

No. 138, Original

In the
Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant,

CITY OF CHARLOTTE, DUKE ENERGY, LLC.,
CATAWBA RIVER WATER SUPPLY PROJECT
Intervenors.

**BRIEF OF THE STATE OF
NORTH CAROLINA
REGARDING ISSUES FOR PHASE I**

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INDEX

ARGUMENT 2

I. In Phase I, South Carolina should be required to identify all alleged harms, and all consumptive uses by North Carolina that are claimed to cause the alleged harms, with specificity as to type, location, time of occurrence, duration and other pertinent factors that will enable the Court to assess whether those harms are “of a serious magnitude.” 2

 A. South Carolina should be required to come forward with evidence of harm at an early stage of the proceedings. 2

 B. South Carolina agrees that she must demonstrate injury by virtue of the consumption occurring in North Carolina 3

 1. Nature and Extent of the Injury in South Carolina 4

 2. Causation 6

 a. Drought and Other Dry Periods 7

 b. Self-Inflicted Injury 7

 c. Reservoir Management 8

II. Discovery should be structured to permit the parties to address these issues in a sequential and logical fashion – a nine month period for South Carolina to specifically identify its harms, a nine month period for North Carolina to probe South Carolina’s alleged harms and a period for expert discovery that is sufficient to facilitate necessary modeling of the river 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

<i>Colorado v. Kansas</i> , 320 U.S. 383 (1943)	2, 4, 8, 11
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982)	2, 4, 8
<i>Colorado v. New Mexico</i> , 467 U.S. 310 (1984)	4
<i>Connecticut v. Massachusetts</i> , 282 U.S. 660 (1931)	4
<i>Idaho v. Oregon</i> , 462 U.S. 1017 (1983)	4
<i>Kansas v. Colorado</i> , 185 U.S. 125 (1902)	11
<i>Kansas v. Colorado</i> , 206 U.S. 46 (1907)	2, 3, 5, 6, 11
<i>Missouri v. Illinois</i> , 200 U.S. 496 (1906)	4, 7
<i>Nebraska v. Wyoming</i> , 507 U.S. 584 (1993)	3, 4, 11
<i>Nebraska v. Wyoming</i> , 515 U.S. 1 (1995)	3, 4, 5
<i>New York v. New Jersey</i> , 256 U.S. 296 (1921)	4, 6
<i>North Dakota v. Minnesota</i> , 263 U.S. 365 (1923)	4, 6
<i>Wyoming v. Colorado</i> , 259 U.S. 419 (1922)	6, 11

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Pursuant to the directive of the Special Master at the conference call of Friday, May 23, 2008, the State of North Carolina submits this brief with respect to: 1) the issues to be addressed during Phase I of the proceeding and 2) the length of discovery and sequencing of expert discovery during Phase I.¹

¹ North Carolina has consistently asserted in this action that South Carolina's Bill of Complaint does not put at issue any consumptive uses by North Carolina other than interbasin transfers and that the Special Master does not have jurisdiction to resolve issues not presented in the Bill of Complaint. *See* N.C.'s First Progress Report (Mar. 13, 2008); N.C. Br. in Response to Case Management Order No. 3 Regarding Scope of Pleadings (Mar. 20, 2008); N.C. Reply Br. in Response to Case Management Order No. 3 Regarding Scope of Pleadings (Mar. 24, 2008); Hearing Transcript 148-70 (Mar. 28, 2008). During the conference call of May 23, 2008, the Special Master indicated that she would be entering an order to the effect that SC's complaint is broader than interbasin transfers. Transcript of Telephone Conference 6-7 (May 23, 2008). During that conference call, the Special Master directed the parties to file briefs by June 16, 2008 regarding the issues to be resolved in Phase I in light of her ruling. *Id.* at 23. North Carolina is filing this brief pursuant to the Special Master's directive of May 23, 2008. North Carolina hereby preserves its position that the Bill of Complaint is limited to interbasin transfers and that the Special Master does not have jurisdiction to resolve issues beyond the Bill of Complaint. Similarly, North Carolina preserves its position that South Carolina's complaint is limited to harms during times of drought and harms in a limited segment of the river.

