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VIA ELECTRONICALLY AND FIRST CLASS MAIL

Special Master Kristin Linsley Myles
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Re: *South Carolina v. North Carolina,* No. 138, Original; Charlotte's Response to South Carolina's Request for Interim Report on Interventions

Dear Special Master Myles:

Charlotte opposes South Carolina's July 30, 2008 request for an interim report to the Court concerning the motions to intervene ("SC Ltr. Br."). An interim report would be inappropriate at this time because South Carolina can point to no undue burden or prejudice caused by the intervenors' participation in this action, and because granting South Carolina's request would disrupt and delay the fact gathering process recently begun by the parties.

The Court's appointment order of January 15, 2008 directs the Special Master to "submit Reports as she may deem appropriate." 128 S. Ct. 1117 (2008). The Special Master thus has discretion in deciding whether to issue interim reports. The Court will defer to the Special Master in such matters. *See Sprint/United Mgmt. Co.* v. *Mendelsohn*, 128 S. Ct. 1140, 1145 (2008) (deference is the "'hallmark'" of judicial review of the exercise of discretionary authority) (quoting *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 143 (1997)). 1/

The Court's *Guide for Special Masters in Original Cases Before the Supreme Court of the United States* (Oct. Term 2004) ("Guide") does not purport to limit the Special Master's discretion in the fashion suggested by South Carolina. The Guide points out, for example, that "[t]he Master also has the authority to . . . rule on motions concerning the litigation," and that the Court often refers intervention motions to the Master. Guide at 3. Decisions on legal issues are to be memorialized in Memoranda of Decision, which ultimately become embodied in or

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1/ There is no indication that the Court expected an interim report when it referred the intervention motions. The Court could have directed the Special Master to issue a report on the intervention motions when it referred those motions to the Special Master. *See, e.g., Georgia* v. *Pennsylvania R.R. Co.*, 67 S. Ct. 974 (1947) ("The motion of the State of Alabama for leave to file a petition of intervention is referred to the Special Master for a Special Report at his earliest convenience."). The Court did not do so. *See, e.g.*, 128 S. Ct. 1694 (2008).

appended to the Final Report. *Id.* at 4, 7. Contrary to South Carolina's assertion, the Guide provides no indication that motions to intervene fall into a "special category" for which "the Court specifically 'want[s] the Master to file an Interim Report . . . .'" SC Ltr. Br. at 2. The Guide simply observes that "the Court may want the Master to file an Interim Report . . . ,'" and notes that in *United States v. Alaska*, No. 128, Original, the Special Master did so with respect to a ruling on intervention in that case. Guide at 7-8.

South Carolina relies heavily on the manner in which an intervention motion was handled in No. 128, but the circumstances there were fundamentally different from this case. As the plaintiff, State of Alaska, pointed out, the proposed intervenors in No. 128 claimed no direct stake in the controversy, but rather asserted "indirect, derivative interests" that could be asserted by "any number of other persons and entities" such that "[d]eferring review of a recommendation to permit intervention would thus constitute an open invitation for anyone interested in the outcome of the litigation to join the action . . . ." and therefore "risk the delay and increased complexity that intervention on such a massive scale would create." *See* Supplemental Br. for Pl. State of Alaska in Opp'n to Mot. for Leave to Intervene and File Answer at 13 (excerpt attached hereto as Ex. 1). Alaska contrasted the situation in No. 128 with a different intervenor in *United States v. Alaska*, No. 84, Original, whose "distinct sovereign title interests" created a direct stake in that controversy, justifying deferral of the recommendation on intervention to the Final Report. *Id.* at 12. Here, as the Special Master concluded in her May 27, 2008 Order of the Special Master, intervention by Charlotte, Duke and CRWSP is founded on just such a direct stake, unlike the indirect interest in No. 128 and very much like the direct interest in No. 84. 2/

Two practical considerations should govern the Special Master's decision on South Carolina's request: (1) whether there is a demonstrable need for the Special Master to command the Court's time and attention to these motions at this preliminary stage; and (2) whether an Interim Report would expedite or retard progress in resolving this litigation. Charlotte believes both factors strongly counsel against issuing an Interim Report at this time.

At a minimum, South Carolina's request is premature and her claimed need for relief unproven. South Carolina has not asserted any tangible burden or prejudice to her interests that may be attributable to the intervenors' presence in this action. 3/ She has complained that Charlotte filed one brief and that the intervenors have sought to express their views on case management matters. But the intervenors have not served discovery, made motions or raised issues requiring South Carolina's time and attention. If such burdens arise, the Special Master is capable of handling them – indeed, has been appointed to handle them. If an Interim Report were to be issued, it would be surprising if the Court did not wonder why its attention should be

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2/ Indeed, South Carolina has been able to position herself to assert that Charlotte's interest in this matter is derivative, and therefore that Charlotte has an obligation to demonstrate inadequate representation by North Carolina, only by continually expanding the scope of her alleged harms beyond the claims set forth in her Complaint, which specifically targeted Charlotte's direct stake in its IBT Certificate. It would be inequitable to grant South Carolina's request and facilitate her use of this bootstrapping tactic to challenge the intervention order at this stage of the case.

3/ We note that South Carolina's dire prediction that allowing the three intervenors to join the case would "open the floodgates" to numerous motions to intervene has proven to be completely wrong.

devoted to such a matter when nothing other than party-directed discovery is expected to occur in this case for the next year or two.

