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Another Case of the Century? Comparing the Legacy and Potential Implications of *Arizona v. California* and the *South Carolina v. North Carolina* Proceedings

ABSTRACT

*With growing demand throughout the United States, water allocation is shifting from traditional institutionally favored water users (i.e., agricultural and hydropower industries) to more wealthy urban centers through interbasin transfers and environmental flow restoration for endangered species. Even in the traditionally wet Southeast, this creates a powerful new tension between states. In a 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-Wateree River to two North Carolina cities, Concord and Kannapolis, in the Yadkin-Pee Dee River basin. This article examines the progression of the lawsuit and its settlement, using a triangulation of legal research and primary and secondary historical documents to compare the proceedings with those of the events in the seminal Colorado River lawsuit, *Arizona v. California*. The findings reveal that although most of the decisive water law precedent originates in the arid West, the present suit has the potential to set a new course in eastern water law, with bearing on future *parens patriae* legal strategies in interstate water disputes.*

I. INTRODUCTION

The U.S. Supreme Court's seminal holding in *Arizona v. California*¹ was one of the most protracted water battles in the western United States

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1. *Arizona v. California*, 373 U.S. 546 (1963). Unless otherwise noted, *Arizona v. California* refers to this 1963 opinion.

and has been dubbed the “Case of the Century.”² 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 largest southwestern river, the Colorado. Native American intervenors ultimately reaped the greatest benefit from the holding, garnering entitlement to a substantial portion of Arizona’s share.³

Although the Catawba-Wataree River originates in the North Carolina mountains and extends through South Carolina’s Sandhills region to eventually join the Broad River that terminates in the Atlantic Ocean, it has nowhere near the volume or majesty of the Colorado.⁴ However, its flow is the source of what may be considered the next “Case of the Century,” as it provides hydroelectric power, economic development, recreation, and drinking water for both states. Like the State of Arizona, South Carolina challenged its neighboring state’s use of the shared water source by filing a *parens patriae* suit⁵ against North Carolina in the U.S. Supreme Court in June 2007.⁶ The repercussions of the settlement are

2. See JACK L. AUGUST, JR., *DIVIDING WESTERN WATERS: MARK WILMER AND ARIZONA V. CALIFORNIA* xvi–xvii (2007); see also NORRIS HUNDLEY, JR., *THE GREAT THIRST: CALIFORNIANS AND WATER: A HISTORY* 305 (2001) (stating that “the trial in *Arizona v. California* became one of the longest, most expensive, and most hotly contested in U.S. Supreme Court history.”).

3. See *Arizona v. California*, 373 U.S. at 596, 600 (holding that the Native Americans were entitled to 1,000,000 acre-feet annually, determined by 135,000 acres of irrigable land, also known as an irrigable acreage standard); see also MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 260–62 (1986).

4. The Catawba-Wataree River flows for 300 miles from North Carolina into South Carolina, and was named America’s Most Endangered River in 2008 by *American Rivers*. See *About the Catawba-Wataree River*, CATAWBA RIVERKEEPER FOUNDATION, <http://www.catawbariverkeeper.org/about-the-catawba/catawba-wataree-facts/> (last visited Apr. 19, 2011). In contrast, the Colorado River flows for 1,450 miles to the Gulf of California from its headwaters in Colorado. See William Arthur Atkins, *Colorado River Basin*, WATER ENCYCLOPEDIA: SCIENCE AND ISSUES, <http://www.waterencyclopedia.com/Ce-Cr/Colorado-River-Basin.html> (last visited Apr. 19, 2011).

5. See Joseph W. Dellapenna, *Interstate Struggles Over Rivers: The Southeastern States and the Struggle Over the “Hooch,”* 12 N.Y.U. ENVTL. L.J. 828, 882–84 (2005) (stating that “[t]he Supreme Court announced at the beginning of the twentieth century that a state had the authority to bring disputes between states or between a state and a citizen of another state over resource management before the Court on a *parens patriae* basis even when the state had no direct interest in the resources apart from representing its citizens. In a *parens patriae* suit, citizens of a state involved in the litigation cannot participate independently in the suit unless they show a compelling interest apart from their interest as a citizen of the state.”).

6. Motion of the State of South Carolina for Leave to File Complaint, Complaint, and Brief in Support of its Motion for Leave to File Complaint, *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) (No. 06-138), 2007 WL 3283683 [hereinafter Motion, Complaint & Brief in Support], available at http://www.mto.com/sm/docs/5400335_1.pdf. See <http://www.supremecourt.gov/Search.aspx?FileName/docketfiles/22o138.htm> for the Supreme

projected to ripple throughout other large eastern riparian and regulated riparian systems, including the Savannah River.⁷

Given this potential, *South Carolina v. North Carolina*⁸ warrants comparison with *Arizona v. California*, despite eastern equitable apportionment precedent in *New Jersey v. New York*.⁹ This article analyzes the *South Carolina v. North Carolina* proceedings and settlement, assessing their potential to set as much eastern precedent as *Arizona v. California* did for western water law. It also evaluates the broader implications of the case in modern water disputes, particularly in terms of growth expectations and a legally empowered environmental paradigm.

II. METHODOLOGY

This article makes a comparative assessment of the factual and legal circumstances of each case, in order to draw parallels and introduce potential lessons for other *parens patriae* suits from the South Carolina and Arizona experiences. The author uses legal and historical research, analyzing the following: pleadings for *South Carolina v. North Carolina*; the Special Master's reports and ultimate holding in *Arizona v. California*; and other primary and secondary historical sources, particularly related to the latter, as *South Carolina v. North Carolina* was recently settled on December 10, 2010,¹⁰ and dismissed on December 14, 2010.¹¹

III. PROCEDURAL PROGRESSION/MILESTONES IN EACH CASE

There have been numerous accounts and perspectives related to the *Arizona* holding, including the events precipitating the filing,¹² the

Court official docket sheet, and <http://www.mto.com/sm> for links to papers filed directly with the Special Master.

7. See Mark Davis, *Preparing for Apportionment: Lessons from the Catawba River*, 2 SEA GRANT L. & POL'Y J. 44, 54–55 (2009–2010) (by accepting the case, the Court “seems also to be preparing itself for a new generation of apportionment cases and sending the message to other states to pay attention and begin preparing for the new water reality that even ‘water rich’ states now face.”).

8. *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) (overruling in part and sustaining in part South Carolina's exceptions to the Special Master's report on the intervenor status of non-state entities), and *complaint dismissed*, 131 S. Ct. 855 (2010) (mem.), and 131 S. Ct. 975 (2011) (mem.) (discharging the Special Master).

9. *New Jersey v. New York*, 345 U.S. 369 (1953).

10. Settlement Agreement, *South Carolina v. North Carolina*, 131 S. Ct. 855 (2010) (mem.) (No. 06-138) (dismissing the complaint).

11. Stipulation for Dismissal, *South Carolina v. North Carolina*, 131 S. Ct. 855 (2010).

12. AUGUST, *supra* note 2, at 43–59; REISNER, *supra* note 3, at 257–61; HUNDLEY, *supra* note 2, at 303–307.

actual 11-year battle,¹³ and the aftermath of the holding.¹⁴ Over 40 years later, in 2006, the Court issued another binding decree.¹⁵ This work relies on those accounts to augment the Special Master's Report (1960)¹⁶ and the 1963 holding itself to give an overview of the procedural and legal milestones in the case, creating a comparative baseline for the *South Carolina v. North Carolina* proceedings and settlement.