ARGUMENT

- I. In Phase I, South Carolina should be required to identify all alleged harms, and all consumptive uses by North Carolina that are claimed to cause the alleged harms, with specificity as to type, location, time of occurrence, duration and other pertinent factors that will enable the Court to assess whether those harms are “of a serious magnitude.”
 - A. South Carolina should be required to come forward with evidence of harm at an early stage of the proceedings.

The Court has established a two-step process for determining whether an equitable apportionment of interstate river flows should be undertaken. Plaintiff has the initial burden and must show that defendant’s use of water has caused substantial injury to plaintiff’s interest. *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982). If that burden is carried, then defendant is permitted to show that the benefits of upstream water uses substantially outweigh the demonstrated downstream injury. *Id.* at 186-88. If defendant carries this second burden, then defendant wins despite plaintiff’s showing of substantial injury.

Thus, there are two points at which this action may be halted short of an equitable apportionment. First, if South Carolina fails to carry her initial burden of demonstrating substantial injury, the action must be dismissed. *Colorado v. Kansas*, 320 U.S. 383, 391-92 (1943). Second, if South Carolina carries this initial burden, but North Carolina carries her ensuing burden of showing that upstream benefits outweigh South Carolina’s injuries, South Carolina is again entitled to no relief. *Colorado v. New Mexico*, 459 U.S. at 186; *Kansas v. Colorado*, 206 U.S. 46, 100-01 (1907). A proceeding to consider equitable apportionment of the Catawba River is called for only if South Carolina meets her initial burden and North Carolina falls short as to its subsequent burden, and even in that situation the Court could determine that South Carolina had not “made out a case entitling it to a decree” requiring North Carolina

to limit its existing or future consumptive water uses. *See Kansas v. Colorado*, 206 U.S. 46, 117 (1907).

Given the Court's construct for resolving interstate water disputes, this litigation will be conducted in the most efficient manner by organizing the proceedings according to Phases that correspond to each State's respective evidentiary burdens. Phase I should be focused solely on South Carolina's effort to demonstrate injuries caused by *consumptive water uses* in North Carolina. Discovery and presentation of evidence should be limited to the alleged harms in South Carolina, the water consuming uses in North Carolina, and the causative link between the two. At the conclusion of South Carolina's identification of alleged "harms" caused by North Carolina, North Carolina will undertake its own discovery to rebut South Carolina's allegations. North Carolina should also be permitted to move for dismissal on the ground that South Carolina has failed to carry her burden. There will be no need for evidence or argument in Phase I concerning the benefits of water consuming activities in North Carolina. Rather, such evidence would be the subject of Phase II in the event it were necessary to proceed to Phase II. South Carolina's effort to demonstrate injury of a serious magnitude is judged against the factors and standards established in the Court's jurisprudence, as discussed below.

B. South Carolina agrees that she must demonstrate injury by virtue of the consumption occurring in North Carolina

In Phase I of this litigation, South Carolina must prove, by "clear and convincing evidence," that actions by North Carolina have caused injury to South Carolina "of a serious magnitude." *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (requiring a showing of substantial injury, rather than purely speculative harms); *Nebraska v. Wyoming*, 507 U.S. 584, 591 (1993) (requiring proof by clear and convincing evidence of real and substantial injury or damage); *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)

(requiring proof by clear and convincing evidence that proposed diversion will not result in certain and immediate harm); *Idaho v. Oregon*, 462 U.S. 1017, 1027 (1983) (requiring proof by clear and convincing evidence of a real and substantial injury or damage); *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982) (requiring proof by clear and convincing evidence of real or substantial injury or damage); *Colorado v. Kansas*, 320 U.S. 383, 398 (1943) (requiring clear showing that Kansas has suffered serious damages to her substantial interests and those of her citizens); *Connecticut v. Massachusetts*, 282 U.S. 660, 666-67 (1931) (requiring proof by clear and convincing evidence that damage to land be of serious magnitude); *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923) (requiring harm of serious magnitude and that such harm be established by clear and convincing evidence); *New York v. New Jersey*, 256 U.S. 296, 309 (1921) (requiring harm of serious magnitude established by clear and convincing evidence); *Missouri v. Illinois*, 200 U.S. 496, 521 (1906) (requiring case to be of serious magnitude, clearly and fully proved). In her arguments to the Special Master, South Carolina stated that “our burden at the first phase is to show that we suffered injury by virtue of the consumption occurring in North Carolina.” Statement of Mr. Frederick, March 28, 2008 Hearing, Tp. 86. We agree with this statement, as far as it goes, provided that South Carolina satisfies the standards noted above. At the same time, detail must be provided to flesh out this statement’s generality so that South Carolina’s burden in Phase I may be properly understood and implemented.

