

ANOTHER “CASE OF THE CENTURY?”: COMPARING THE LEGACY AND POTENTIAL IMPLICATIONS OF *ARIZONA V. CALIFORNIA* IN THE *SOUTH CAROLINA V. NORTH CAROLINA* PROCEEDINGS

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Abstract With geometrically growing demand and a realization of muddied supply management and source limitation, the conceptualization of water and its corresponding allocation are changing on global, national, state, and local scales. Allocation is shifting from traditionally institutionally-favored water users (e.g. agricultural and hydro-power industries) to more wealthy urban centers through interbasin transfers and to environmental flow restoration for threatened or endangered species. The state of South Carolina is beginning to realize the actual cost of minimal water policy on interstate watercourses in its relationships with its neighboring states (North Carolina and Georgia) and to act accordingly. In a potentially precedent-setting action in June 2007, South Carolina brought suit in the U.S. Supreme Court against the state of North Carolina over the approved interbasin transfer of 13 million gallons per day from the Catawba River to two North Carolina cities in the Yadkin-Pee Dee River basin.

This research examines the progression of the lawsuit to date, using the *South Carolina v. North Carolina* pleadings, other legal research and primary and secondary historical documents to compare the proceedings under the assigned special master with those of the events in the seminal Colorado River lawsuit, *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963). The findings reveal that although most of the decisive water law precedent originates in the arid West, the present suit has the potential to change that disparity and set a new course in eastern water law. Additionally, the implications and legacies of the *Arizona v. California* (1963) holding have import and bearing on South Carolina's legal strategies and ultimate water policy and planning objectives (e.g. accommodating anticipated shifts in water users and future economic development).

Introduction

The United States Supreme Court's (USSC) seminal holding in *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963) was one of the most protracted water battles in the Western U.S. and has been dubbed “the Case of the Century.” It represents the David and Goliath story in water law, with a

small state challenging and prevailing over the largest water-consuming state on the lower portion of the largest western river, the Colorado. Native American intervenors ultimately reaped the greatest benefit from the holding, garnering one fifth of Arizona's share (Reisner 1993; Sax et al. 2006; Getches 1997).

Although the Catawba River, originating in the North Carolina (NC) mountains and extending through South Carolina's (SC) sandhills region, is nowhere near the volume or majesty of the Colorado, its flows are the source of what may be the next “Case of the Century.” They provide hydroelectric power, economic development, recreation, and drinking water for both states. Like the state of Arizona, SC challenged its neighboring state's approval of an interbasin transfer of 13 million gallons per day from the Catawba River to two NC cities in the Yadkin-Pee Dee River basin. It filed a *parens patriae* suit against the state of NC in the U.S. Supreme Court in June 2007 alleging harm and seeking relief through equitable apportionment. The repercussions of the eventual holding are projected to ripple throughout other large riparian systems, including the Savannah River. Given this potential, *South Carolina v. North Carolina* warrants comparison with *Arizona v. California* (1963), despite eastern equitable apportionment precedent in *New Jersey v. New York*, 283 U.S. 336 (1931) (Sax et al. 2006).

Background and Related Work

There have been numerous accounts about the *Arizona v. California* (1963) case, including the events precipitating the filing (Hundley 2001; August 2007), the actual 11-year battle (August 2007), and the aftermath of the holding (Reisner 1993). As late as 2006, over 40 years after the holding, the USSC issued another binding decree (*Arizona v. California*, 547 U.S. 150 (2006)). But the focus for this work involves the actual facts and legal strategies used in the case.

AZ's initial arguments were based on water rights between the states, and they faced the problem of California's perfected prior appropriation being put to beneficial use. The law was

recognized in all states that were party to the Colorado Compact. But a change in legal counsel in the spring of 1957 caused the argument to shift. Instead of contending with water rights, AZ invoked the supremacy of a federal statutory allocation through the Boulder Canyon Project Act of 1922. And they ultimately prevailed, as the USSC agreed that the Act controlled the mainstream of the Colorado.

