometimes the proof ends up being in the pudding
5 rather than in the abstract. Because you look at,
6 okay, what evidence are we actually talking about
7 here?

8 In the case of -- in the Connecticut case, it
9 was, you know, a power plant that was either -- might
10 not ever be constructed, it was kind of a possibility,
11 but no one had really pressed it forward.

12 You know, you may look at other things like
13 population growth and other statistics and see, well,
14 gee, those are more realistic and likely. So I think,
15 you know, it may depend upon what particular facts are
16 being -- are being analyzed.

17 MR. GULICK: Special Master Myles, I have
18 another question. This is Jim Gulick again.
19 The -- and this question relates to the issue
20 of potential motions for summary judgment.

21 Ordinary -- our existing case management
22 order, which was drafted when both parties were
23 contemplating bifurcation of a different type than
24 this, I believe, because we were bi- -- we were
25 contemplating that we would reach the threshold

1 question of causation of harm. We were talking
2 about -- we have a provision in there that talks about
3 that discovery, expert discovery, and then motions for
4 summary judgment at the close of that.

5 But in view of what you're contemplating, I
6 can certainly see that North Carolina would want the
7 opportunity to, before all of the discovery on all of
8 the remedy issues, including balancing of harms and
9 benefits, to have an opportunity to test the issue of
10 whether or not South Carolina can meet that threshold
11 burden.

12 SPECIAL MASTER MYLES: Uh-huh.

13 MR. GULICK: And do you contemplate that we
14 would have to wait that until all of that discovery
15 was finished? Or on all questions that might be in
16 the first trial? Or is that something that could be
17 appropriately brought up, and if there is some more
18 discovery, as it needs to be done on that, that it
19 could await that discovery rather than waiting --
20 awaiting all the discovery that might be relevant to
21 that first trial, as you framed it?

22 SPECIAL MASTER MYLES: Uh-huh. That's a good
23 question. And I think -- I actually thought about
24 this in preparing for today's call. It seems to me
25 that we should not wait. And like the federal rules

1 provide usefully, that summary judgment motions can be
2 brought at any time. I actually had an opposing
3 counsel for the government, in a case I had years
4 back, move for summary judgment after the trial.

5 He successfully argued to the judge that
6 summary judgment motion could be heard at any time,
7 but the judge then denied the motion on the merits. I
8 thought that was pretty expansive.

9 I wouldn't contemplate that here. But I do
10 think that a summary judgment motion should be brought
11 at any time that's appropriate. And if, at the end of
12 a certain amount of discovery, or even before, you
13 know, much discovery occurs, there's a discrete issue
14 in the case that could be summarily adjudicated, we
15 should do that.

16 In fact, you know, one of the issues I think
17 we resolved by argument, was the portion of the river
18 south of Lake Wateree, is that still the case, I hope?
19 I think South Carolina conceded that point.

20 MR. FREDERICK: This is David Frederick.

21 That's correct.

22 SPECIAL MASTER MYLES: Okay. If that hadn't
23 been the case, that it would have been a perfect issue
24 for summary adjudication. And I would have said,
25 Okay, let's resolve that issue now, so we don't have

1 to have discovery on it. Let's have whatever limited
2 discovery is needed under 56(f). We can order
3 expedited discovery on that particular issue and get
4 it over with.

5 I absolutely think we should do that here,
6 especially if we're contemplating a more expansive
7 vision of what might -- what issues might be in,
8 whatever you want to call it, Phase 1, the liability
9 phase. That if there's -- if North Carolina can make
10 a motion to cut off the case or part of the case, then
11 we ought to do that.

12 MR. FREDERICK: Special Master Myles, this is
13 David Frederick.

14 We agree that the federal rules generally are
15 a guide to these types of proceedings. And there very
16 well may be motions that South Carolina brings that
17 would be dispositive as to aspects of the case that
18 could well end up being dispositive or cause
19 North Carolina to want to engage in settlement talks
20 with us.

21 But what I'd also like to just note that our
22 view would be that the case shouldn't stop just
23 because, as to one discrete issue, one party or the
24 other has brought a summary judgment motion.

25 Unless there is, you know, a good and

1 substantial basis for thinking that there ought to be
2 a functional stay, we'd like the case to keep
3 proceeding and, you know, have you issue a recommended
4 decision on any matter while the rest of the case is
5 marching forward toward trial.