1. Nature and Extent of the Injury in South Carolina. South Carolina must identify the specific injuries to her water uses that are due to alleged water shortages caused by consumption in North Carolina. See *Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995) (emphasizing that “[p]urely speculative harms will not, of course, carry Nebraska’s burden of showing substantial injury ”); *Kansas v. Colorado*, 206 U.S. 46,

99-100 (1907) (“[Our injury] is not limited to the simple matter of whether any portion of the waters of the Arkansas [River] is withheld by Colorado. We must consider the effect of what has been done upon the conditions in the respective States”). South Carolina cannot carry her burden by simply providing examples of asserted injury, as she did in her Complaint. Rather, South Carolina must clearly show the nature and extent of the actual alleged injuries. Moreover, South Carolina must be required to identify these actual harms at an early stage so that other parties may have adequate opportunities to discover evidence and undertake expert evaluation of the magnitude and causes of those alleged injuries.

South Carolina must prove her aggregate harms in a detailed fashion. Each individual harm should be quantified and identified by type, location, time of occurrence, duration and other pertinent factors that will enable the parties, and ultimately the Special Master and the Court, to assess whether, in the aggregate, those harms are “of a serious magnitude.” Perceptible, but localized, injuries are insufficient to carry South Carolina’s burden if the consumptive uses occurring in North Carolina are not shown to have caused widespread harm to the Catawba River Basin in South Carolina. *See Kansas v. Colorado*, 206 U.S. at 117. South Carolina’s proof also must be sufficiently detailed to judge the extent to which her alleged injuries were caused by water consumption in North Carolina, as opposed to other factors.

In addition, because South Carolina alleges that her injuries are caused by consumptive-use activities in North Carolina, she must identify what those activities are, and take into account any benefits those activities confer on South Carolina such that the “net injury” in South Carolina is measured against the Court’s “serious magnitude” standard. For example, if IBTs in North Carolina result in flow augmentation to river basins other than the Catawba in South Carolina, the benefits

to South Carolina in those basins must be identified and quantified. As the Court has recognized in several cases, upstream water uses and diversions can benefit downstream users in ways that offset flow reductions at the State line. *See Kansas v. Colorado*, 206 U.S. at 101 (observing that Colorado’s irrigation water may percolate through the soil, “giving to Kansas territory, although not in the Arkansas [River] Valley, a benefit from water as great as that which would enure by keeping the flow of the [river] in its channel undiminished”); *cf. Wyoming v. Colorado*, 259 U.S. 419, 456-57 (1922) (involving a diversion to another valley from which water could not reach the complaining State). Similarly, if South Carolina alleges that Duke Energy’s storage of water to support hydroelectric generating operations in North Carolina has caused a portion of the alleged harm, she must account for the benefits to South Carolina of Duke’s operations (e.g., storage of water for flow augmentation to support downstream uses). South Carolina should not be heard to complain about activities in North Carolina that consume water from the Catawba River without also acknowledging the benefits that those activities confer on South Carolina -- benefits that might be curtailed as a result of the relief sought in this action.