In contrast, the SC complaint involves NC interbasin transfers and a state-initiated statutory form of regulated riparianism. According to the SC complaint, NC adopted an interbasin transfer statute in 1991 that regulates transfers over 2 million gallons per day and established a review process for affected parties in the watershed. Since 1991, NC has authorized transfer of over 48 million gallons per day from the Catawba to other in-state basins (South Carolina Brief in Support of Motion for Leave to File Complaint 2007).

Despite the recommendation of an interstate commission to wait six months, the North Carolina Environmental Management Commission approved the most recent transfer in January 2007 (South Carolina Brief in Support of Motion for Leave to File Complaint 2007). Meanwhile, SC and NC were purportedly attempting to compact on the river. But the approval caused SC to forgo further compacting efforts and file suit under Article III, § 2, clause 2 of the Constitution, which allows the USSC to hear disputes between two or more states, and 28 U.S.C. § 1251(a). SC sought an injunction on NC's interbasin transfers, an equitable apportionment of the Catawba and appointment of a special master, and to enjoin NC from any other transfers that violate the apportionment (South Carolina Brief in Support of Motion for Leave to File Complaint 2007).

There are two main issues in the case; namely, whether NC's transfer statute is invalid because it allows NC to use more than its equitable share of the Catawba River, causing downstream user injury, and whether that injury should be remedied with equitable apportionment and appointment of a special master.

SC argues that there is historic volume variability in the Catawba's natural flow as determined in the FERC re-licensing process for Duke Energy and that it is subject to prolonged droughts that have affected SC as the downstream user (e.g. 1998 – 2002 and the economic harm + inability to drink the water from the Wateree's high algal content). Through expert opinion (e.g. supporting letters from hydrologists), NC's Jan. 2007 approved transfer combined with earlier transfers (a perfected claim through the NC transfer statute) exceed the Catawba's dependable flow.

SC also argues that federal common law trumps state statutes (e.g. NC's transfer statute) in resolving interstate river issues (and is only asserting this on the Catawba River). So the NC transfer statute is invalid for resolving an interstate river dispute, particularly because the NC Environmental Management Commission need only consider "a number of factors . . . in granting a permit, all of which on their face

pertain only to North Carolina's interests." (South Carolina Brief in Support of Motion for Leave to File Complaint, 6)

Consequently, SC argued that it is entitled to equitable apportionment as a remedy, and NC should take action consistent with the apportionment after the special master is appointed (South Carolina Brief in Support of Motion for Leave to File Complaint 2007).

NC filed a reply brief, the USSC accepted the case and assigned the first female special master in the country, Kristin Linsley Myles. The states are currently attempting to agree upon a case management plan, after having concluded that bifurcation and phased discovery is appropriate. The first phase will involve whether SC can show harm, and if so, the second phase will involve legal and factual issues regarding equitable apportionment. The states are also arguing about the scope of the pleadings, including the appropriate geographic boundary and whether intervenors (the City of Charlotte, the Catawba River Water Supply Project, and Duke Energy) should be permitted. Special master Myles granted them intervenor status in May 2008.

Methodology

This is a comparative assessment of the factual and legal circumstances of each case, in order to draw parallels and introduce potential lessons for SC from AZ's experience. To do so, the author uses legal and historical research, examining pleadings for the *South Carolina v. North Carolina* suit, the holding(s) in the *Arizona v. California* (1963) suit, and other primary and secondary historical sources, particularly on the latter.

Findings

Despite geographic and climatic differences between eastern and western states, there are several factual and legal parallels that can be drawn in the two cases.

Factual Similarities

The primary one is the disparate power relationship between the plaintiff and the defendant. Both California (CA) and NC are/were in stronger economic positions than the plaintiff states in each case and were consistently more developed (legally, physically, economically, etc.). Both also have/had an interest in delaying the outcome, because each could continue to consume during litigation (Hundley), watering thirsty Southern California or the greater Charlotte metropolitan statistical area.