A. *Arizona v. California*

Arizona's initial arguments in its bill of complaint rested on the concept of equity in the Lower Colorado River, despite the fact that California had perfected its right under a prior appropriation standard to 5.362 million acre-feet per year, which was being put to beneficial use through delivery contracts.¹⁷ This was a higher volume than the 4.4 million acre-feet statutorily allocated in the Colorado River Compact of 1922, the Boulder Canyon Project Act of 1928, and the California Limitation Act of 1929, collectively known as the "Law of the River."¹⁸ The prior appropriation water-rights structure was used in all states that were party to the Colorado River Compact.¹⁹ Even though Arizona was suffering actual economic effects from lack of water, and its communities were overdrafting their groundwater supplies,²⁰ Arizona could not assert a legal claim to the water through prior appropriation because it was not yet using the water and when/if it did, Arizona would be junior to senior rights holders in California.²¹ California was effectively perfecting water

13. AUGUST, *supra* note 2, at 59–97.

14. *Id.* at 99–114; *see also* REISNER, *supra* note 3, at 262–65.

15. *Arizona v. California*, 547 U.S. 150 (2006).

16. Report of the Special Master, *Arizona v. California*, 373 U.S. 546 (1963) (No. 8).

17. AUGUST, *supra* note 2, at 62.

18. JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES* 799 (2006) (stating that "this 'Law' consists of an intricate mélange of interstate compacts, federal statutes, regulations, court decisions, contracts, and state law.").

19. AUGUST, *supra* note 2, at 69.

20. HUNDLEY, *supra* note 2, at 304–305.

21. To perfect a water right under a prior appropriative standard, an individual must get there first, also known as "first in time is first in right," *Irwin v. Phillips*, 5 Cal. 140 (1855), and show intent to apply the water to beneficial use, obtain actual physical control of the water through diversion (depending on the state and its environmental flow protection statutes), and apply the flow to beneficial use, *Empire Water & Power Co. v. Cascade Town Co.*, 205 F. 123 (8th Cir. 1913) (where recreation was not considered a beneficial use). Although the Colorado River Compact of 1922, which Arizona did not ratify until 1944, allocated 2.8 million acre-feet of the lower Colorado River to Arizona, it lacked the ability to physically divert the water from the system. The users were in central parts of Arizona, and the state required a significant infrastructure investment to move the water to these areas. Consequently, Arizona's users could not perfect their water rights under an appropriative system, while Southern California benefited from their lobbying for the federally

rights to more than its statutory allocation of 4.4 million acre-feet and arguing that Arizona had alternate sources (i.e., the Colorado tributaries, the Gila and Salt rivers).²² Arizona argued that it was entitled to the Gila since it was salvaged water.²³ Without a viable legal theory, the attorneys for Arizona “realized that Arizona had charged out of the gates and stumbled badly; they began to realize that they needed to sharpen their legal theory, modify their legal team, or both; or else they would lose the case.”²⁴

A change in legal counsel in the spring of 1957 shifted the entire strategy for Arizona. Instead of contending with perfected water rights and priority, Arizona invoked the supremacy of a federal statutory allocation through the Law of the River.²⁵ The new counsel, Mark Wilmer, argued that Congress’s passage of the Boulder Canyon Project Act²⁶ in 1928, and the subsequent construction of Boulder Canyon Dam, indicated Congress’s intent to assert control, akin to “dominant servitude” over the main stem of the river.²⁷ And when “the federal government assumed control of the river, to the extent at least that it intended to and did exercise its dominant servitude over and in the waters of the river, all other rights, howsoever they may be catalogued, ceased.”²⁸ As a result of the dam’s construction, Congress had the ability to determine the distribution of the water it stored.²⁹

But Congress had not directly addressed the tributaries to the Colorado, particularly the Gila River.³⁰ Arizona had perfected prior appropriative rights to this source, but California was arguing that under Article 3(b) of the Colorado River Compact³¹ of 1922, the Gila constituted surplus water to which California and Nevada were each entitled. As a result, California would prevail on the mainstream, because Arizona was receiving more than its allocation of the surplus.³² Wilmer again changed the course of the argument, using legislative history in the *Congressional*

constructed All-American Canal and the Metropolitan Water District’s bond-financed Colorado River Aqueduct.

22. AUGUST, *supra* note 2, at 80–82.

23. Mark Wilmer, *Arizona v. California, A Statutory Construction Case*, 6 ARIZ. L. REV. 40, 51 (1964–65).

24. AUGUST, *supra* note 2, at 65.

25. Wilmer, *supra* note 23, at 63.

26. Boulder Canyon Project Act, H.R. 5773, 70th Cong. (1928).

27. *Id.*; AUGUST, *supra* note 2, at 81–85.

28. Wilmer, *supra* note 23, at 63 (using *United States v. Twin City Power Co.*, 350 U.S. 259 (1956) to justify this reasoning).

29. AUGUST, *supra* note 2, at 77.

30. Wilmer, *supra* note 23, at 52.

31. Colorado River Compact of 1922, COLO. REV. STAT. § 37-61-101 (2002).

32. AUGUST, *supra* note 2, at 79–80.

Record and Article 8 of the same compact, which stated that prior perfected rights were safe from the terms of the compact.³³ That argument preserved Arizona's claim to 2.8 million acre-feet on the mainstream. After the 1960 Special Master's Report to the U.S. Supreme Court—Arizona ultimately prevailed in 1963³⁴—the Court agreed that the Boulder Canyon Project Act controlled the mainstream of the Colorado, conveniently excluding the Gila River and other appropriated tributaries.³⁵

And yet, Arizona had to share its victory, ceding a substantial portion of its 2.8 million acre-feet to federal reserved water rights for Native American tribes, through an extension of the *Winters* doctrine.³⁶ Although not explicitly relying upon it, the Court followed the *Federal Power Commission v. Oregon* holding that extended the federally reserved water rights to non-Native American federal lands, and ruled that the Native American tribes were entitled to Lower Colorado River water for present and future needs, as determined by the practically irrigable acreage quantification standard.³⁷

B. *South Carolina v. North Carolina*

In contrast, the South Carolina complaint was based on entirely different grounds, involving North Carolina interbasin transfers (IBT) and a state-initiated statutory form of regulated riparianism.³⁸ According to the bill of complaint, North Carolina adopted an IBT statute in 1991³⁹ that regulates transfers over 2 million gallons per day and established a review process for affected parties in the watershed.⁴⁰ Since 1991, North

33. *Id.* at 79–81.

34. Report of the Special Master, *supra* note 16; *Arizona v. California*, 373 U.S. 546 (1963).

35. *Arizona v. California*, 373 U.S. at 565–69, 590–91; Wilmer, *supra* note 23, at 52–53; Edward W. Clyde, *The Colorado River Decision—1963*, 8 UTAH L. REV. 299, 304 (1962–64).

36. *Arizona v. California*, 373 U.S. at 596, 600; REISNER, *supra* note 3, at 261–62. The *Winters* Doctrine, first articulated in *Winters v. United States*, 207 U.S. 564 (1908), states that whenever Congress creates a reservation of land, an implied reservation of water is created in order to fulfill the purposes of the reservation.

