IN THE

Supreme Court of the United States

No. 138, Original

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

CATAWBA RIVER WATER SUPPLY PROJECT;
CITY OF CHARLOTTE, N.C.; AND
DUKE ENERGY CAROLINAS, LLC,

Intervenors.

Before the Special Master
Hon. Kristin L. Myles

RESPONSE OF CATAWBA RIVER WATER SUPPLY PROJECT TO SOUTH CAROLINA'S MOTION FOR RECONSIDERATION OF MAY 27, 2008 ORDER GRANTING LIMITED INTERVENTION

July 10, 2008

In her May 27, 2008 Order ("Order"), the Special Master granted the Motions of Catawba River Water Supply Project ("CRWSP"), Duke Energy Carolinas, LLC ("Duke"), and the City of Charlotte ("Charlotte") (collectively, "Intervenors") to intervene in this original action. The Special Master found that "[m]uch of South Carolina's Complaint is directed toward the North Carolina inter-basin transfer ['IBT'] statute and the transfers from the Catawba River authorized under the statute." Order at 8. With regard to CRWSP in particular, the Special Master found that intervention was appropriate because CRWSP relied upon IBT permits to transfer water withdrawn from the Catawba River; CRWSP was thus the "authorized agent" "carrying out the 'actual diversion of water'" that South Carolina's Complaint challenges. *Id.* at 10.

On June 27, 2008, over 30 days after the Special Master's Order, South Carolina filed a Motion For Clarification Or, In The Alternative, For Reconsideration Of May 27, 2008 Order Granting Limited Intervention ("Motion").[1] The Motion first asked the Special Master to "clarify" that the Intervenors, including CRWSP, could participate only in Phase Two proceedings. Motion at 3. In the alternative, the Motion asked the Special Master to reverse her decision allowing intervention.

South Carolina's Motion is procedurally deficient. If there is a procedural basis for the Motion, the Motion is untimely. Should the Special Master believe the

[1] This caption actually misrepresents the Special Master's Order, which was titled, "Order Granting Motions for Leave to Intervene of the City of Charlotte, North Carolina, Catawba River Water Supply Project, and Duke Energy Carolinas, LLC." The title contains no mention of "limited" intervention.

Motion is procedurally sufficient and timely, both of South Carolina's arguments are without merit. The Special Master should accordingly deny the Motion.

I. South Carolina's Motion Is Procedurally Deficient, And If There Is A Procedural Basis, The Motion Is Untimely.

South Carolina does not identify the procedural bases upon which it has filed its Motion 31 days after the Special Master's Order. Under Supreme Court Rule 44, a petition for rehearing must be filed within 25 days of the date of entry of the decision, which means in this case the Motion should have been filed by June 22; the Motion was instead filed on June 27.

Moreover, under the Federal Rules of Civil Procedure – which serve as "a guide to procedure in an original action," *Arizona v. California*, 460 U.S. 605, 614 (1983) – the Motion is both procedurally deficient and untimely. The only Federal Rules that might support the Motion are Rule 59(e) and Rule 60(b). *See In re Burnley*, 988 F.2d 1, 2 (4th Cir. 1992) ("In cases where a party submits a motion . . . which is unnamed and does not refer to a specific Federal Rule of Civil Procedure, the courts have considered that motion either a Rule 59(e) motion to alter or amend a judgment, or a Rule 60(b) motion for relief from a judgment or order.").

Courts generally interpret a motion for clarification as being made under Rule 59(e). *See, e.g.*, *Capacchione v. Charlotte-Mecklenburg Sch.*, 190 F.R.D. 170, 175 (W.D.N.C. 1995) ("A post-judgment motion for clarification requesting a court to interpret the scope of its injunction is properly made under Rule 59(e)[.]"); *Belair v. Lombardi*, 151 F.R.D. 698, 699 (M.D. Fla. 1993) ("A motion to clarify an order as to the court's intent regarding the continuation of state court proceedings is considered

a motion to alter or amend the judgment, under Rule 59(e).”); *cf.* Barry v. Bowen, 825 F.2d 1324, 1328 n.1 (9th Cir. 1987) (treating motion for clarification as a motion under Rule 59(e)), *abrogation on other grounds recognized by Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1462 (9th Cir. 1992). Such a motion must be filed within 10 days of the judgment, even if granting the motion would not necessarily require amending the court’s decision. *See* Fed. R. Civ. P. 59(b); *Brown v. Hovatter*, 525 F. Supp. 2d 754, 757 (D. Md. 2007) (“It is . . . permissible for a district court to clarify a previous judgment under the auspice of Rule 59(e) without necessarily amending it, so long as it is filed within ten days of judgment.”). South Carolina’s motion for clarification was filed well after this 10-day limitation.

