

No. 138, Original

In the
Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

**BRIEF OF THE STATE OF NORTH
CAROLINA IN RESPONSE TO CASE
MANAGEMENT ORDER NO. 3 REGARDING
SCOPE OF PLEADINGS**

ROY COOPER

Attorney General

State of North Carolina

Christopher G. Browning, Jr.*

James C. Gulick

J. Allen Jernigan

Marc D. Bernstein

Jennie W. Hauser

North Carolina Department of Justice

Post Office Box 629

Raleigh, N.C. 27602

(919) 716-6900

March 20, 2008

*Counsel of Record

INTRODUCTION

On March 14, 2008 the Parties participated in a telephone conference with the Special Master. Prior to that date, the Parties had filed with the Special Master case status reports indicating that, although both parties agreed to bifurcating the case, issues still remained regarding the scope of South Carolina's claims. Pursuant to the Special Master's request and Case Management Order Number 3, the State of North Carolina files this brief regarding the scope of pleadings.

North Carolina contends (1) that South Carolina's complaint has not claimed harm from any consumptive use by North Carolina other than interbasin transfers and (2) that South Carolina has not alleged any harms to South Carolina except during periods of reduced river flows caused by drought. An additional threshold issue raised in the status reports is whether South Carolina's claim of harm relates to the entirety of the Catawba/Wateree River basin in South Carolina or only to a portion of the basin, and, if the latter, the geographical limitation of South Carolina's claim.

The concerns discussed herein are not merely of academic interest to the Special Master and the Court. South Carolina's effort to expand the scope of its complaint will dramatically expand the scope of discovery necessary to understand precisely about what South Carolina is now complaining. This is so because, in its first Case Management Report, South Carolina's responses to North Carolina's preliminary questions are quite vague as to the parameters of the scope of the action, whereas South Carolina's complaint itself is quite specific and narrow. This expansion will greatly prolong the time necessary for discovery and make much more complex and

difficult the ability to model the impacts and benefits of the consumptive uses about which South Carolina ultimately decides it is complaining.

ARGUMENT

Principles of notice pleading are not applicable to an original action between States. *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (“We have found that the solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure does not suit cases within this Court’s original jurisdiction.”) (citations omitted). Allowing a State to try claims beyond those expressly set out in its bill of complaint would deprive the Court of its ability to perform its “gatekeeping function” in original actions. *Id.* Accordingly, when a bill of complaint is filed, it is imperative that the complaining State set out its claims with specificity so that the Court will have “an understanding of the scope of [the] litigation as envisioned under the initial pleadings.” *Id.* In denying a motion to amend a bill of complaint in *Ohio v. Kentucky*, 410 U.S. 641 (1973), the Court noted that:

Accepted procedures for an ordinary case in this posture would probably lead us to conclude that the motion for leave to file should be granted, and the case would then proceed to trial or judgment on the pleadings. This, however, is not an ordinary case. It is one within the original and exclusive jurisdiction of the Court. Procedures governing the exercise of our original jurisdiction are not invariably governed by common-law precedent or by current rules of civil procedure. Under our rules, the requirement for a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage.

Id. at 644 (citations omitted).

Should South Carolina wish to expand the scope of its original bill of complaint, the procedure that it must follow is to move the Supreme Court for leave to amend its complaint. See *Nebraska v. Wyoming*, 515 U.S. 1 (1995); *California v. Nevada*, 447 U.S. 125, 133 (1980); *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). The Special Master is without authority to allow South Carolina to bring claims beyond the original bill of complaint in the absence of an order by the Court allowing an amendment to the complaint. The determination must be made by the Court as to whether “to expand the Special Master’s reference.” *California v. Nevada*, 447 U.S. 125, 133 (1980).