37. *Arizona v. California*, 373 U.S. at 596, 600. The Court set precedent in federal and Native American reserved rights doctrine in two ways. First, it applied the *Winters* Doctrine to non-Native American federally reserved lands, reserving rights to water with any federal land reservation through interpretation that silence implies reservation. Second, for Native American reservations of water, the Court followed *Fed. Power Comm'n v. Oregon*, 349 U.S. 435 (1955), to increase that reservation for future needs, so they are not limited by current population demands on Native American lands.

38. Motion, Complaint & Brief in Support, *supra* note 6.

39. Motion, Complaint & Brief in Support, *supra* note 6, Complaint at 2 (describing aspects of N.C. GEN. STAT. § 143-215.22 (2010)).

40. *Id.*, Brief at 6–7.

Carolina has authorized the transfer of over 48 million gallons per day from the Catawba-Wateree River to other in-state basins.⁴¹ North Carolina uses a variation of a regulated riparian water rights system, which was first adopted in 1967.⁴² South Carolina was formerly a riparian state, but changed to a regulated riparian system through S. 452,⁴³ South Carolina's Water Withdrawal Act, adopted June 11, 2010.⁴⁴

Despite the recommendation of an interstate commission to wait six months, the North Carolina Environmental Management Commission approved an IBT of 10 million gallons per day from the Catawba-Wateree River to two North Carolina cities in the Rocky River basin in January 2007.⁴⁵ Meanwhile, South Carolina and North Carolina purportedly attempted to enter into a compact on the river.⁴⁶ But the January 2007 transfer approval, which South Carolina opposed, caused the state to forgo further compact negotiations and to file suit under Article III, Section 2, clause 2 of the U.S. Constitution, and 28 U.S.C. Section 1251(a).⁴⁷ South Carolina sought an injunction of North Carolina's IBTs from the Catawba-Wateree River, an equitable apportionment of the same, and appointment of a Special Master, enjoining North Carolina from any other transfers that violate the apportionment, once instated as a remedy.⁴⁸

The bill of complaint presented two main issues; whether North Carolina's transfer statute is invalid because it allows North Carolina to use more than its equitable share of the Catawba-Wateree River, causing downstream users injury, and whether that injury should be remedied

41. *Id.*, Complaint at 1, Brief at 1.

42. Water Use Act of 1967, 1967 N.C. Laws, ch. 933, § 1 (codified as N.C. GEN. STAT. § 143-215.11 (2010)).

43. Motion, Complaint & Brief in Support, *supra* note 6, Brief at 1.

44. South Carolina Surface Water Withdrawal, Permitting, Use, and Reporting Act, 2010 S.C. Sess. Laws Reg. Sess. Act 247 (codified as amended at S.C. Code Ann. § 49-4-10 (2010)).

45. Motion, Complaint & Brief in Support, *supra* note 6, Brief at 7-9.

46. See Marjorie Riddle, *S.C. Is Ready for Water War with N.C.—State to Sue If Cities Given OK to Draw Water from Catawba*, THE STATE, Jan. 8, 2007, at A1. "But N.C. commission chairman David Moreau said it's too late to consider an interstate compact to resolve the Catawba issue. 'It's a very long process,' he said. 'It would take years of negotiation to bring the compact about. We've delayed the decision twice and held two very large public meetings to gather additional information. We've heard what people have to say.' The N.C. commission is acting on the proposal because water would be withdrawn from parts of the Catawba in that state."

47. Motion, Complaint & Brief in Support, *supra* note 6, Brief at 2.

48. *Id.*; Application of the State of South Carolina for a Preliminary Injunction, South Carolina v. North Carolina, 128 S. Ct. 349 (2007) (mem.) (No. 06-A1150) (denying preliminary injunction and granting motion for leave to file a bill of complaint), available at http://www.mto.com/sm/docs/4462131_1.pdf.

with equitable apportionment and appointment of a Special Master.⁴⁹ To support its claim, South Carolina argued that there is historic volume variability in the Catawba-Wateree's natural flow as determined in the Federal Energy Regulatory Commission (FERC) relicensing process for Duke Energy's power plants on the river,⁵⁰ and that it is subject to prolonged droughts that have affected South Carolina as the downstream user.⁵¹ Using expert opinion, South Carolina demonstrated that the combination of North Carolina's January 2007 transfer and earlier transfers⁵² cumulatively exceeded the Catawba-Wateree's dependable flow.⁵³

South Carolina also argued that federal common law trumps state statutes⁵⁴ in resolving the interstate river issues on the Catawba-Wateree

49. Motion, Complaint & Brief in Support, *supra* note 6, Brief at 9–14.

50. *Id.* at 4–5. Duke Energy began the comprehensive planning process for the relicensing application of its Catawba-Wateree Hydro Project in June 2003. According to Bowman, “[a]ll hydropower dams not owned by the federal government must obtain an operating license from FERC, unless the dam has been issued an exemption or is on a nonnavigable river (US Code, title 16, sec. 797[e]). When these 30- to 50-year licenses expire, the dam owner must reapply to FERC to obtain a new license (US Code, title 16, sec. 808). As part of this licensing process, FERC must determine whether issuing a new license is in the public interest, providing equal consideration to power development and nonpower uses of the river (e.g., fish and wildlife habitat, recreation, aesthetics) (US Code, title 16, sec. 797[e]).” Margaret E. Bowman, *Legal Perspectives on Dam Removal*, 52 *BioSci.* 739, 740 (2002). To ensure compatible accommodation of all beneficial public purposes on the river system while maintaining hydropower generation, license applicants must create a comprehensive plan to improve the water system on which the project is located. 16 U.S.C. §§ 802(a)(1), 803(a). After a three-year process, the Comprehensive Relicensing Agreement for the Catawba-Wateree Hydro Project was signed in August 2006, then revised and filed with FERC in December 2006. COMPREHENSIVE RELICENSING AGREEMENT FOR THE CATAWBA-WATEREE HYDRO PROJECT FERC PROJECT NO. 2232 at 3–5 (Dec. 22, 2006) [hereinafter COMPREHENSIVE RELICENSING AGREEMENT], available at <http://www.duke-energy.com/catawba-wateree-relicensing/final-agreement-summaries.asp> (click on Catawba-Wateree Final Agreement Signature Copy). It corresponds to and is a vital component of the actual license still to be issued by FERC. Settlement Agreement, *supra* note 10, at 2.

51. Motion, Complaint & Brief in Support, *supra* note 6, Brief at 4–6. For instance, South Carolina describes particular economic harm (or its potential) in the 1998–2002 drought on the Catawba River, which is subject to significant fluctuations in level. *Id.* at 5. The drought purportedly caused the water from the Wateree to be “undrinkable” in the city of Camden, due to high algal content. *Id.*

52. Which are perfected claims through N.C. GEN. STAT. § 143-215.22 (2010).

53. Motion, Complaint & Brief in Support, *supra* note 6, app. at 17a (Ex. 4: Affidavit of Dr. A. W. Badr (May 31, 2007)) (stating “that natural hydrologic conditions can cause insufficient flows in the Catawba River at any time of the year, and during severe droughts, the minimum flow requirement of 1,100 cfs may not be met for months at a time. Hydrologic conditions can result in periods when the basin does not have enough water to maintain the Catawba River at even minimally adequate flows, and during these times, transfers of even relatively small volumes of water out of the basin in North Carolina will further reduce the Catawba River flow, increasing the hardship for water users in South Carolina.”).