6 SPECIAL MASTER MYLES: I think that's
7 generally true.

8 Mr. Gulick, do you agree with that? I mean,
9 I don't think that's not the case.

10 MR. GULICK: Ordinarily. It might depend on
11 what the circumstances were at the time. I don't know
12 what they all would be, but I wouldn't necessarily
13 disagree with that. But I wouldn't necessarily agree
14 with it either. It might depend on how things stood
15 at the time.

16 SPECIAL MASTER MYLES: Right. You know, but
17 if there were to be a stay, someone could move for a
18 stay and have to make a showing required for a stay.
19 I don't think we'd automatically stay anything, just
20 because --

21 MR. GULICK: I would agree with that.

22 SPECIAL MASTER MYLES: Yeah. And obviously,
23 I didn't mean to suggest North Carolina would be the
24 only one bringing a motion. Of course, South Carolina
25 can do so, too, if it has an issue that ought to be

1 summarily decided as well.

2 I do think, you know, the federal rules are
3 a guide. They're not always dispositive at all. It
4 depends upon what rule it is. Summary judgments may
5 operate differently here, because of the -- because
6 it's a different sort of proceeding. In a bunch of
7 different ways.

8 But obviously, summary judgment is
9 appropriate. I think the Court has made that clear,
10 that it's a procedure that can appropriately be used.
11 Wasn't that just the case in, was it Alabama versus
12 North Carolina? Wasn't that a summary judgment?

13 MR. GULICK: Yes. That was a -- the compact
14 case you're referring to, Special Master?

15 SPECIAL MASTER MYLES: Yeah.

16 MR. GULICK: Yes. And it narrowed the issues
17 considerably.

18 SPECIAL MASTER MYLES: Uh-huh. Are there any
19 more additional comments, questions, arguments that --
20 on these points?

21 MR. GULICK: This is Jim Gulick. We're going
22 to have to -- if this is how your ruling's going to
23 be, we're going to have to reflect -- our current case
24 management order is, which we have, which you did
25 enter, would have to be modified. And I think we

1 would want the opportunity to reflect a little bit on
2 how that would -- because this would have to do with
3 sort of how that might be reframed. The parties might
4 be able to talk to each other, in light of that, after
5 you've entered your order.

6 And then with respect to that. And then,
7 of course, we can try to negotiate that in the
8 interim, so that we can come back to you with a
9 proposal about how that reworked one might look.

10 SPECIAL MASTER MYLES: Uh-huh.

11 MR. GULICK: And then we're going to have to
12 reflect some on the timing question of some of these
13 things, too, because the way you framed it is a little
14 bit different from the way we've thought about it. So
15 I'd have to -- it's more of a comment than a statement
16 of a particular thing.

17 SPECIAL MASTER MYLES: Yeah, I regret that we
18 didn't have more clarity at the outset. I think
19 really a lot of difficulty was caused by the
20 disagreement over what the -- you know, what the parts
21 would be. And I think the disagreements were
22 legitimate. But ultimately, they really are
23 disagreements going to what the burden of proof is.

24 And those are disagreements that are valid,
25 but that didn't lend itself to the kind of phrasing

1 that we had initially contemplated. I think this
2 phasing is going to make sense conceptually and be
3 manageable, but I agree that there's going to have to
4 be revisions to the case management plan, along the
5 lines you mentioned.

6 So I think it makes sense for the parties to
7 go back and see how that can be rewritten in relevant
8 parts to accommodate this new structure.

9 And then also, also, as you said, we have to
10 add in the parts that are missing from it now, which
11 we left open and kind of deferred, which were what the
12 trial schedule would look like. And as you point out,
13 you know, the phasing is going to have to be slightly
14 different because of -- if we're going to have summary
15 judgment as something that can be done earlier rather
16 than later, earlier in addition to later, that needs
17 to be built in, too.

18 MR. FREDERICK: Special Master Myles, this is
19 David Frederick. We certainly are ready to sit down
20 with North Carolina and the intervenors to start
21 coming up with a list of proposed changes and
22 additions to the case management plan. And we can do
23 that in advance of you preparing your order --
24 at least start that process to do it.

25 And it could very well be that, unlike the

1 case that you had with the government, it may well be
2 after a Phase 1 trial summary judgment motions are
3 appropriate as to the remedy.

4 And we wouldn't want to foreclose the
5 possibility that there wouldn't be disputed issues of
6 fact that could narrow even the remedy phase of the --
7 of the case. But I just say that now, because I don't
8 want there be to any presumption that we couldn't
9 possibly dispense with a second trial if the -- if the
10 issues were such that we could tee them up in a
11 summary fashion subsequently -- subsequent to the
12 first trial.

