

IN THE
Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

Before Special Master
Kristin Linsley Myles

CITY OF CHARLOTTE'S MOTION FOR PERMISSION
TO PARTICIPATE AS AN AMICUS CURIAE

The City of Charlotte ("Charlotte") respectfully moves the Special Master for permission to participate in this case as an *amicus curiae*. As Chief Justice Roberts emphasized in the dissenting opinion, the Court "often denies motions to intervene while granting leave to participate as an *amicus* in original actions generally . . . and in equitable apportionment actions specifically . . ." South Carolina v. North Carolina, No. 138 Grig., slip op. at 13 (Roberts, C.1, dissenting) (citations omitted). The Court's "familiar and customary approach," id. at 14, is well suited to this action because Charlotte, although denied participation as a party, is by far the major diverter of water from the North Carolina portion of the Catawba River basin and, consequently, is the focus of South Carolina's complaint seeking injunctive relief to address her allegation that harm has been caused by such diversions.

Charlotte's aim is to be as helpful as possible to the Special Master's consideration of facts and law in this case, and is prepared to do so as the Special Master sees fit. Charlotte does not seek a broad order granting permission to participate generally, and does not believe it is necessary at this time for the Special Master to define Charlotte's role in terms of particular aspects in which Charlotte will, or will not, be allowed to participate. With the exception of a few aspects, discussed below, Charlotte would envision making specific requests to participate, or responding to specific requests from the Special Master or the Parties, as the case progresses.

In order to monitor the progress of the case and remain prepared to offer benefits as an *amicus curiae*, Charlotte requests an initial order allowing it to do several specific things. First, Charlotte requests permission to take part in the periodic conferences with the Special Master, as it has done since the case began. Courts often conduct status conferences and motion hearings in open courtrooms; Charlotte sees no reason why it should not be allowed to hear discussions during the telephonic conferences held in this case. Second, Charlotte asks that it be served with all filings and other documents, notices, and correspondence served on or provided to the Parties by any Party or the Special Master. As most of these communications are provided electronically, the retention of Charlotte on the Parties' and the Special Master's email lists should not be a burden. Finally, Charlotte requests permission to be present at all hearings and depositions.

Beyond those few things, Charlotte would seek the Special Master's permission, on a case-by-case basis, to participate more fully in specific aspects of the case. As discussed below, Special Masters in other original actions have permitted *amici* to participate through a variety of means. Charlotte would urge the Special Master, in addressing Charlotte's case-by-case requests,

to consider the value to the Court in obtaining Charlotte's views, analysis and information, as well as Charlotte's need to represent its interests in the case.

CHARLOTTE'S INTERESTS

South Carolina takes the position that the proposed intervenors, including Charlotte, should be able to "represent their interests" by participating in the case as *amicus curiae*. Exceptions of the State of South Carolina to First Interim Report of the Special Master at 54.11 Appearing before the Court as *amicus curiae* itself, the United States made essentially the same argument. Brief for the United States as *Amicus Curiae* in Support of Plaintiff's Exceptions at 20 n.3; see also Oct. 13, 2009 Tr. at 20. Therefore, a brief review of Charlotte's interests in this case should be helpful in deciding the motion.

The Court has said that "[t]he gravamen of the complaint is that North Carolina has authorized upstream transfers of water from the Catawba River basin that exceed North Carolina's equitable share of the river." South Carolina v. North Carolina, No. 138, Orig., slip op. at 2. The Court noted that South Carolina's complaint focuses on Charlotte's authority to transfer 33 million gallons per day (MGD), the Concord-Kannapolis authority for 10 MGD, the authority of CRWSP's co-venturer, Union County, to transfer 5 MGD, and an unknown number of *de minimis* or grandfathered transfers. The Court also noted that South Carolina alleges it has been harmed by "these upstream transfers." Id. Finally, the Court pointed out that South

^{1/} See also Sur-Reply Brief of the State of South Carolina in Support of Exceptions to First Interim Report of the Special Master at 13 ("To the extent their views will benefit the Court, they can be expressed as *amici* without the panoply of party rights that an intervenor possesses."); Brief of the State of South Carolina in Opposition to Motion for Leave to Intervene of the City of Charlotte, North Carolina at II ("Like the other would-be intervenors, Charlotte fails to explain why its participation as *amicus curiae* would be insufficient to assert its interests."); Brief of the State of South Carolina in Opposition to Motion of the Catawba River Water Supply Project for Leave to Intervene at 8 ("CCRWSP), like Duke, cannot demonstrate why participation as *amicus curiae* would be insufficient to assert its interests."); Brief of the State of South Carolina in Opposition to Duke Energy Carolinas, LLC's Motion for Leave to Intervene and File Answer at 14 ("Duke cannot demonstrate why participation as an *amicus curiae* would be insufficient to assert its interests.").