54. *E.g.*, N.C. GEN. STAT. § 143-215.22I.

River.⁵⁵ Consequently, the North Carolina transfer statute was deemed an inadequate resolution tool in an interstate river dispute, particularly because the North Carolina 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.”⁵⁶ As a remedy, South Carolina argued that it was entitled to equitable apportionment, and that North Carolina should take action consistent with that apportionment after the appointment of a Special Master.⁵⁷

North Carolina filed a reply brief,⁵⁸ the Court granted certiorari,⁵⁹ and a month later Duke Energy and the Catawba River Water Supply Project (CRWSP) filed motions to intervene.⁶⁰ On January 15, 2008, the Court then assigned the first female Special Master in the country, Kristin Linsley Myles, which is a landmark in itself.⁶¹ Shortly thereafter, the City of Charlotte, North Carolina, filed a motion to intervene.⁶² South Carolina opposed all three intervenors.⁶³ Special Master Myles issued an order granting Duke Energy, CRWSP, and the City of Charlotte inter-

55. Motion, Complaint & Brief in Support, *supra* note 6, Brief at 10–12.

56. Motion, Complaint & Brief in Support, *supra* note 6, Brief at 6 (referencing N.C. GEN. STAT. § 143-215.221(f)).

57. *Id.* at 11–14.

58. Brief of the State of North Carolina in Opposition on Motion for Leave to File Bill of Complaint, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 06-138), *available at* http://www.mto.com/sm/docs/4462349_1.pdf.

59. Order Granting Motion for Leave to File Complaint, South Carolina v. North Carolina, 128 S. Ct. 349 (2007) (mem.) (No. 06-138), *available at* http://www.mto.com/sm/docs/5245735_1.pdf.

60. Duke Energy Carolinas, LLC’s Motion and Brief in Support of Motion to Intervene and File Answer, and Answer, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 06-138), *available at* http://www.mto.com/sm/docs/4724461_1.pdf; Motion of the Catawba River Water Supply Project for Leave to Intervene and Brief in Support of the Motion, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 06-138), *available at* http://www.mto.com/sm/docs/4462956_1.pdf.

61. Kristin Linsley Myles Order of Appointment as Special Master, South Carolina v. North Carolina, 552 U.S. 1160 (2008) (mem.) (No. 06-138).

62. Motion for Leave to Intervene of the City of Charlotte, North Carolina, and Brief in support of Motion, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 06-138), *available at* http://www.mto.com/sm/docs/4995436_1.pdf.

63. Brief of the State of South Carolina in Opposition to Duke Energy Carolinas, LLC’s Motion for Leave to Intervene and File Answer, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 06-138), *available at* http://www.mto.com/sm/docs/4463040_1.pdf; Brief of the State of South Carolina in Opposition to Motion of the Catawba River Water Supply Project for Leave to Intervene, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 06-138), *available at* http://www.mto.com/sm/docs/4463164_1.pdf; Brief of the State of South Carolina in Opposition to Motion for Leave to Intervene of the City of Charlotte, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 06-138), *available at* http://www.mto.com/sm/docs/4548495_1.pdf.

venor status in May 2008,⁶⁴ and, despite resistance,⁶⁵ reaffirmed her decision in her First Interim Report filed with the Court in November 2008.⁶⁶ The U.S. Supreme Court heard oral argument on October 13, 2009,⁶⁷ and on January 20, 2010, ruled that Duke Energy and CRWSP met the intervenor standard, but that the City of Charlotte's interests were adequately represented by the State of North Carolina in *parens patriae*.⁶⁸

After additional legal maneuvering (see APPENDIX, Table 1), Special Master Myles issued an order regarding the structure of trial and discovery, in which she affirmed her telephonic ruling that the case would no longer be bifurcated.⁶⁹ Each party would have the opportunity for discovery on any relevant issue, after which, if South Carolina could show sufficient harm in a broader sense and entitlement to equitable apportionment, the Special Master would hold another trial "on the contours of that remedy."⁷⁰ Immediately following the release of this ruling, the Special Master held another—and the last—telephonic conference in response to a settlement concept that was initiated in letters submitted by counsel.⁷¹

This settlement concept began in a parallel set of actions, set into motion in August 2010 at a meeting of the Catawba-Wateree River Basin Advisory Commission (Bi-State Commission),⁷² but originating long before that meeting through other events/actions. In a cooperative effort

64. Order Granting Motions for Leave to Intervene of the City of Charlotte, North Carolina, Catawba River Water Supply Project, and Duke Energy Carolinas, LLC, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 06-138), available at http://www.mto.com/sm/docs/5201990_1.pdf.

65. Motion of South Carolina for Clarification or, in the Alternative, for Reconsideration of May 27, 2008, Order Granting Limited Intervention, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 06-138), available at http://www.mto.com/sm/docs/5386049_1.pdf.

66. First Interim Report of the Special Master, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 06-138), available at http://www.mto.com/sm/docs/6523714_1.pdf.

67. Transcript of Oral Argument Before the U.S. Supreme Court, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 06-138), available at http://www.mto.com/sm/docs/9141431_1.pdf.

68. South Carolina v. North Carolina, 130 S. Ct. 854.

69. Order Regarding Structure of Trial and Discovery, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 06-138), available at <http://www.mto.com/sm/docs/12402469.pdf>.

70. *Id.* at 14.

71. Transcript of Telephonic Conference Before the Special Master Kristin Linsley Myles, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (No. 06-138) [hereinafter Telephonic Conference Nov. 22, 2010], available at <http://www.mto.com/sm/docs/CONF11222010.pdf>.

72. Joint Settlement Concept at ll. 5–10, South Carolina v. North Carolina, 130 S. Ct. 854 (on file with the Natural Resources Journal).

in 2004 in response to sustained drought, both South Carolina and North Carolina enacted legislation creating river basin advisory commissions, one of which included the Catawba-Wateree River.⁷³ Additionally, in 2003, as part of its FERC relicensing application for the Catawba-Wateree Hydro Project, Duke Energy initiated a lengthy and inclusive comprehensive planning process, which was finalized in August 2006. The resulting agreement is formally known as the Comprehensive Relicensing Agreement (CRA) and includes “70 signatories who are stakeholders in the Catawba-Wateree River Basin . . . [as] the result of a public, multi-stakeholder process that involved approximately 58,000 person-hours over a three-year period.”⁷⁴

In response to this effort, the Bi-State Commission adopted a motion on August 27, 2010, that instructed the parties to “use the [CRA] as a starting point for settlement negotiations and include the Bi-State Commission in the process.”⁷⁵ All of the parties agreed to do so.⁷⁶ On November 12, 2010, they submitted proposed settlement language, known as the “Joint Settlement Concept” to the Bi-State Commission for a public comment period.⁷⁷ This concept cited official reasons for working toward a settlement: equity; cost to both tax and ratepayers; and, a desire for the states to maintain a cooperative, rather than antagonistic relationship with each other.⁷⁸ The parties “believe that it is important that the States regard each other as close neighbors, which share the Catawba-Wateree River, rather than as a plaintiff and a defendant in a lawsuit and that this Agreement will be a model for regional cooperation.”⁷⁹ After approval from the respective states and Duke Energy, passage by the county

73. N.C. GEN. STAT. §§ 77-110 to 77-124 (2010); S.C. CODE ANN. REGS. §§ 44-59-10 to 44-59-70 (2010). The Bi-State Commission comprises 15 members that reside in the basin, including North Carolina and South Carolina legislators, a Duke Energy official, a nonprofit representative, a water utility representative, a homeowners’ association representative, etc., each of whom are variably appointed. Although a permanent entity, this commission has a purely advisory role for agencies with regulatory authority over the use of the basin’s water, and is supported by staff from the South Carolina Department of Health and Environmental Control, and the North Carolina Department of Environmental and Natural Resources.