South Carolina cannot rely either upon Rule 60(b) to justify its reconsideration request. First, South Carolina asks the Special Master to reconsider her legal conclusion about the propriety of intervention, but “Rule 60(b) does not authorize a motion merely for reconsideration of a legal issue.” *United States v. Williams*, 674 F.2d 310, 312 (4th Cir. 1982). Second, although Rule 60(c)(1) permits certain motions under Rule 60(b) to be filed “within a reasonable time,” a month-long delay is not “reasonable” when there has been no explanation for the delay and the Motion essentially rehashes South Carolina’s original arguments against intervention. Apparently, South Carolina believes that it can challenge any adverse decision by the Special Master according to South Carolina’s own timeline, with no limitations on the timing or grounds for its challenges.

Thus, even without considering the merits of South Carolina's contentions, the Special Master should reject South Carolina's procedurally deficient and untimely Motion.

II. CRWSP May Participate in Both Phases of This Litigation.

South Carolina errs in arguing that "limited" intervention requires CRWSP's categorical exclusion from Phase One. CRWSP's participation in Phase One is essential to its ability to protect its "compelling interest[s]" in this case.[2]

Although there is some dispute about the precise scope of Phase One, every party agrees that, generally speaking, Phase One requires South Carolina to prove that it has suffered substantial injury because of North Carolina entities' inequitable uses of the Catawba River. *See Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982). As part of this inquiry, South Carolina intends to collect "complete information on all non-de minimis consumptive uses and other activities affecting the Catawba River in North Carolina," including IBTs. *See* South Carolina's July 3, 2008, Letter on the Timing of Phase One Discovery.

These inquiries directly implicate CRWSP's compelling interests. South Carolina seeks to identify the sources of its alleged injuries in Phase One, including the IBTs of CRWSP and the City of Charlotte. Although South Carolina contends

[2] CRWSP believes that the Special Master's Order already permits the Intervenors to participate in both Phase One and Phase Two of these proceedings. Counsel for South Carolina contested the Intervenors' participation in Phase One during the hearing before the Special Master. *See* Hearing Transcript March 28, 2008, at 81 (D. Frederick). Counsel for the Intervenors explained the importance of their participation in all phases of the original action and further represented that the Intervenors' participation in *both* Phases would not exceed each Intervenors' own interests. *See id.* at 15-16 (C. Phillips); *id.* at 20-21 (C. Phillips); *id.* at 53 (T. Goldstein); *id.* at 135 (T. Goldstein). CRWSP understood the Special Master's Order as adopting the Intervenors' positions and rejecting South Carolina's attempt to categorically exclude the Intervenors from Phase One.

that it "is *not* limited to showing only that particular actions of Charlotte, CRWSP, or Duke have caused (or threaten to cause) it harm," Motion at 6, there is no question that among those causes will be the IBTs allocated to CRWSP. South Carolina's Phase One arguments thus directly implicate CRWSP as "the instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief." Order at 7. CRWSP should not be forced to sit on the sidelines while South Carolina attempts to prove that CRWSP's allocated IBTs are a source of injury, particularly when South Carolina will inevitably seek in Phase Two to eliminate or modify the sources of harm it identifies in Phase One.[3] CRWSP has the right to defend itself against such allegations.

Further, the scope of South Carolina's claimed injury due to North Carolina entities' allegedly inequitable uses of the Catawba River is not yet known but is to be determined during Phase One. Despite the Complaint's focus on IBTs, South Carolina is now seeking discovery on *all* of Union County's consumption from the Catawba River, including from non-IBT sources. Because South Carolina has broadened the range of its attack, CRWSP has a right to defend itself on all fronts – including response to any allegations by South Carolina that CRWSP's or Union County's North Carolina consumption is inequitable.

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[3] The Special Master acknowledged the intertwining of Phase One and Phase Two considerations at the hearing. In questioning South Carolina's counsel, the Special Master pointed out that "[a]ssuming two things; one, overuse and two, injury, doesn't that necessarily encompass Charlotte[] and Mr. Goldstein's client [CRWSP] that their uses are equitable?" Hearing Transcript March 28, 2008, at 86.

Finally, discovery in Phase One will uncover facts that are relevant to one of the most important factors in an equitable apportionment analysis – "the extent of established uses," or the existing "consumptive use of water in the several sections of the river." *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945). As the Supreme Court has acknowledged, "the equities supporting the protection of existing economies will usually be compelling." *Colorado v. New Mexico*, 459 U.S. 176, 187 (1982). As an existing user of the Catawba River, directly attacked by South Carolina in its Complaint, CRWSP has a strong interest in participating in the discovery process of Phase One.