13 SPECIAL MASTER MYLES: Right. In other
14 words, some aspects of the remedies phase could be
15 resolved by summary judgment.

16 MR. FREDERICK: That's right. If there was
17 no disagreement that the water meter, at a certain
18 point in the river, needed to show, you know, 1500
19 cubic feet per second in order to achieve a certain
20 flow downstream, that would be an issue on which I
21 think summary adjudication would be appropriate.

22 And then whatever remedial work needed to be
23 done to focus on those aspects of river gauges, water
24 flow, acre feet in the reservoirs that were actually
25 in dispute.

1 SPECIAL MASTER MYLES: Uh-uh. That's a
2 possibility.

3 MR. FREDERICK: I just offered that up,
4 Special Master, because we might want to file a motion
5 for summary judgment after the trial --

6 SPECIAL MASTER MYLES: Yeah.

7 MR. FREDERICK: -- and I don't want you, have
8 everyone come back to the transcript and misunderstand
9 the way that you phrased it in your prior experience.

10 SPECIAL MASTER MYLES: Well, if the motion
11 related to the next phrase, I don't think anyone could
12 make that argument. And even after a trial, one can
13 bring a motion for directed verdict on the evidence
14 that's presented, say even on a -- but I'm not sure
15 that would be necessary in a case like this, because
16 we don't have a jury. So the motion for directed
17 verdict would really be akin to a motion for a
18 judgment in favor of the, of the moving state, so --

19 but in terms of, you know, the other way to
20 handle that situation you described is sometimes you
21 can achieve quite a bit by stipulated facts. And if
22 you were going into a remedies phase, and you could
23 come up with a set of stipulated facts, which may also
24 be a useful tool at the liability phase after
25 discovery. Then you can achieve some of that,

1 you know, efficiency not having to have evidence on
2 particular factual points. If they're not disputed.

3 MR. FREDERICK: This is David Frederick. We
4 would think there's a benefit, even before the first
5 trial, of having a list of undisputed facts that the
6 parties and the intervenors can agree upon, just
7 simply as a way of making trial shorter.

8 SPECIAL MASTER MYLES: It would be hugely
9 helpful. So I would probably want to have that effort
10 be done. You could build that into the case
11 management plan, if there's a place for it, as
12 something to be -- as something to be endeavored.

13 MR. GULICK: I think assuming we get close to
14 trial, we'd probably want to have a pretrial --
15 assuming we get that far, we'd want to have a pretrial
16 order of some sort.

17 SPECIAL MASTER MYLES: Yeah.

18 MR. GULICK: And there may be stipulated
19 facts or something else that could be -- to the extent
20 that we can agree on them.

21 DEPOSITION OFFICER: Who is speaking, please?

22 MR. GULICK: I apologize. This is Jim
23 Gulick.

24 DEPOSITION OFFICER: Thank you.

25 MR. GULICK: Sorry.

1 SPECIAL MASTER MYLES: Yeah, I think that's
2 right. So we do need to set out a schedule now, which
3 we hadn't done before. We talked about it in one of
4 our very early calls I think we kind of sketched out a
5 preliminary schedule, but that's before we got into
6 intervention and other confounding factors.

7 And now bifurcation has -- has also delayed
8 the resolution of the schedule. But now I think
9 there's no further impediment to making at least a
10 first stab at a case schedule, which would include the
11 pretrial order phase at the very end.

12 MR. GULICK: Agreed. One of the issues,
13 of course, that we'll probably -- if we can't work it
14 out, we'll need to get to fairly soon, is identifying
15 what South Carolina is actually complaining about. I
16 don't want to belabor that right now. It's just we
17 still --

18 MR. FREDERICK: Jim.

19 SPECIAL MASTER MYLES: I have the response to
20 the contention interrogatories that you submitted.

21 MR. GULICK: Yeah.

22 SPECIAL MASTER MYLES: But I haven't studied
23 it yet.

24 MR. GULICK: I don't mean to belabor it. I'm
25 just raising it as something that will need to be

1 addressed.

2 MR. FREDERICK: Yes. And we -- this is David
3 Frederick. We responded at great length. And
4 North Carolina hasn't brought any motion to compel for
5 a failure to provide an answer, so -- and that's been
6 two-and-a-half months now.