74. Joint Settlement Concept, *supra* note 72, at ll. 23–27.

75. *Id.*; Settlement Agreement, *supra* note 10, at 1.

76. Given the effort, expense, detail, and sheer number of users included in the CRA, the settlement agreement’s recitals state the parties’ consensus that the CRA is “an appropriate foundation for resolution of this Litigation and that they should each commit to continue to work together to help the CRA achieve its intended purposes and deliver its agreed-upon provisions throughout its intended duration.” Settlement Agreement, *supra* note 10, at 2.

77. Joint Settlement Concept, *supra* note 72.

78. *Id.*

79. Settlement Agreement, *supra* note 10, at 1.

boards for CRWSP,⁸⁰ examination and approval by the Special Master,⁸¹ the settlement agreement—virtually identical to the settlement concept—was signed on December 10, 2010, and the case was dismissed by the U.S. Supreme Court on December 14, 2010.

IV. COMPARISON OF THE TWO CASES

A. Similarities

1. Factual Similarities

The primary factual similarity is the disparate power relationship between the plaintiff and the defendant. Both California and North Carolina were in stronger economic positions than the plaintiff states in each case and were consistently more developed (legally, physically, economically, etc.). Both also had an interest in delaying the outcome, because each could continue to consume during litigation⁸²—watering thirsty Southern California or the greater Charlotte metropolitan statistical area.

Arizona and South Carolina are somewhat similarly situated, despite a larger GDP (Gross Domestic Product) disparity between Arizona and California than between South Carolina and North Carolina.⁸³ 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 Arizona had already depleted its surface water and was rapidly diminishing its groundwater aquifers in the 1950s,⁸⁴ and South Carolina was experiencing economic and some drinking water effects from drought-induced low flows in the Wateree in 2006.⁸⁵

80. Telephonic Conference Nov. 22, 2010, *supra* note 71, at 6–7.

81. *Id.*

82. AUGUST, *supra* note 2, at 63 (stating that “California attorneys commenced a campaign of judicial delay. A blizzard of motions and filings postponed the start of the proceedings, while the number and complexity of the issues raised prompted the Court to appoint a special master to hear arguments.”).

83. The GDP for industry by SIC (standard industrial classification) codes for Arizona and California in 1963 was \$4,482 and \$77,809 million (in current dollars), respectively, according to the U.S. Bureau of Economic Analysis. *Gross Domestic Product by State*, BUREAU OF ECONOMIC ANALYSIS, <http://www.bea.gov/regional/gsp> (last visited May 24, 2011). Comparatively, in 2007, South Carolina and North Carolina had a GDP for industry by NAICS (North American Industry Classification System) codes of \$157,636 and \$3,953,115 million (in current dollars), respectively. *Id.*

84. HUNDLEY, *supra* note 2, at 305; REISNER, *supra* note 3, at 260 (stating that “Arizona had reversed the pattern of some western states—it had fully developed its surface water first, and *then* began to overdraft its groundwater. Except for its Colorado River entitlement—whatever it was—it literally had nothing left.”); AUGUST, *supra* note 2, at 52; SAX ET AL., *supra* note 18, at 806.

85. Motion, Complaint & Brief in Support, *supra* note 6.

Although battling in different venues (i.e., congressional or state environmental commission hearings), Arizona, California, South Carolina, and North Carolina were similarly unable to establish trust in water allocation amongst their political leadership. After secretive and overt disputes between the states, with politicians using the water allocation issue for their personal political agendas, the political underdogs Arizona and South Carolina made aggressive legal moves by filing bills of complaint for *parens patriae* suits. And yet, for the most part, each state “had no consistent statewide water policy, its political leadership was divided, and . . . California [or North Carolina], in its inherent complexity, had nevertheless proceeded in a unified fashion concerning her claims to the river.”⁸⁶

2. Legal Similarities

In both suits, there was struggle in the cause of action itself. The stated issue in South Carolina’s original bill of complaint is entirely separate from the real issue, which is quite similar to the fundamental one in *Arizona v. California*; namely, the “basis of controversy . . . lies in the choice between the future development of central Arizona and the expansion of California uses.”⁸⁷ South Carolina and North Carolina, respectively, could have been substituted in that sentence.

Consequently, there was legal jockeying for advantage regarding the scope of the resource at issue. As previously mentioned, in *Arizona v. California*, the parties debated the inclusion of the Gila River and other tributaries in the volumetric allocation or whether the action was limited to the main stem of the Colorado River. California sought to include the tributaries, which would provide the majority of Arizona’s 2.8 million acre-feet entitlement under the Colorado River Compact, while Arizona opposed the inclusion and argued that the dispute solely involved the main stem.

In *South Carolina v. North Carolina*, South Carolina initially suggested expansion of the scope to the entire Catawba-Wateree River system (including tributaries),⁸⁸ while North Carolina sought to limit the

86. AUGUST, *supra* note 2, at 44 (citing to Wilmer’s interpretation of Arizona’s position after the *Arizona v. California* (1931) holding).

87. Frank J. Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation*, 1963 SUP. CT. REV. 158, 164 (1963).

88. Telephonic Conference Nov. 22, 2010, *supra* note 71, at 30–32, 51–52; *see also* South Carolina’s Ninth Progress Report at 1–2, *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) (No. 06-138) (where the state agrees to “limit its showing of harms to the Catawba River Basin to points north of the confluence of the Wateree River and the Congaree River. South Carolina does not intend to rely on harms south of that point.”), *available at* http://www.mto.com/sm/docs/6525070_1.pdf.

complaint spatially (to particular stretches of the river), temporally (during drought), and to particular actions (IBT).⁸⁹ North Carolina “continue[d] to preserve its position that the Bill of Complaint is limited to interbasin transfers and that the Complaint is limited to harms during times of drought and harms in a limited segment of the river.”⁹⁰

Additionally, both Arizona and South Carolina faced daunting and somewhat untenable legal hurdles. South Carolina asserted evidence of harm primarily during times of drought, thus acknowledging that adequate volumes are generally present on the river (despite the Catawba-Wateree’s variability). It argued that drought should be the baseline for the showing of harm, per the holding in *Nebraska v. Wyoming*,⁹¹ while North Carolina argued that South Carolina lacked harm otherwise, and the legal standard should exclude times of drought for determination of harm. Arguably, North Carolina was also harmed during drought.⁹²

Arizona’s initial hurdle was even more daunting, as it was challenging a state that had perfected appropriative water rights to 5.3 million acre-feet a year, despite the Boulder Canyon Project Act allocation of 4.4.⁹³ Should Arizona have wanted to use 900,000 acre-feet per year, they had no infrastructure to transfer the allocation and put it to beneficial use. Arizona “lacked a legal theory, like prior appropriation, to support its case.”⁹⁴ And in fact, it would not have been able to meet the (albeit somewhat nebulous) threatened injury standard of an equitable apportionment suit, had it continued to pursue a common law approach. By switching arguments with new counsel, Arizona preempted California’s perfected appropriation with congressional apportionment through the Boulder Canyon Project Act of 1922.⁹⁵

Like Arizona’s need to challenge California’s perfected prior appropriation, South Carolina may have been forced to act to prevent North Carolina from establishing a prescriptive right to the Catawba-Wateree River water, through the IBTs. The North Carolina Environmental Commission approved multiple transfers over several years, and unless South Carolina acted, it might have lost the ability to enjoin future

89. See North Carolina Progress Report No. 11 at 2 n. 2, *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) (No. 06-138), available at http://www.mto.com/sm/docs/7070444_1.pdf.