2. Causation. In addition to identifying and quantifying her injuries, South Carolina should demonstrate how, and in what measure, “consumption occurring in North Carolina” has caused those injuries. *See North Dakota v. Minnesota*, 263 U.S. 365, 388 (1923); *New York v. New Jersey*, 256 U.S. 296, 302-03 (1921). South Carolina cannot attribute to North Carolina climatic and other factors that contribute to flow reduction in the Catawba River, nor can she ignore localized factors that contribute to the nature and extent of the alleged harms themselves. Several examples serve to illustrate the importance of this point:

a. Drought and Other Dry Periods. South Carolina acknowledges that river flows are sufficient much of the time, but claims that harms in South Carolina are caused by consumptive uses in North Carolina during times of drought and other, unspecified, “low-flow conditions.” It is incumbent on South Carolina to prove the degree to which her alleged harms were caused by consumption in North Carolina rather than by these “conditions.” For example, if the closure of boat ramps, reduced electrical generation and loss of assimilative capacity mentioned in South Carolina’s Complaint would have occurred, in whole or substantial part, by reason of dry regional conditions or elevated water temperatures irrespective of reasonable consumptive uses in North Carolina, then South Carolina cannot rely on these harms to carry her burden.

b. Self-Inflicted Injury. Likewise, South Carolina must demonstrate that the specific injuries she attributes to consumption in North Carolina were not caused or exacerbated by actions in South Carolina. *Missouri v. Illinois*, 200 U.S. 496, 522-26 (1906). For example, any water quality problems in South Carolina may be attributable in whole or substantial part to South Carolina’s wastewater permitting practices, which may unreasonably increase the waste load in the River, or to South Carolina’s own consumptive uses. If consumption of water in North Carolina alone is not the cause of the alleged injuries in South Carolina, then South Carolina cannot seek to lay these “harms” at North Carolina’s feet. In general, if South Carolina’s alleged water shortages and injuries are attributable to activities in South Carolina, including interbasin transfers, upstream consumption within South Carolina, inadequate conservation measures, or failure to plan for and utilize alternative water supplies or storage opportunities, then South Carolina must take responsibility for these failings and not claim the resulting problems among the injuries allegedly

attributable to consumption in North Carolina. *Colorado v. New Mexico*, 459 U.S. 176, 184-86 (1982); *Colorado v. Kansas*, 320 U.S. 383, 399 (1943).

c. Reservoir Management. Flows in the Catawba River Basin are completely controlled by a series of Duke Energy dams and associated hydroelectric generation facilities. Duke manages water storage and releases from this system according to the requirements of its FERC license in order to meet a wide variety of needs. Especially during periods of low basin inflow, the flows received by South Carolina water users in the lower portion of the basin are highly dependent on the timing and magnitude of Duke's reservoir releases.

In proving that its alleged injuries are caused by water consumption in North Carolina, South Carolina must demonstrate that, during drought or other low inflow periods, Duke's standard operating practices would have resulted in flows that are sufficient to avoid those injuries but for the consumptive uses in North Carolina

II. Discovery should be structured to permit the parties to address these issues in a sequential and logical fashion – a nine month period for South Carolina to specifically identify its harms, a nine month period for North Carolina to probe South Carolina's alleged harms and a period for expert discovery that is sufficient to facilitate necessary modeling of the river.

As discussed above, South Carolina must identify the consumptive uses in North Carolina that South Carolina contends are causing harm of serious magnitude to South Carolina: discrete harms that South Carolina asserts it has suffered as a result of North Carolina's use of the Catawba River. South Carolina has requested roughly nine months for such discovery. *See* Statement of Mr. Frederick, May 23, 2008 Hearing, Tp. 14.

North Carolina agrees that given the vague nature of the Complaint filed in this matter, South Carolina will require at least nine months of discovery for identification of the alleged "harms," the cause of these "harms," and North Carolina's consumptive

uses of water from the Catawba River if related to these “harms.” As discussed above in Issue I, South Carolina’s identification of “harms” must include: (1) the specific injury suffered, geographic location of the injury, and time of injury; and (2) a demonstration that it is North Carolina’s consumptive uses that have caused the alleged “harms,” rather than other factors that have caused the alleged “harms.” The alleged “harms” must be readily identifiable and capable of being quantified and modeled.

Following South Carolina’s filing of a report identifying the specific alleged “harms” and the consumptive uses by North Carolina allegedly related to those “harms,” North Carolina should be given a similar time period (nine months) to probe South Carolina’s allegations. Thus, North Carolina proposes that the length of time necessary to conduct factual discovery in Phase I should be eighteen months from the date of the Special Master’s order resolving the discovery schedule.