In its first Case Management Report, South Carolina has informed the Special Master that despite the language of its bill of complaint, South Carolina intends to pursue claims that: (1) South Carolina is harmed by water withdrawals in North Carolina beyond interbasin transfers and (2) South Carolina suffers harm from North Carolina withdrawals even during the absence of drought conditions. Additionally, South Carolina has informed the Special Master that it does not know whether South Carolina’s claims cover the entire Catawba/Wateree River basin or only a limited portion of the river basin. As set out below, South Carolina is seeking to exceed the scope of the bill of complaint. The bill of complaint is limited to interbasin transfers and to such withdrawals during times of drought. Additionally, South Carolina’s complaint does not specifically identify the portions of the Catawba/Wateree River at issue in this matter; South Carolina’s complaint only alleges harms that occurred in locations upstream of the discharge from Lake Wateree, which harms supposedly are caused by North Carolina’s interbasin transfers and drought conditions.

The bill of complaint is limited to interbasin transfers.

The limited scope of South Carolina's claims against North Carolina is best reflected by the complaint's introductory paragraphs and its prayer for relief. In its complaint, South Carolina alleges:

1. The Catawba River is an interstate river that originates in the mountains of North Carolina and flows . . . until it meets Big Wateree Creek to form the Wateree River in South Carolina.

2. . . . Yet the Catawba River is subject to severe periodic fluctuations in water level that can render its volume inadequate. The normal flow of the River has been significantly affected by severe droughts. Indeed, both North Carolina and South Carolina have issued drought advisory warnings for the Catawba River Basin

3. In 1991, North Carolina enacted an "interbasin transfer statute" that purports to authorize the transfer of large volumes of water from one river basin in North Carolina to another basin in that State. Under that statute, North Carolina has authorized the transfer of at least 48 million gallons per day from the Catawba River Basin, with the most recent such transfer authorized in January 2007.

4. These past transfers – and threatened pending transfers – exceed North Carolina's equitable share of the Catawba River. . . .

(Bill of Compl. ¶¶ 1, 2, 3, and 4)

In its prayer for relief, South Carolina requests:

1. 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.

2. That the Court enter 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 transfer statute is invalid to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment as determined by this Court's decrees.

3. For such other and further relief as the Court may deem proper.

(Bill of Compl., Prayer for Relief)

Thus, the relief that South Carolina requests in its complaint is limited to interbasin transfers. South Carolina's prayer for relief is consistent with the body of its complaint. The singular focus of the complaint is interbasin transfers. All twelve paragraphs in the body of the complaint that allege wrong doing by North Carolina focus upon and discuss in detail North Carolina's interbasin transfers. (Bill of Compl. ¶¶ 18-29) Paragraphs 26 through 29, for example, allege that North Carolina has failed to respond to South Carolina's demands regarding a particular interbasin transfer. South Carolina's complaint fails to allege any other wrongful transfers or consumptive water uses by North Carolina.

South Carolina's bill of complaint is based upon an assertion that North Carolina's interbasin transfers "exceed North Carolina's equitable share of the Catawba River." (Bill of Compl. ¶ 4) This is the case that South Carolina convinced the Supreme Court to accept. Accordingly, South Carolina's claims must be limited to the bill of complaint that it was given leave to file.

The bill of complaint is limited to drought conditions.

To pursue an equitable allocation, South Carolina must plead harm. Here, the harm that is the subject of the complaint is limited to reduced water flow during drought conditions. In fact, South Carolina readily recognizes that: "There is usually

more than enough water in the Catawba River to meet the needs of all of its water users in South Carolina” (Br. in Supp. of Mot. for Leave to File Bill of Compl., app. 14)

The harm to South Carolina that South Carolina has articulated for the Court is set out in Paragraph 17 of the bill of complaint. The harms upon which South Carolina bases its complaint are expressly limited, however, to harms that occurred during “drought conditions.” The only alleged harms to which South Carolina cites in its complaint are that, during drought conditions: (1) boat landings were closed, (2) the taste of tap water was affected, (3) the production of hydroelectricity was reduced, (4) businesses were forced to incur additional costs to assimilate wastewater, and (5) flow in tributaries was reduced. (Bill of Compl. ¶ 17) Having failed to allege any harm whatsoever during non-drought conditions, South Carolina should not be permitted to expand its complaint to cover water usage during periods – in South Carolina’s own words – when there is “more than enough water” for everyone. (Br. in Supp. of Mot. for Leave to File Bill of Compl., app. 14)

The bill of complaint is limited to the upper reaches of the
Catawba/Wateree River in South Carolina

When a plaintiff files an action, it should know and be able to articulate the harm that it has incurred. This is particularly true in original actions between States. In its first Case Management Report, South Carolina, however, notes that it does not know what portions of the Catawba/Wateree River it wants to put at issue in this action.