90. *Id.*

91. *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945).

92. See Opening Letter Brief of the State of South Carolina re Bifurcated Proceedings at 4, *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) (No. 06-138) [hereinafter Opening Letter Brief], available at http://www.mto.com/sm/docs/11291753_1.pdf.

93. AUGUST, *supra* note 2, at 61.

94. *Id.* at 76.

95. *Id.* at 75–77.

diversions.⁹⁶ However, with the change to a regulated riparian system discussed in Part IV.B.2.d, it is not clear whether the prescription argument is relevant. But both Arizona and South Carolina made the proverbial charge out of the gates in filing the suits, and underestimated the magnitude, ramifications, and possible outcomes of a *parens patriae* suit.

Both cases are also nationally precedent-setting. Wilmer's novel argument extended the statutory construction aspect of Arizona's case, creating a new strategy in interstate water dispute allocation.⁹⁷ In *South Carolina v. North Carolina*, both the Special Master—by formulating a more expansive intervenor test—and the Court itself—by utilizing the existing test but applying it in a novel manner—extended intervenor status to nonsovereign parties in an interstate apportionment, which has never otherwise occurred. And even though a settlement agreement in a *parens patriae* case is not novel,⁹⁸ the elements of this one create a model for other interstate water bodies in terms of achieving a science- and process-based approach to responsible current and future resource stewardship.⁹⁹

But in each case, several justices objected to the precedent-setting expansion of federal and individual powers. In both cases, the dissent perceived a dilution of states' sovereign powers; whether to the federal government with increased allocation authority over western water projects in *Arizona v. California*, or to the individuals who could avoid state representation through *parens patriae*, and intervene on their own behalf, in *South Carolina v. North Carolina*. In fact, the dissent vehemently opposed the holding on intervention in *South Carolina v. North Carolina*, arguing that it opened the proverbial flood gates to class actions in *parens*

96. Prescription is another name for adverse possession of a riparian water right. Like land and other forms of property, riparians can lose their rights through use of the water in a manner that is "open and notorious, hostile, exclusive, actual, and continuous . . . for a prescribed number of years." DAVID H. GETCHES, *WATER LAW IN A NUTSHELL* 72 (2009). The ability to prescribe on a riparian system depends on location and the nature of the entity conducting the prescription, as well as the extent of reasonable use and interference with downstream use. *Id.*

97. Clyde, *supra* note 35, at 309 (stating "[a]s far as this writer knows, there has never before been a legislative apportionment of an interstate stream. The two methods which were both well-known and much used were a division agreed to by the states through the making of an interstate compact, and an equitable apportionment by the United States Supreme Court.").

98. Telephonic Conference Nov. 22, 2010, *supra* note 71, at 19–22 (citing to the two other original actions resolved through settlement, which are *Vermont v. New York*, 417 U.S. 270 (1974) and *Georgia v. South Carolina*, 536 U.S. 979 (2002)).

99. See Settlement Agreement, *supra* note 10; see also COMPREHENSIVE RELICENSING AGREEMENT, *supra* note 50.

patriae suits. Justices Roberts, Scalia, Ginsberg, and Sotomayor dissented on the grounds that

this Court has never before granted intervention in such a case to an entity other than a State, the United States, or an Indian tribe. Never. That is because the apportionment of an interstate waterway is a sovereign dispute, and the key to intervention in such an action is just that—sovereignty. The Court’s decision to permit nonsovereigns to intervene in this case has the potential to alter in a fundamental way the nature of our original jurisdiction, transforming it from a means of resolving high disputes between sovereigns into a forum for airing private interests.¹⁰⁰

Written by Chief Justice Roberts, the dissent argued that the majority misapplied the test from *New Jersey v. New York*¹⁰¹ and violated two principles of original jurisdiction. First, original jurisdiction is reserved for states conflicts alone, and is unavailable to private claims. Second, the Court’s original jurisdiction is “not well suited to assume the role of a trial judge.”¹⁰² And as a result, nonsovereigns have not been permitted in previous equitable apportionment suits. “The reason is straightforward: An interest in water is an interest shared with other citizens, and is properly pressed or defended by the State.”¹⁰³ Despite the dissent’s reasoning, there is a new nonsovereign intervenor precedent in equitable apportionment disputes.

And after *Arizona v. California*, “the national government emerged with new powers over western water resources, but not without objection from three of the eight Justices who sat.”¹⁰⁴ Justice Harlan dissented in part, and was joined by Justices Douglas and Stewart. However, Justice Douglas also wrote a separate dissenting opinion. All three justices agreed that the majority of the Court put too much weight on the Boulder Canyon Project Act, and consequently misinterpreted/overextended the authority of the Secretary of the Interior in allocating the Colorado River below the dam. Justice Harlan argued that “[section] 4(a) [of the Project Act], on which the Court so heavily relies, neither apportions the

100. *South Carolina v. North Carolina*, 130 S. Ct. 854, 869 (overruling in part and sustaining in part South Carolina’s exceptions to the Special Master’s report on the intervenor status of non-state entities) (Roberts, C.J., joined by Thomas, J., Ginsberg, J., & Sotomayor, J., concurring in part, dissenting in part), *and complaint dismissed*, 131 S. Ct. 855 (2010) (mem.), *and* 131 S. Ct. 975 (2011) (mem.) (discharging the Special Master).

101. *New Jersey v. New York*, 345 U.S. 369 (1953).

102. *South Carolina v. North Carolina*, 130 S. Ct. at 869.

103. *Id.* at 870.

104. Trelease, *supra* note 87, at 159.

waters of the river nor vests power in any official to make such an apportionment.”¹⁰⁵ Instead, it merely allocated a volume of water to each basin, and did not interfere with states’ authority to distribute water according to priorities. The legislative history illustrates the resistance of western legislators to extend authority to the federal government in water allocation, and

when Congress ultimately resigned itself to the necessity of legislating in some way with respect to the division of Lower Basin waters, it used narrow words suitable to its narrow purpose and to its regard both for the system of judicial apportionment and appropriation and for the rights of the States. Even then Congress did not attempt to legislate an apportionment of Lower Basin water; it simply prescribed a ceiling for California.¹⁰⁶

Justice Douglas, while joining in Justice Harlan’s dissent, challenged the Court’s interpretation of congressional intent and power with respect to the Secretary of the Interior’s authority:

The question is not what Congress has the authority to do, but rather the kind of regime under which Congress has built this and other irrigation systems in the West. . . . The present case . . . will, I think, be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature.¹⁰⁷

B. Differences

These similarities are exceeded by the factual and legal differences between the positions of the plaintiffs and defendants. Although starting from similar positions, it is important to note the nuances that contributed to the divergence, particularly in charting legal strategy in future *parens patriae* suits.