At the conclusion of factual discovery, South Carolina should provide expert reports pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure. Given that South Carolina’s Bill of Complaint was filed on June 7, 2007, this will give South Carolina over two years for its experts to conduct the modeling work they believe is necessary to support South Carolina’s claim. North Carolina requests a two month period within which to depose South Carolina’s experts.

North Carolina’s experts cannot effectively begin to conduct necessary modeling work until North Carolina knows the specific harms that South Carolina intends to put at issue in this case. Moreover, the experts retained by North Carolina have informed North Carolina’s counsel that this modeling work will require nine months to complete. Thus, North Carolina proposes that its expert reports for Phase I be due nine months following South Carolina’s expert reports. This, of course, would mean that these

expert reports would be due only seven months after the depositions of South Carolina's experts are complete. Like North Carolina, South Carolina should have a two month period to conduct depositions of the experts identified by North Carolina.

North Carolina further proposes that any rebuttal reports from South Carolina's experts be due within thirty days of the conclusion of the time period for deposing North Carolina's experts. Any deposition necessitated by such rebuttal reports would be conducted within thirty days of South Carolina's deadline for producing expert rebuttal reports. North Carolina should be allowed to file a surrebuttal expert report within thirty days of close of the period for rebuttal depositions, and surrebuttal depositions would be conducted within thirty days of North Carolina's filing of such surrebuttal report, if any.

Thus, North Carolina believes that factual discovery for Phase I will require approximately eighteen months and expert discovery will require approximately fourteen additional months, depending on the need for a surrebuttal expert report and associated depositions. If South Carolina were able to identify its alleged harms with specificity sooner than nine months from the date of the Special Master's order, the length of discovery, of course, could be reduced.

The discovery period for Phase I that is proposed by North Carolina is consistent with similar original action proceedings. For example, *Nebraska v. Wyoming*, No. 108 Original, involved an action filed in 1986 seeking to enforce the 1945 decree apportioning the water of the North Platte River, and in that case the first period of discovery lasted approximately two years and led to Wyoming's motion for summary judgment, which was denied, followed by a second period of extensive discovery across approximately one and three-quarters years in preparation for an evidentiary hearing. See 1992 Report 13, 1992 U.S. S. Ct. Briefs LEXIS 993 (1992); 1989 Report 32, 1989

U.S. S. Ct. Briefs LEXIS 1582 (1989); United States' Brief Opposing Exceptions to the First and Second Reports of the Special Master, pp. 8-9, 1992 U.S. S. Ct. Briefs LEXIS 995 (1992); United State's Brief Opposing Nebraska's Motion for Leave to File Amended Petition, pp. 1-3, 17-18, 1991 U.S. S. Ct. Briefs LEXIS 993 (1991); Nebraska's Motion for Leave to File Amended Petition, pp. 10-12, 1991 U.S. S. Ct. Briefs LEXIS 996 (1991).² As suggested in *Nebraska v. Wyoming*, although not the result in that case, adequate time for discovery may allow the Court to dispose of this matter on