Carolina seeks relief from this alleged harm in the form of a decree that, among other things, enjoins North Carolina from continuing to authorize some or all of these transfers. Id. 2/

Aside from the unknown *de minimis* or grandfathered users, Charlotte is the only entity that withdraws water from the North Carolina portion of the river and transfers that water from the basin. Concord and Kannapolis have not done so. CRWSP withdraws water from the South Carolina stretch of the river; a portion of that water is transferred out of the basin under authority granted by both South Carolina and North Carolina. Duke makes no interbasin transfers of water. South Carolina requests no relief against the intervenor parties, 3/ but seeks to enjoin North Carolina's approval of Charlotte's interbasin transfers.

In seeking to enjoin a water diversion, South Carolina bears the burden of proving that the diversion is causing real or substantial injury or damage. Connecticut v. Massachusetts, 282 U.S. 660, 672 (1931). 4/ South Carolina will endeavor to carry that burden here. Her efforts to show actual harm that has been caused by actual diversions of water from the North Carolina portion of the river must focus on Charlotte and the unknown *de minimis* or grandfathered diverters.

As the United States emphasized at oral argument on the motions to intervene, the Court decides whether to exercise its original jurisdiction on the basis of its view of the plaintiff State's complaint. See Oct. 13, 2009 Tr. at 21-22. Here, the Court has described its view of South Carolina's complaint in unmistakable terms that, when considered in light of the actual practice

2/ According to her complaint, South Carolina seeks an equitable apportionment of the river to establish the yardstick by which to measure the lawfulness of North Carolina's approval of past and future interbasin transfers. See South Carolina v. North Carolina, No. 138, Orig., slip op. at 2-3; Complaint at 10.

3/ See Oct. 13, 2009 Tr. at 16 ("Here the form of relief South Carolina seeks goes only against North Carolina.").

4/ See also Colorado v. New Mexico, 459 U.S. 176, 187 o.13 (1982) (citing New Jersey v. New York, 283 U.S. 336, 344-45 (1931); Kansas v. Colorado, 206 U.S. 46, 117 (1907); Colorado v. Kansas, 320 U.S. 383, 393-94 (1943)).

of interbasin transfers in North Carolina, focus this case primarily on Charlotte's diversion of water. Charlotte's interest is in protecting its right to make that diversion.

APPROPRIATE FORMS OF PARTICIPATION

South Carolina has identified several forms of participation that she believes are appropriate for an *amicus curiae*. In opposition to Duke's motion for leave to intervene, South Carolina said that, as an *amicus curiae*, "Duke would be free to file an *amicus* brief on the merits, either supporting or criticizing the Special Master's report and recommendations." Brief of the State of South Carolina in Opposition to Duke Energy Carolinas, LLC's Motion for Leave to Intervene and File Answer at 14. In opposition to Charlotte's motion, South Carolina said Charlotte might file an *amicus* brief "as to any appropriate dispositive motion." Brief of the State of South Carolina in Opposition to Motion for Leave to Intervene of the City of Charlotte, North Carolina at 11. And in her sur-reply brief to the Court, South Carolina said that CRWSP's and Duke's interest in presenting evidence could be accommodated as an *amicus curiae* because "[a]n *amicus* . . . 'may selectively be permitted to introduce evidence . . . to develop certain issues.'" Sur-Reply Brief of the State of South Carolina in Support of Exceptions to First Interim Report of the Special Master at 13 (quoting the Special Master's Third Interim Report in Nebraska v. Wyoming, at 20). Charlotte agrees with South Carolina that these are among the forms of *amicus* participation that would be appropriate in this case.

In addition, South Carolina points to other Special Masters' accommodations of *amici* in two original actions as examples of the appropriate types of participation that can enable an *amicus curiae* to represent its interests: Nebraska v. Wyoming, 507 U.S. 584 (1993), 5/ and

5/ The Chief Justice also pointed to Nebraska v. Wyoming, finding that case to be "particularly instructive" because "[t]he interests of those entities in the water dispute were quite similar to the interests of the entities seeking to intervene here" South Carolina v. North Carolina, No. 138 Orig., slip op. at 13 (Roberts, C.J., dissenting).

Alaska v. United States, 545 U.S. 75 (2005). Charlotte agrees that these two examples are instructive.

In Nebraska, the Special Master denied five motions to intervene, but invited all five movants to participate as *amici curiae* "both to preserve their interests and as traditional friends of the court to aid in full exposition of the issues." Special Master, First Interim Report, Nebraska v. Wyoming, No. 108, Orig. (June 14, 1989) at 6. ^{6/} Even though intervention was denied on the basis that existing parties adequately represented the movants' interests, id. at 6-14, the Special Master "prOvided for active involvement in the case by the *amici*, allowing them to present affidavits, file briefs, including reply briefs, as well as the potential to participate more fully respecting key matters in the proceedings upon a showing of good cause." Id. The Special Master said: "[t]o the extent that the case might have some impact on the eventual disposition of their interests, I thought it fitting that the *amici* should work closely with the parties to ensure full exposition of the necessary evidence and examination and availability of important witnesses." Id. at 8. Several of the *amici* participated actively by "filing briefs, presenting affidavits and appearing at hearings." Id. at II, 12.