1. Factual Differences

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

105. *Arizona v. California*, 373 U.S. 546, 606 (1963).

106. *Id.* at 613.

107. *Id.* at 628.

Also, the cost of moving water under the prior appropriative system in California and Arizona is absent from the development controversy that occurred in North Carolina and South Carolina. Instead, it's the pure growth rate itself; the City of Charlotte has exceeded the Catawba River basin (e.g., the Charlotte suburbs of Concord and Kannapolis, which are in another basin but fueled by the Charlotte growth engine), while South Carolina's cities on the Wateree have not. But South Carolina sought to reserve the possibility of additional growth in these downstream communities, which cannot occur without reliable water availability.¹⁰⁸

Unlike the relationship between South Carolina and North Carolina, there had been a long, protracted, legal and political fight occurring between Arizona and California before Arizona actually filed suit in 1952.¹⁰⁹

Since the states of the lower basin were never able to agree on . . . an intrabasin allocation, Arizona took to the courts. First, she tried to enjoin the construction of Boulder Dam, then to perpetuate the testimony of the negotiators of the Compact. Next, she sought a judicial apportionment of the river, in the absence of the United States as a party. In all these suits, she was unsuccessful. All other roads blocked, Arizona finally ratified the Compact in 1944. In 1952 she brought the present suit against California.¹¹⁰

Inviting the inception of *Arizona v. California*, Congress could not find proof that Arizona would have enough water to warrant the construction of the Central Arizona Project, which was being precluded by California's use. Both legally and politically, Arizona was systematically being defeated by California. Although South Carolina objected as a downstream user affected by a proposed IBT, there is no similar history of a multidecade fight between the two states over water.¹¹¹

108. Opening Letter Brief, *supra* note 92, at 10.

109. HUNDLEY, *supra* note 2, at 304; REISNER, *supra* note 3, at 259–61; SAX ET AL., *supra* note 18, at 806 (tracking the negotiations in the Boulder Canyon Project Act, after which, “in 1930 Arizona decided, in the first of four original jurisdiction suits it was to bring against California, to seek relief in the United States Supreme Court. For years, the Court declined to decide the case because, without an active project to bring Colorado River water to central Arizona, it had no controversy ripe for judicial solution.”).

110. Trelease, *supra* note 87, at 162 (discussing *Arizona v. California*, 283 U.S. 423 (1931), *Arizona v. California*, 292 U.S. 341 (1934), and *Arizona v. California*, 298 U.S. 558 (1936)).

111. In fact, it was quite amicable, as is evidenced by communications between the state water management agencies over the contested IBT prior to litigation, and by the cooperation in creating the river basin advisory commissions. Danny Johnson, South Carolina's Department of Health and Environmental Control, wrote via e-mail, to Thomas C. Fransen,

The dam ownership is another significant difference, both factually and legally. The Colorado River's dams are federally constructed and controlled, while Duke Energy built and controls the dams on the Catawba-Wateree. As a result, South Carolina could not utilize Wilmer's legal strategy.¹¹² Had the Army Corps built the Catawba-Wateree dams, arguably there would have been grounds for invoking federal control. And while the dams are multipurpose on the Colorado,¹¹³ the primary purpose of the dams on the Catawba-Wateree is for energy generation.¹¹⁴ From a public perspective, there is no figure in *South Carolina v. North Carolina* who stands out in the case—unlike Wilmer in *Arizona v. California*.

Additionally, the *Arizona v. California* case—like other *parens patriae* suits—was extremely long in duration, while *South Carolina v. North Carolina* settled three years and six months after the motion to file a complaint was filed in June 2007. *Arizona v. California* was filed in 1952, and the ultimate holding was made in 1963. *South Carolina v. North Carolina* was anticipating a similar duration before the settlement, as North Carolina estimated that without bifurcation, the discovery process would take

head of the River Basin Management Section of North Carolina's Division of Water Resources in the Department of Environment and Natural Resources, that the transfer was not of a significant size and that South Carolina would benefit from it in the Yadkin-Pee Dee River basin. *Noted in* Defendant State of North Carolina's Brief in Support of Continued Bifurcation of the Litigation at 15, *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) (No. 06-138). In the e-mail, which preceded the litigation, Johnson stated, "I've re-discussed the matter with Bud [Dr. A.W. "Bud" Badr] and our Division Director, and the consensus opinion is that the transfer is not large enough to be of concern to us. Besides, we get it back in the [Yadkin-]Pee Dee [River] where we may need it more anyway." *Quoted in id.* (corrections in original). While the 1997–2002 drought affected both states, they generally negotiated with each other over water supplies in both the Catawba-Wateree and the Yadkin-Pee Dee River basins, particularly since the river systems' flows are ultimately regulated by power-generating dams.

112. Meaning that because the federal government built the dams, they assume control over the distribution of stored water, through the navigational servitude. *See* Wilmer, *supra* note 23.

113. The congressionally approved multipurpose uses include hydroelectric power generation, flood control, and consumptive uses, including municipal, industrial, and agriculture. *See* Boulder Canyon Project Act of 1928, 43 U.S.C. § 617–617v (2011).

114. The Catawba-Wateree River dams generate energy through hydroelectric, coal-fired and nuclear power plants that use cooling water. *See* Lake Wylie, DUKE ENERGY, <http://www.duke-energy.com/lakes/facts-and-maps/lake-wylie.asp> (last visited Apr. 25, 2011) (describing power generation on Lake Wylie); Lake Wateree, DUKE ENERGY, <http://www.duke-energy.com/lakes/facts-and-maps/lake-wateree.asp> (last visited Apr. 25, 2011) (describing power generation on Lake Wateree).

years.¹¹⁵ This was, in part, because the states could not agree upon the legal standard and procedural structure that should be associated with equitable apportionment cases, and exchanged numerous briefs in a tactic to buy time before trial.¹¹⁶ In fact, California engaged in the same strategy, snowing Arizona at the beginning of the suit with copious motions to prolong delay.¹¹⁷ Such protracted cases exact a toll on all parties, as well as the Special Master.¹¹⁸

2. Legal Differences

Although the cases started out somewhat similarly, there are also considerable procedural and substantive differences that emerged throughout their duration. Procedurally, they differ in the fact that Arizona filed three other original jurisdiction suits against California before the U.S. Supreme Court accepted *Arizona v. California*, while South Carolina was granted certiorari on its first filing. Additionally, their motions for intervention and the structure of the lawsuits themselves (e.g., to bifurcate or not, phased discovery, etc.) are procedurally different. Perhaps

115. Defendant State of North Carolina's Reply Brief in Support of Continued Bifurcation at 2, *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) (No. 06-138), available at <http://www.mto.com/sm/docs/10395853.pdf>.

116. Within a year of filing the initial motion, the states agreed upon a bifurcated case structure with phased discovery, in which South Carolina would show and possibly meet the harm threshold for serious real or imminent injury from actions caused by North Carolina, after which the water system would be allocated through balancing of the interests. See Brief of the State of South Carolina Concerning Phase One and Phase Two Issues and Timing, *South Carolina v. North Carolina*, 130 S. Ct. 854(2010) (No. 06-138), available at http://www.mto.com/sm/docs/5329023_1.pdf. Despite submitting a joint case-management plan that was finalized by the Special Master on Jan. 7, 2009, the states could not agree on the issues for resolution in Phase I and II, with North Carolina seeking specificity of the harm and adding subsidiary issues in Phase I. See South Carolina's Eleventh Progress Report, *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) (No. 06-138), available at http://www.mto.com/sm/docs/7070826_1.pdf; North Carolina Progress Report No. 11, *supra* note 89. Seven days after the U.S. Supreme Court granted intervenor status to Duke Energy and the CRWSP, South Carolina changed tactics and sought to consolidate the bifurcation of the case into a single proceeding. See Opening Brief of the State of South Carolina Favoring a Single Proceeding and Opposing Bifurcation of Discovery and Trial, *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) (No. 06-138), available at http://www.mto.com/sm/docs/10203010_1.pdf.