7 MR. GULICK: We'll give you an opportunity to
8 meet and confer with us again. And then we'll
9 probably have to tee that up, if that's not
10 successful. But --

11 SPECIAL MASTER MYLES: Okay.

12 MR. GULICK: I don't mean to belabor that
13 now. That's -- I was pointing out that it's something
14 that needs to be done, because it does relate to when
15 things happen.

16 MR. FREDERICK: It would be frivolous to say
17 South Carolina hasn't set forth in detail the nature
18 of the harm at this point.

19 MR. GULICK: Well, we can disagree. I'm
20 talking about what the cause is, what are you
21 complaining about. But I didn't mean to get into that
22 debate here, Special Master.

23 SPECIAL MASTER MYLES: Again, that -- I'm
24 happy to, you know, anything that's presented to me
25 I'll take a look at on that. If you feel that -- as I

1 said, I haven't reviewed the responses, so I have the
2 luxury of speaking without any knowledge of what they
3 say.

4 So if there's a deficiency in the responses
5 that needs to be remedied, obviously, we can -- we can
6 talk about that. And, you know, again, some of these
7 issues ultimately may come up as part of a summary
8 judgment, summary adjudication down the road.

9 So, you know, we just need to keep that in
10 mind in developing these responses that that may be
11 the test ultimately is how do they look against a
12 summary judgment motion? But again, not having read
13 them, I'm not giving an opinion one way or the other
14 on that.

15 So next steps, at least from my perspective,
16 would be getting responses on case management and
17 trying to put something in place by way of an amended
18 or supplemented -- supplementary case management plan
19 and order.

20 MR. GULICK: Special Master Myles, are you
21 going to issue an order on this?

22 SPECIAL MASTER MYLES: Yes, I will. I will.
23 You mean on bifurcation and discovery?

24 MR. GULICK: Yes.

25 SPECIAL MASTER MYLES: Yes, I will. But

1 don't await that. I don't want to await that, to
2 begin the planning of the case management plan. There
3 is no reason why the parties can't get together now
4 and revise the case management order -- the case
5 management plan, right?

6 MR. GULICK: Yes. It's called a case
7 management plan, which you then --

8 SPECIAL MASTER MYLES: Order.

9 MR. GULICK: -- order as an order or enter an
10 order about the plan, I think is the way --

11 SPECIAL MASTER MYLES: Right. So maybe what
12 makes sense is to set another call. And then in the
13 meantime, between now and that call, you all should
14 reflect and then discuss and then hopefully come up
15 with something that I can look at and -- before the
16 next call.

17 MR. FREDERICK: Special Master Myles, this is
18 David Frederick. What I would propose that we do is
19 to meet and confer with North Carolina and the
20 intervenors to come up with as many amendments that
21 are agreed upon, and then to identify any that we
22 can't agree on and provide you with a side by side --
23 here is what the two sides propose and then have you
24 enter whichever version you believe is appropriate.

25 SPECIAL MASTER MYLES: Yeah, that's what we

1 did last time. There was actually only a handful of
2 things you disagreed on.

3 MR. FREDERICK: Our hope is that there would
4 be an even smaller list this time.

5 SPECIAL MASTER MYLES: Uh-huh. That makes
6 sense to me. So what should we have as the timing for
7 accomplishing that?

8 MR. GULICK: I think for working that out is
9 probably going to take something more than a month.
10 With the way other things have -- other things have
11 taken. So I would -- my recommendation would be for
12 us to schedule something in October.

13 SPECIAL MASTER MYLES: Uh-huh. Well, two
14 Fridays that are possibilities are the 8th and the
15 15th.

16 MR. GULICK: Of October?

17 SPECIAL MASTER MYLES: Yeah.

18 MR. FREDERICK: Special Master Myles, this is
19 David Frederick.

20 I may be in the Ninth Circuit arguing on the
21 8th. And in any event, I have got a Supreme Court
22 argument on the 12th. So if we could do it for the
23 15th, I'd appreciate it.

24 SPECIAL MASTER MYLES: Does that work for
25 other people?

1 MR. GULICK: I'm looking right now.

2 MR. GOLDSTEIN: This is Tom Goldstein. I'm
3 going to be in London, but don't reschedule around me.
4 Because Mr. Sheedy will be able to cover for me, if
5 that day works for other folks.