The most likely consequence of issuing an Interim Report would be to drag this case to a halt. Preparing an Interim Report and awaiting a ruling by the Supreme Court could cause substantial delay. The strong and longstanding policy against piecemeal appellate review speaks to this situation and counsels against South Carolina's request. *See Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940) ("To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause."). Were the Special Master to issue an interim report recommending that the Supreme Court grant the motions to intervene, a prompt ruling by the Court is by no means guaranteed. In *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), the Special Master's report recommending intervention was issued on May 14, 1980. The Court accepted the recommendation more than a year later, on May 26, 1981. *See id.* at 734, 745 n.21. In *South Carolina* v. *Baker*, 485 U.S. 505 (1988), the Supreme Court received the Special Master's report recommending the grant of a motion for leave to intervene on December 10, 1984. *See South Carolina* v. *Regan*, 469 U.S. 1083 (1984). The Supreme Court adopted the recommendation more than *three years* later, on April 20, 1988. *See* 485 U.S. at 510 n.4.

South Carolina contends that an interim report should be filed on the intervention order "before going further." SC Ltr. Br. at 2. Since the mere filing of a report would settle nothing, she also must mean the Special Master and the parties should await the Court's decision before going further. Charlotte, for example, should not be expected to respond as a party to South Carolina's discovery requests while South Carolina attempts to eliminate Charlotte as a party. 4/ South Carolina's request for an interim report will not aid the Special Master in her obligation to "move the case along in a reasonably expeditious fashion." Guide at 3. It will instead inhibit the fact development process upon which the parties only recently embarked.

For the reasons set forth above, Charlotte respectfully submits that the Special Master should decline to issue an interim report at this time.

Sincerely,

James T. Banks

James T. Banks

Cc: Counsel on Service List

4/ On July 3, 2008, South Carolina served Charlotte with a massive document request. In addition, just yesterday, August 5, South Carolina served its first set of interrogatories on Charlotte.

EXHIBIT 1

No. 128, Original

IN THE
Supreme Court of the United States

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

On Motion for Leave to Intervene

SUPPLEMENTAL BRIEF FOR PLAINTIFF STATE OF ALASKA IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

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would not use because it might damage the Federal Government's case against the recommended intervenors. Id. Here, by contrast, the Proposed Intervenors and the United States have no adverse claims to the disputed lands. Indeed, both seek the same determination: that the disputed lands belong to the United States. Moreover, the Proposed Intervenors offer no evidence supporting federal title that the United States itself will not present.

Under the circumstances, permitting the Proposed Intervenors to participate as parties on the merits of the United States' title claim will add nothing to the case. The United States and the Proposed Intervenors seek the same result. The United States is perfectly capable of representing its claim to the disputed lands on behalf of all citizens, including the Proposed Intervenors, and has shown no indication that it will not do so. See also Alaska Opp. at 8-9, 14-16. Intervention should therefore be denied.

II. THE INTERVENTION RECOMMENDATION SHOULD NOT BE UNREVIEWABLE IN THIS CASE.

With the concurrence of all parties, the No. 84 Special Master recommended that only after his final report was submitted should the parties be allowed to file exceptions and the Court review his recommendation that intervention be granted. See No. 84 Special Master's Report at 515. This case is fundamentally different in that the parties here do not agree that this procedure is appropriate. The decision as to whether to join parties to this original action, like

the decision to accept jurisdiction over the current parties in the first place, is for the Supreme Court to make. The Court has referred the motion for intervention to the Special Master for a recommendation. But without the consent of the parties, the Special Master may not determine the timing of the review of his recommendations or treat the Proposed Intervenors as parties pending a ruling by the Court on those issues. See, e.g., Robert L. Stern, et al., Supreme Court Practice and Procedure 488 (7th ed. 1993) ("[T]he Master's reports and recommendations are advisory only and are subject to exceptions and objections by the parties. The Court itself determines all critical motions and grants or denies the ultimate relief sought.").

Here, unlike in No. 84, Alaska does not believe it would be appropriate to defer review of the Special Master's recommendation on intervention. The parties' decision to defer review in No. 84 was based on the special circumstances of that case, in which the recommended intervenors alleged distinct sovereign title interests not possessed by other classes of citizens. This case presents an entirely different situation. The Proposed Intervenors here have no direct interest in the disputed title in their own right, but rather simply possess an interest in a particular regulatory status shared with all rural Alaska residents.

In light of this fact, practical considerations favor a definitive and final resolution of the intervention request. Both existing parties presently claim

title to the disputed lands. If the Special Master effectively determines that the State of Alaska and the United States do not adequately represent their citizens' best interests, any number of other persons and entities would be entitled to participate on the same basis as the Proposed Intervenors. Deferring review of a recommendation to permit intervention would thus constitute an open invitation for anyone interested in the outcome of the litigation to join the action. Such a result is contrary to the principles of sovereign dignity and sound judicial administration underlying the New Jersey rule. 345 U.S. at 372-373.

Rather than risk the delay and increased complexity that intervention on such a massive scale would create, Alaska and the United States should remain free to seek immediate Court review of a recommendation to grant intervention. Alaska does not believe such review would necessarily require an adjustment to the deadlines set forth in the Case Management Plan. But the possibility that the opportunity for such review may require such an adjustment is far less troubling than the prospect of having this original action between sovereigns transformed into a class action by parties with indirect, derivative interests.

III. THE PROPOSED INTERVENORS SHOULD BE REQUIRED TO PAY THEIR FAIR SHARE OF THE COSTS OF THIS CASE.

The Proposed Intervenors argue that if intervention is granted, the two existing parties should bear all the fees and costs of this case. Proposed Intervenors' Supplemental Brief at 7. If permitted to intervene, however, the

No. 138, Original

IN THE

Supreme Court of the United States

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

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 August 6, 2008, I caused copies of Charlotte's Response to South Carolina Request for Interim Report on Interventions, 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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