Arizona (AZ) and SC are somewhat similarly situated (despite a larger GDP disparity between AZ and CA than between SC and NC). They each sought to grow and/or reserve the potential to do so for economic and social reasons. Neither had an interest in delay, as AZ had already depleted its surface water and was rapidly diminishing its groundwater aquifers in the 1950s (Hundley 2001; Reisner 1993; August 2007; Sax et al

2006), and SC was experiencing economic and drinking water effects from water reduction in the Wateree in 2006.

Legal Similarities

Legally, both AZ and SC face(d) daunting and somewhat untenable legal hurdles, because SC asserted most of its harm during times of drought, acknowledging adequate volumes more generally on the river (despite the Catawba's variability). AZ was challenging a state that had perfected its appropriative water rights to 5.3 million acre-feet a year, despite the Boulder Canyon Project Act allocation of 4.4 (August 2007). Even if AZ had wanted to use 900,000 acre-feet per year (so that they would not lose the right under the rules of an appropriative system), they had no infrastructure to transfer the allocation and put it to beneficial use. Through a fortunate turn of events for AZ, they switched argument course with new counsel (Mark Wilmer) and preempted CA's perfected appropriation with Congressional apportionment through the Boulder Canyon Project Act of 1922 (August 2007). Like CA, NC created a de facto prior appropriation situation through the interbasin transfer statute and associated approvals. Because the *South Carolina v. North Carolina* suit hasn't even reached discovery, there are no other legal similarities.

Differences

The factual and legal differences between the positions of the plaintiffs and defendants are equivalent, if not surpass their similarities. However, the lessons from *Arizona v. California* (1963) should still act as a guide for SC in its strategy and more importantly, in the wake of the holding in AZ's favor.

Factual Differences

In terms of physical growth, AZ was superseding that which has been experienced in SC, causing AZ's reliance on water to rapidly increase. As its cities grew, AZ suffered subsidence from groundwater overdraft. SC's growth is comparatively minimal in the Catawba basin.

Unlike SC and NC, there had been a long and protracted fight occurring between AZ and CA before AZ actually filed suit (Hundley 2001; August 2007). Although SC has objected as a downstream user affected by a proposed interbasin transfer, there is no long-standing fight between the two states over water.

Legal Differences

Legally, SC is relying on establishing the harm threshold and then arguing for equitable apportionment. The case has been bifurcated and this first hurdle must be passed before the special master will consider the terms of the equitable apportionment. In contrast, once the new counsel stepped in, AZ no longer had to fight the water rights priority battle. Instead, they had to assert their statutory apportionment of 2.8 million acre-feet per year and show harm from its withholding. AZ's argument was saved by the Boulder Canyon Project Act,

which effectively apportioned the lower Colorado River. But SC cannot invoke the same; the state is asking for equitable apportionment, not showing harm from its violation. An analogous argument to AZ is curtailed by the fact that the Catawba has no compact, which would otherwise have extended similar authority and allocation assurance to the Congressional statutory allocation on the Colorado.

Adding to SC's burden, the special master permitted all intervenors early in the proceedings, including the City of Charlotte, the Catawba River Water Supply Project, and Duke Energy (Order Granting Motions for Leave to Intervene 2008). However, intervenors were only allowed later in the *Arizona v. California* (1963) proceedings, and they were limited to sovereign Native Americans.

Finally, there is a simple difference in the nature of the water rights involved in each river system. The common property nature of the riparian doctrine, even under a regulated riparian structure, means that SC has a more substantial and equal legal platform than AZ with CA's perfected, priority-based appropriative rights. In theory, an upstream riparian cannot harm a downstream riparian, but that is changing with more consumptive uses on riparian systems.

From AZ to SC: Lessons

Although it is still quite early in the *South Carolina v. North Carolina* suit, upon reading the filings to date, it is fair to anticipate years of wrangling. NC estimated 10 years with discovery after successful showing of harm in the bifurcation. Like *Arizona v. California* (1963), such protracted cases exact a toll on both sets of parties, as well as the special master (Rifkind suffered a stress-induced heart attack in the midst of that case (August 2007)).