To be clear, CRWSP intends to participate only in those portions of Phase One that implicate its own interests – consistent with the Special Master's Order. *See* Hearing Transcript March 28, 2008, at 53 (T. Goldstein) ("We're here to focus on the things that directly affect us . . . so that we would sort of self-condition our participation in the case."); *id.* at 135 (T. Goldstein) ("[W]e intend to participate in those specific phases pieces of the case, be they Phase 1 or Phase 2, that really, directly go to our interests in the things that we can hopefully guide the Court on."). If South Carolina believes that CRWSP's participation during any particular portion of Phase One imposes an undue burden on South Carolina, CRWSP believes that South Carolina can raise a specific objection at that time. Thus, there is no support for South Carolina's categorical rule entirely barring CRWSP and the other Intervenors from Phase One.

III. The Special Master Correctly Granted Intervention.

South Carolina raises a number of arguments against the Special Master's Order. South Carolina's reasons for calling the Special Master's ruling into question are meritless.

1. South Carolina first contends that CRWSP's interest in preserving its authorized IBTs "cannot rise to a 'compelling' interest in the context of an equitable apportionment case." Motion at 10. That is incorrect. The units of government that jointly own and operate CRWSP – Union County and Lancaster County Water and Sewer District – rely heavily upon IBTs to meet their water needs. Indeed, as the Special Master found, one of the offending IBTs mentioned by name in South Carolina's Complaint, *see* Compl. ¶ 21, is "the *only* process through which [a portion of] Union County receives water from the Catawba River." Order at 10 (emphasis added). Because CRWSP depends on IBT specifically targeted by South Carolina's Complaint, CRWSP has an interest in this original action that is just as "compelling" as the interests that justified the non-state actors' intervention in *Arizona v. California*, 460 U.S. 605, 614-15 (1983) (holding that Indian tribes could intervene in an equitable apportionment case because their use of the river in question was "critical to their welfare"), and *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (holding that private pipeline companies could intervene in an original action concerning a Louisiana tax because the tax was "directly imposed" upon the companies).

South Carolina asserts to the contrary that CRWSP's interest "cannot be compelling as a matter of law" because equitable apportionment is a matter of federal law. Motion at 10-11. CRWSP has never disputed that equitable apportionment is a matter of federal common law, and CRWSP acknowledges that any apportionment by the Special Master may override the existing IBT allocations in North and South Carolina. *See Hinderlider v. La Plata Co.*, 304 U.S. 92, 106 (1938). But that possibility is precisely *why* CRWSP has a compelling interest in intervention: the Special Master's decision in this case will inevitably affect CRWSP's (and both of the other Intervenors') direct and concrete interest in the Catawba River.

2. South Carolina next contends that CRWSP cannot "point out a single concrete consideration in respect to which [North Carolina's] position does not represent [CRWSP's] interests." *New Jersey v. New York*, 345 U.S. 369, 374 (1953); *see* Motion at 14-15. According to South Carolina, the only way in which CRWSP's interests will diverge from North Carolina's is if North Carolina decides to reduce CRWSP's IBTs out of preference to another in-state user. Motion at 15.

This assertion fails to account for CRWSP's unique inter-state presence. As the Special Master recognized, "the entirety of CRWSP's intake from the Catawba River occurs" in South Carolina; some of that water is then "'shipped to customers, to Union County's customers, back up in North Carolina'" pursuant to both South Carolina and North Carolina regulations, including the IBT authorizations at issue in this case. Order at 10 (quoting Hearing Transcript March 28, 2008, at 28). This

distinctive upstream and cross-border distribution of water places CRWSP at odds with both states. Because CRWSP's North Carolina consumption (by Union County) derives from a South Carolina water intake, it is not a foregone conclusion that North Carolina will adequately represent all aspects of CRWSP's North Carolina consumption; and South Carolina is apparently not going to represent CRWSP's entire consumption from its South Carolina water intake. *See generally* CRWSP's Brief in Support of Its Motion for Leave to Intervene at 9-10; CRWSP's Reply Brief in Support of Its Motion for Leave to Intervene at 3-4. Thus, CRWSP is not fully represented by either state, and the Special Master was correct in allowing intervention.

3. South Carolina also asserts that CRWSP is not sufficiently independent of "'all other citizens and creatures of the state'" to justify intervention. Motion at 13 (quoting *New Jersey*, 345 U.S. at 373). First, South Carolina argues that its Complaint is fundamentally about equitable apportionment, and as such no user of the Catawba River is unique. *Id.* Second, even conceding that South Carolina's primary grievance is with North Carolina's IBT authorizations, South Carolina contends that the intervenors are again not unique because there are "at least 22 others transferring water from the Catawba River Basin" pursuant to IBT authorizations. *Id.* at 14.