In the complaint, South Carolina alleges that North Carolina's interbasin transfers have reduced the flow of the Catawba River into South Carolina. Although South Carolina's complaint does not clearly limit the portions of the Catawba/Wateree River system that are at issue in this action, the first paragraph of South Carolina's complaint discusses the Catawba River as "an interstate river that originates in the mountains of North Carolina and flows . . . until it meets Big Wateree Creek to form the Wateree River in South Carolina." (Bill of Compl. ¶ 1) The specific harms claimed in the complaint all appear to occur upstream from the discharge at Lake Wateree into the Wateree River. See Bill of Compl. ¶ 17 (closure of boat docks on Lake Wylie, S.C.; unpleasant-tasting tap water in Camden, S.C.; decrease of hydroelectrically generated power by Duke Energy from the stations located on the Catawba River; increased expense for Bowater Incorporated's pulp and paper mill located at Catawba, S.C. to assimilate wastewater; and reduced flow in the major tributaries of the Catawba River, all of which join the Catawba River prior to the discharge at Lake Wateree). That is, the complaint includes *no* allegations of harm in the lower portion of the system. Thus, the complaint certainly implies that the focus of South Carolina's claim is on that upstream part of the system.

If the complaint can be interpreted to include the lower portion of the system, North Carolina notes that South Carolina's refusal or inability to disclose what portions of the basin are at issue in this action will necessarily lengthen the amount of discovery that will be required to clarify South Carolina's allegations on this point.

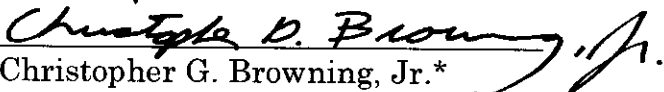
South Carolina could simplify the course of discovery and reduce the costs of all parties if it were to respond to Preliminary Question No. 3 with an unequivocal answer.

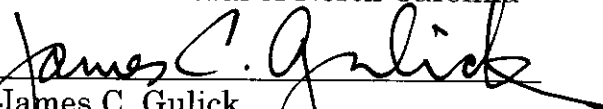
CONCLUSION

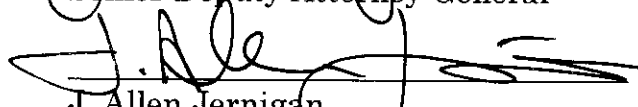
The State of North Carolina requests that the Special Master rule that, unless South Carolina is granted leave by the Supreme Court to amend its complaint, South Carolina's claims are limited to those set forth in its complaint, i.e., that the scope of the complaint does not include: (1) harm to South Carolina from any consumptive use other than interbasin transfers from the Catawba River Basin; (2) harm to South Carolina during periods when there are no reduced flows caused by drought; and (3) harm to South Carolina in areas of the State below Lake Wateree. Alternatively, on the question as to which portion of river is at issue in this case, North Carolina requests the Special Master to require South Carolina to clarify, prior to the start of any discovery period, the portions of the Catawba/Wateree River for which South Carolina claims it has suffered harm of significant magnitude.

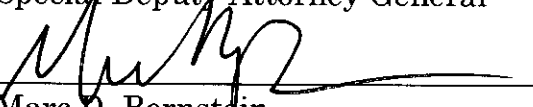
Respectfully submitted.


ROY COOPER
Attorney General of North Carolina


Christopher G. Browning, Jr.*
Solicitor General of North Carolina


James C. Gulick
Senior Deputy Attorney General


J. Allen Jernigan
Special Deputy Attorney General


Marc D. Bernstein
Special Deputy Attorney General


Jennie W. Hauser
Assistant Attorney General

March 20, 2008

*Counsel of Record