6 MR. GULICK: That works for me. Chris
7 Browning is also nodding in.

8 MR. SHEEDY: Actually, Special Master Myles,
9 this is Jim Sheedy. Now that Tom has shared his
10 schedule, we actually are in New Orleans during that
11 period of time, so the 15th is not ideal. But I
12 suppose that if it suits everyone else's schedule,
13 we'll find a way to make it work ours.

14 MR. GOLDSTEIN: Could I just ask -- this is
15 Tom Goldstein, I apologize -- whether the 14th is a
16 possibility?

17 SPECIAL MASTER MYLES: The 14th is fine for
18 me. Does that affect anybody else?

19 MR. GULICK: Thursday the 14th. That works
20 for us, too. This is Jim Gulick of North Carolina.

21 MS. SEITZ: Virginia Seitz for Duke. That's
22 fine with us.

23 MR. GOLDSTEIN: Same time?

24 This is Tom Goldstein.

25 MR. FREDERICK: This is David Frederick. I

1 think that works for me. Would it be 1:00 or 2:00
2 Eastern time?

3 SPECIAL MASTER MYLES: Either one is fine
4 with me. We've been doing it at 1:00, although for
5 a long while we had a stretch of 2:00.

6 MR. GULICK: 1:00 works well -- Eastern Time
7 works well for North Carolina.

8 MS. SEITZ: Virginia Seitz. 1:00 is fine
9 with Duke.

10 SPECIAL MASTER MYLES: All right. So we --
11 absent objection then, we'll have it October 14th at
12 10:00.

13 Now, in terms of submitting things in
14 advance, we probably should set a schedule for that.
15 We could do five court days in advance, or more than
16 that, to submit whatever it is that's going to be
17 submitted, either a joint draft amended plan or a
18 joint draft with competing pieces.

19 If we build in a little bit of time, we can
20 build in time for what might be reply phase if -- in
21 case there is a disagreement on particulars. We could
22 do that now, so we could have a five-day and then a
23 two-day, or something like that. And if there is no
24 disagreement, then great.

25 MR. GULICK: I think five days ahead of time

1 to get a draft to you works fine. It may well be --
2 it may well be that we both know exactly what any
3 disagreements are and can set it out sufficiently and
4 anything that --

5 SPECIAL MASTER MYLES: Right. The 7th, does
6 that work?

7 MR. FREDERICK: For a joint draft?

8 SPECIAL MASTER MYLES: Yes. A joint draft,
9 together with position papers on any disputed
10 sections.

11 MR. FREDERICK: That would be fine, from
12 South Carolina's perspective. This is David
13 Frederick.

14 MR. GULICK: Jim Gulick. That's fine for
15 North Carolina.

16 SPECIAL MASTER MYLES: Okay. Ms. Seitz?

17 MS. SEITZ: That's fine with Duke.

18 SPECIAL MASTER MYLES: All right. So then we
19 could put the 12th as the response date, or even the
20 13th, if they were to come in the morning. We could
21 do close of business on the 12th, I suppose.

22 So the beauty of this approach, I hope to the
23 extent there is a beauty in it, may be that it
24 minimizes disputes over trying to define issues in
25 phases that will or won't be included. Either by

1 excluding specific issues or by defining the phase on
2 what's included. It allows people to proceed somewhat
3 at their peril. If they think an issue isn't
4 relevant, it turns out to be relevant, then they won't
5 have developed that issue.

6 So maybe that will minimize disagreements
7 over the drafting of the case management plan. And I
8 guess we won't -- I mean, we've already resolved some
9 things. If there's other issues that have proven
10 unworkable in the plan, I suppose, do people
11 anticipate there being other amendments, or will they
12 strictly be these phasing trial-related issues we've
13 talked about?

14 MR. FREDERICK: This is David Frederick.
15 I don't want to prejudge that. I think the parties
16 and intervenors can meet and confer to figure out.
17 I'm not aware of any other aspects that are
18 unworkable. But I respect Mr. Gulick's observation
19 that there may be some tweaks that we need to look at
20 in light of how these other matters need to be
21 expressed. And we're prepared to talk to them about
22 that.

23 SPECIAL MASTER MYLES: Okay.

24 MR. GULICK: This is Jim Gulick. We agree
25 with that.

1 SPECIAL MASTER MYLES: Okay. All right.
2 Well, is there anything else for today's call? If
3 not, we can adjourn.

4 MR. FREDERICK: Thank you very much.

5 MR. GULICK: Thank you.

6 SPECIAL MASTER MYLES: Thank you.

7 (Whereupon, the proceedings were adjourned at
8 10:58 a.m.)

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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