South Carolina's arguments do not account for the inter-state presence that distinguishes CRWSP, not only from other users of the Catawba River, but also from Charlotte and Duke. Even putting that point aside, however, South Carolina's

attempt to downplay the exclusively compelling interests of CRWSP and the other Intervenors must fail.

As an initial matter, South Carolina mischaracterizes its own Complaint's insistent focus on North Carolina's IBT authorizations. Although South Carolina may ultimately be seeking a broader equitable apportionment of the Catawba River, there can be no question that its fundamental grievance is with North Carolina's IBT authorizations, like the one granted to CRWSP, as the Special Master properly recognized. Order at 8. The only major section of the Complaint detailing North Carolina's alleged transgressions is titled "North Carolina's Unlawful Authorization of Transfers from the Catawba River"; every paragraph in that section relates to existing or suspected IBTs authorized under North Carolina law. Compl. at 7-9. Moreover, the Complaint's prayer for relief pointedly asks the Supreme Court to "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 further "declaring that the North Carolina interbasin transfer statute is invalid to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment." Compl. at 10. The Special Master was thus entirely correct to focus upon CRWSP's specific interests as a beneficiary of North Carolina's IBT authorizations, rather than its more general interest as mere user of the Catawba River.[4]

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[4] This focus was particularly appropriate when, as here, the full scope of the issues to be litigated was not yet fully resolved. The Special Master was fully justified in relying upon the Complaint's heavy focus on IBTs.

Focusing on these IBT authorizations, the Special Master was also correct in concluding that CRWSP's role as an authorized agent effecting one of the complained-about transfers justified its participation in this original action. South Carolina repeatedly attempts to explain away New York City's intervention on similar grounds in *New Jersey v. New York*, 345 U.S. 369 (1953), but its purported distinctions are unavailing. According to South Carolina, "the *sole* basis of [New Jersey's] complaint was the City of New York's proposed construction of dams." Motion at 11. But, as the Supreme Court made clear, the overall aim of that litigation was to achieve an equitable apportionment. *See* 345 U.S. at 374. In any event, the basic thrust of South Carolina's Complaint in this case so directly turns on IBTs that New Jersey's perhaps marginally narrower focus provides little ground for distinction.

South Carolina also claims that the Court's "authorized agent" language was merely intended to explain why New York City was joined as a defendant, and that it has little to do with intervention. Motion at 12. This contention reads *New Jersey* too constrictively and ignores the broader principle that the Special Master identified and fully explained in her Order. *See* Order at 3-7. It also fails to account for the many precedents in which the Court allowed non-state entities to intervene in original actions when they were "accused of being the agent of injury or executing the policy to which the complaining state objects." Order at 4 (citing cases).

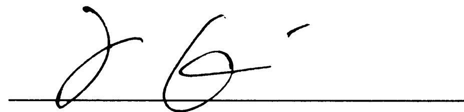
Ultimately, the only way that South Carolina can distinguish these precedents and rebut the Special Master's reasoning is by attaching talismanic effect to a plaintiff State's naming of a non-state actor as a defendant. *See* Motion at 12 ("South Carolina . . . did not seek to join either Charlotte or CRWSP as a defendant in this case."). But none of the Court's precedents suggest that a non-state actor's participation in an original action is easier to justify when it is sued directly: as the Special Master noted, "the Court has dismissed non-state parties that were named as defendants by the complaining state where the Court found that their interests would be represented sufficiently by the defendant state," Order at 5; and, conversely, the Court has allowed non-state parties to intervene as plaintiffs when they satisfied the appropriate prerequisites, *id.* 6-7. The same basic principles govern intervention whether a non-state entity seeks to intervene as a plaintiff or defendant, and whether that entity has or has not been directly sued.[5]

[5] Indeed, taken to its logical conclusion, South Carolina's argument suggests that a plaintiff State can unilaterally prevent a non-state entity from intervening simply by leaving that entity's name off of the caption, even if the complaint targets that entity by name and seeks relief that would directly affect that entity's rights. The Supreme Court's intervention analysis is not so formalistic.

CONCLUSION

For the foregoing reasons, the Special Master should deny South Carolina's Motion and uphold the May 27, 2008 Order permitting intervention in all phases of this original action.

Respectfully Submitted,



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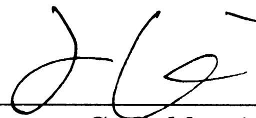
CERTIFICATE OF SERVICE

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 the Catawba River Water Supply Project's Response to South Carolina's Motion for Reconsideration of May 27, 2008 Order Granting Limited Intervention to be served by first-class mail, postage prepaid, and by electronic mail (as designated) to those on the attached service list.



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