SC's position might have been stronger if it had proverbially "cleaned its own house" before engaging in the litigation. While proposed S.428 was an attempt to allocate water and protect environmental flows, it was also introduced during drought and grandfathered all existing users—maintaining the disputed status quo. Had SC carefully examined its own uses, determined whether to permit surface water (aka regulated riparianism) before the drought and adopted S.428 or similar legislation protecting flows in addition to establishing the permitting system, it might have a more equal position in challenging NC. But until then, NC can argue that SC should not ask it to change its consumptive behavior until SC has been able to do so successfully itself.

As a legal strategy that differs from AZ's position, SC should have passed S.428 (or similar legislation) protecting environmental flows. Then they might have argued in the original complaint that NC's water consumption and interbasin transfers were interfering with reasonable environmental flow levels, regardless of drought. Because NC is challenging actual harm to SC based on their description of events during drought, this strategy would have established stronger grounds for

proving harm. But the lack of legal development may actually give SC an advantage.

In another form of “cleaning house,” SC would most definitely have benefitted from a compact. Had one been in place, SC could have invoked federal reservation and oversight like AZ, instead of relying on riparianism. This begs the question whether both states actually exhausted their compacting efforts and whether they had an obligation to do so. And it suggests that before the suit concludes, SC would benefit from entering a compact with Georgia (GA) over the Savannah River.

However, SC may have been forced to bring suit somewhat prematurely in order to prevent NC’s prescriptive right to the water through the interbasin transfers. Statutorily, NC could be close to establishing prescriptive rights to the Catawba and in that sense, SC had an obligation to object. But these weren’t grounds in the original motion.

In a larger sense, one must step back and ask whether the outcome of *Arizona v. California* was the right one in terms of water use for AZ, and the West more generally. Arguably, the answer is “no.” After the suit, hydrologists realized that the Colorado had been experiencing unusually wet years during the time in which the river was allocated, and they now know that water volumes are generally much lower (Reisner 1993; Sax et al. 2006).

Additionally, winning the lawsuit does not mean winning the battle. AZ suffered in its construction of the water conveyance system (the Central Arizona Project) thanks to CA’s subsequent Congressional interference (Hundley 2001; Reisner 1993). Water shortage was a reality, regardless of the legal outcome. And the Native American intervenors ultimately benefitted the most, receiving one-fifth of AZ’s allocation (Sax et al. 2006). As Reisner intimated, after discussing the legal issues in the case, “The *real* issues had much more to do with nature and economics than with law, and they were just beginning to make themselves felt” (259). Economic development did follow the water for AZ after the suit, and potentially the same will occur for SC.

But that begs the question of what SC is truly inviting with this suit. It’s possible that they will see unsustainable economic development enabled, as the state’s consumptive uses increase. It’s also possible that a negative outcome for SC will then set a precedent upon which GA can capitalize on the Savannah (e.g. the cities of Augusta and Savannah, as well as the potential for Atlanta’s straw). Equitable apportionment does not always produce the desired result, and there may be some surprise beneficiaries through the suit. In fact, the environment may be the new winner, analogous to the Native American intervenors in *Arizona v. California* (1963).

This lawsuit has the potential to change the course of eastern water law. Arguably, the stakes are as high here as in the *Arizona v. California* (1963) suit because of the potential to affect interbasin transfer statutes on shared watercourses (particularly for growing urban consumers) and to affect the course of the FERC re-licensing on contested interstate water bodies. Finally, the environment may prove to be analogous to the Native American intervenors. This case, arguably precipitated by drought, should have arrived long ago for equitable apportionment, or better, a compact to avoid the suit entirely. But North Carolina argued that even equitable apportionment isn’t needed outside of drought, given the Catawba’s capacity. Of all of the legacies that can be transferred from *Arizona v. California* (1963) to this suit, the most important is the idea of holistic, basin-wide sustainable and equitable water management policies.

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Conclusions and Future Research