The Special Master subsequently denied *amici's* renewed motions to intervene, in part because they had not shown that existing parties had failed to represent their interests, and rejected the argument of one *amicis curiae* (the Platte River Trust) that it needed to become a party in order to play a "more active litigation role." Special Master Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention, Nebraska v. Wyoming, No. 108, Orig. (Apr. 9, 1992) at 103-04. ^{2/} The Special Master concluded that party status

^{6/} Available at <http://www.supremecourtus.gov/SpecMastRpt/ORG%20108%20061489.pdf> (last visited Feb. 18, 2010).

^{1/} Available at <http://www.supremecourtus.gov/SpecMastRpt/ORG%20108%20040992.pdf> (last visited Feb. 18, 2010).

"would add little to the status the Trust already enjoys as an *amicus*," and added that "I have always seen the *amici* as potential sources of expertise and will continue to do so." *Id.* at 104.

As the case proceeded, the Special Master saw increasing value in *amici*'s participation. In his third interim report, the Special Master said "[t]he *amici* represent important interests and have added substantial factual information and learning. Indeed, it is contemplated that they may selectively be permitted to introduce evidence at trial to develop certain issues." Special Master Third Interim Report on Motions to Amend the Pleadings, Nebraska v. Wyoming, No. 108, Orig. (Sept. 9, 1994) at 20. ^{8/} In his final report, the Special Master also noted that *amici* had been permitted to make oral presentations at hearings. Final Report of the Special Master, Nebraska v. Wyoming, No. 108, Orig. (Oct. 12, 2001) at 12. ^{9/}

In Alaska, the Special Master denied motions to intervene by individuals and communities of native Alaskans because both of the parties, the State of Alaska and the United States, were presumed to represent the movants' interests. Report of the Special Master on the Motion to Intervene by Franklin H. James et al., Alaska v. United States No. 128 Orig. (Nov. 2001) at 1, 13. ^{10/} The Special Master allowed their participation as *amici curiae*. *Id.* at 22. Consistent with the approach Charlotte recommends here, the Special Master established certain parameters for *amici* participation, and reserved judgment to address other aspects on a case-by-case basis. Initially, the Special Master: allowed *amici* to be served with "all of his future orders, reports, rulings and recommendations"; allowed them to "attend the trial and all hearings"; allowed them to "file written *amicus curiae* briefs addressing any subject to be decided by the

^{8/} Available at <http://www.supremecourtus.gov/SpecMastRpt/ORG%20108%20090994.pdf> (last visited Feb. 18, 2010).

^{9/} Available at http://www.supremecourtus.gov/SpecMastRpt/ORG_108_10122001.pdf (last visited Feb. 18, 2010).

^{10/} Available at http://www.supremecourtus.gov/SpecMastRpt/OrigI28_112601.pdf (last visited Feb. 18, 2010).

Special Master"; and required the parties to serve on *amici* all motions and briefs concerning summary judgment, settlement and "conclusions to be drawn from the evidence submitted at trial." Case Management Order No. 14, Alaska v. United States, No. 128 Orig. (June 3, 2002) at 1-2. ^{11/} The Special Master required that *amici* obtain specific permission to actually participate in the trial and any hearings, and required that they seek permission from the Court to file briefs regarding the Special Master's reports and recommendations. Id. at 2.

As these examples demonstrate, the Special Master's decision to grant or deny a motion to participate as an *amicus curiae* is a matter of discretion. In Virginia v. Maryland, the Special Master denied the motion of Loudoun County, Virginia to participate as an *amicus curiae* after concluding that the County would not "add[] value or net benefit to the resolution of this matter that the State parties would not provide." Report of the Special Master Appendices, Virginia v. Maryland, No. 129, Orig. (Dec. 9, 2002) at F-2. ^{12/} Applying that standard, Charlotte believes its participation thus far in the proceedings supports a decision to allow its continued involvement as an *amicus curiae* to assist the Special Master and add value to the resolution of this matter.

CONCLUSION

For the foregoing reasons, the Special Master should grant Charlotte's motion and issue an order: (1) allowing Charlotte to participate as an *amicus curiae*; (2) specifying Charlotte's right to participate in the specific ways outlined above; and (3) providing that Charlotte may seek the Special Master's permission to participate more fully in specific aspects of the proceedings in order to aid in the Special Master's consideration of factual and legal questions and to represent Charlotte's interests.

^{11/} Available at <http://docs.law.gwu.edu/facweb/gmaggs/128orig/cmo-14.pdf> (last visited Feb. 18, 2010).
^{12/} Available at <http://www.supremecourtus.gov/SpecMastRpt/Orig129SpecMasterApp.pdf> (last visited Feb. 18, 2010).

Respectfully submitted,



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February 19, 2010

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STATE OF SOUTH CAROLINA,

Plaintiff,

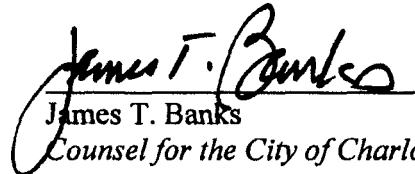
v.

STATE OF NORTH CAROLINA,

Defendant.

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 February 19, 2010, I caused copies of Charlotte's Motion for Permission to Participate as an Amicus Curiae, 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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