² See, e.g., Report of Special Master in *Oklahoma and Texas v. New Mexico*, 1990 Report 7-11, 1990 U.S. S. Ct. Briefs LEXIS 1435 (1990) (an action filed in 1987 alleging New Mexico's violation of the Canadian River Compact and seeking to enforce the Compact, where formal discovery required approximately 11 months in addition to a period of 7 months of informal exchange of documents); Reports of Special Master in *Texas v. New Mexico*, 1982 Report 10-19, 26-28, 1982 U.S. S. Ct. Briefs LEXIS 1846 (1982) and 1979 Report 3-5, 444 U.S. 912 (1979) (an action filed in 1974 alleging that New Mexico had breached the Pecos River Compact by failing to deliver water to the Texas-New Mexico state line in accordance with the terms of the Compact and seeking enforcement of the Compact, where discovery occurred sometime between the Special Master's issuance of the 1979 pre-trial order grouping the issues to be decided and the time of the Special Master's issuance of his 1982 Report); *Wyoming v. Colorado*, 259 U.S. 419, 455 (1922) (an action filed in 1911 for the purpose of preventing a diversion of part of the water of the Laramie River where the Court applied the law of prior appropriation and issued a decree strictly limiting Colorado's withdrawal of water from the Laramie, where discovery occurred sometime between the Court overruling Colorado's motion to dismiss in 1912 and the close of taking of evidence in 1914); *Colorado v. Kansas*, 320 U.S. 383 (1943) (an action filed in 1928 against Kansas and the Finney County Water Users' Association seeking to enjoin both from further litigating rights in the Arkansas River where Kansas again sought to enjoin Colorado from diverting water from the River, the Court appointed a commissioner to take evidence and a Special Master to take additional evidence, and the Court did not hear arguments and issue its opinion until late in 1943); *Kansas v. Colorado*, 206 U.S. 46, 105-06 (1907) and *Kansas v. Colorado*, 185 U.S. 125, 142-47 (1902) (an action filed in 1901 alleging that Colorado intended to divert all of the water of the Arkansas River for use in Colorado so that neither surface water nor groundwater should cross into Kansas, where discovery occurred sometime between the Court's denial of Colorado's demurrer in 1902, the Court's appointment of a commissioner to take evidence in 1904, and the Court's determination in 1907 that Kansas had not made out a case entitling it to a decree at that time).

motions without further evidentiary proceedings. Even if the Court does not dispose of the matter on motions, however, the scope of the proceedings will be beneficially defined through adequate time for discovery in Phase I. *See* 1989 Report 32, 1989 U.S. S. Ct. Briefs LEXIS 1582 (1989) (determining after denying motions for summary judgment that the parties should develop relevant evidence and litigate, *inter alia*, questions involving the Inland Lakes); United States' Brief Opposing Exceptions to the First and Second Reports of the Special Master, pp. 8-9, 1992 U.S. S. Ct. Briefs LEXIS 995 (1992) (the Special Master supervised pretrial proceedings and discovery aimed at narrowing and defining the issues).

CONCLUSION

For the reasons set out in this brief, South Carolina should be required to identify the consumptive uses that South Carolina contends are causing actual, or threatened imminent, harm of serious magnitude to South Carolina in such a way that each discrete "harm" alleged to have been caused by North Carolina's use of the Catawba River is identifiable, is capable of being quantified, and is capable of being modeled as supported by expert reports. Consistent with such a sequencing of this case, North Carolina requests that the following schedule be entered for Phase I:

1) Factual discovery for Phase I shall conclude eighteen months following the Special Master's rulings with respect to the scope of discovery;

2) Within nine months following the Special Master's rulings with respect to the scope of discovery, South Carolina shall be required to identify in a report filed with the Special Master the specific "harm[s]" alleged by type, location, time of occurrence, duration, related consumptive use by North Carolina and other pertinent factors that will enable the Court to assess whether those harms are of a serious magnitude;

3) South Carolina shall provide all Phase I expert reports required by Rule 26(a)(2) immediately upon the close of factual discovery;

4) Any deposition of the experts identified by South Carolina shall be conducted within two months of the close of factual discovery;

5) North Carolina shall provide all Phase I expert reports required by Rule 26(a)(2) within nine months of the close of factual discovery;

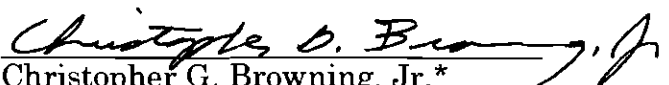
6) Any deposition of the experts identified by North Carolina shall be conducted within eleven months of the close of factual discovery;


7) Any rebuttal report by South Carolina's experts shall be provided within twelve months of the close of factual discovery, and any deposition or redeposition necessitated thereby shall be conducted within thirteen months of the close of factual discovery; and


8) Any surrebuttal report by North Carolina's experts shall be provided within fourteen months of the close of factual discovery, and any deposition or redeposition necessitated thereby shall be conducted within fifteen months of the close of factual discovery.

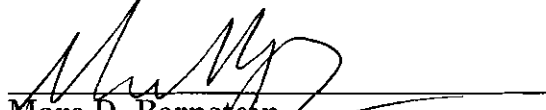
Respectfully submitted, this the 16th day of June, 2008.

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