117. AUGUST, *supra* note 2, at 63 (stating that in response to Arizona's initial filing, "California attorneys commenced a campaign of judicial delay. A blizzard of motions and filings postponed the start of the proceedings, while the number and complexity of the issues raised prompted the Court to appoint a special master to hear arguments.").

118. The first Special Master, George I. Haight, died two years into the proceedings. His replacement, Special Master Simon H. Rifkind, suffered a stress-induced heart attack two years after being appointed to the position. AUGUST, *supra* note 2, at 63, 67. See also REISNER, *supra* note 3, at 261 (discussing the fact that Rifkind was only in his early fifties).

the ultimate procedural difference is that South Carolina and North Carolina reached a settlement agreement, rather than obtaining a U.S. Supreme Court ruling that favored one sovereign over another.

Substantively, they differ in the legal standard on which water apportionment turns (i.e., an equitable apportionment remedy, rather than one based on statutory allocation), and the issues associated with different water rights systems, both between and across the respective disputes. These differences are examined in more detail below.

a. Equitable Versus Statutory Allocation

In an equitable apportionment suit, the plaintiff (generally) must clearly show the harm from actions of another (often upstream) state,¹¹⁹ after which the burden shifts to the other state to compare harms and benefits from existing uses, and the Court determines how to equitably apportion the waters.¹²⁰ Throughout most of the briefing and in the original complaint, South Carolina applied this standard, arguing that the harm from North Carolina's IBT and cumulative upstream uses injured South Carolina's downstream uses during times of drought. And yet, South Carolina failed to note that the dam releases, which significantly affect downstream flow levels, are governed largely by a nonsovereign party, Duke Energy.¹²¹ In contrast, when Arizona started out with a similar equitable strategy, its harm was in sheer volume leaving the system at all times of the year, caused by another sovereign party. And with apportionment under a prior appropriative system, the rule of priority is the general rule—with exceptions. This created a significant problem for Arizona.¹²² But the question of priority is not likely to be at issue in a regulated riparian system, which became the primary water law structure in both South Carolina and North Carolina.

Once new counsel stepped in, Arizona no longer had to fight the water rights priority battle or seek equitable apportionment, diverging entirely from South Carolina's argument. Instead, it used a statutory construction approach, shifting the case to congressional apportionment under the Law of the River, which was interpreted to apportion 2.8 mil-

119. The elements to show injury are further enumerated later in Part IV.B.2.a.

120. Douglas L. Grant, *Part VIII: Interstate Water Allocation*, in *WATERS AND WATER RIGHTS* §§ 45.05–45.06, at 43-1 (Robert E. Beck & Amy K. Kelly eds., 2009).

121. Transcript of Oral Argument before the U.S. Supreme Court, *supra* note 67, at 49 (“Mr. Browning: ‘Okay, with respect to Duke Energy: Duke is—has 11 dams in North and South Carolina. As a result of those dams, Duke Energy controls the flow of the river into South Carolina.’”).

122. See *Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945) (citing *Arizona v. California*, 298 U.S. 558 (1936)).

lion acre-feet per year to Arizona.¹²³ Arizona could then show harm from its withholding. Saved by the Boulder Canyon Project Act, this argument engendered a “shift from a case based on equity to a case based on statutory apportionment.”¹²⁴

But South Carolina could not invoke the same theory. The state asked for equitable apportionment, instead of showing harm from violation of statutory apportionment. The applicability of the Arizona post-Wilmer strategy was curtailed by the fact that the Catawba-Wateree River has no compact, which would otherwise have extended authority and allocation assurance similar to the congressional statutory allocation on the Colorado River. Consequently, before settlement, South Carolina was caught in a quagmire analogous to the one in which Arizona found itself at the start of the litigation; a desire for equity, supported by broad and unfocused pleadings for equitable apportionment.

As previously mentioned, South Carolina and North Carolina disagreed on the specificity of the showing of harm for the proposed Phase I of the originally bifurcated proceedings. North Carolina stated that before further discovery “South Carolina has the obligation to provide a Statement of Particularized Harm,” including specific identification of injury and the uses causing it.¹²⁵ In response, South Carolina disagreed “that this Court’s cases articulate such a standard” and argued that it was “unnecessary for the Special Master to resolve this issue at this time.”¹²⁶ Special Master Myles reversed the bifurcation and opted for a single trial in which South Carolina had to show more harm than the fact that “present or future diversions by North Carolina had resulted, or would result, in less water than is needed for South Carolina’s present uses.”¹²⁷

To seek equitable apportionment, South Carolina had to prove to the Court, which prefers not to mediate interstate disputes, that there was a threatened invasion of rights sufficiently serious in magnitude.¹²⁸ The Court utilizes the *Connecticut v. Massachusetts*¹²⁹ standard: “The governing rule is that this Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence.”¹³⁰ Generally, the threatened injury ap-

123. Trelease, *supra* note 87, at 166.

124. AUGUST, *supra* note 2, at 83.

125. North Carolina Progress Report No. 11, *supra* note 89, at 2 n.1.

126. South Carolina Progress Report No. 11, *supra* note 116, at 3.

127. Order Regarding Structure of Trial and Discovery, *supra* note 69, at 4.

128. Grant, *supra* note 120, at 45-31.

129. *Connecticut v. Massachusetts*, 282 U.S. 660 (1931).

130. *Id.* at 669.

plies to already appropriated water, although the holding—to which South Carolina cited¹³¹—in *Idaho ex rel. Evans v. Oregon*¹³² suggests that unused waters may be subject to the remedy. However, even though it was an equitable apportionment suit to divide water that was unused by one of the entities with established title, that case is distinguished because it turned on anadromous fish, rather than the water itself.¹³³ So the question of whether threatened injury applies to unused water (reserved for future uses) remains open.

In addition to the threatened injury itself, the plaintiff must show that it is “of serious magnitude,” which is interpreted to mean that it can be quantified and is substantial.¹³⁴ It must also be “established by clear and convincing evidence,” in contrast to the lower standard of preponderance of the evidence.¹³⁵ Without access to the discovery process, the South Carolina bill of complaint did not appear to meet the full magnitude prong.¹³⁶ This is because South Carolina’s existing uses were affected only during times of drought and, by its own admission, the Catawba-Wateree system was otherwise water-rich. To combat this argument, in her “Opening Letter Brief” on July 30, 2010, South Carolina further refined its pleadings, using excerpts from the first set of contention interrogatories as exhibits.¹³⁷

Relying heavily on the Court’s previous holdings in *New Jersey v. New York*¹³⁸ and *Nebraska v. Wyoming*,¹³⁹ South Carolina argued that the harm during drought is of serious magnitude because “the Court has made clear that select harms suffered only at certain times of the year will suffice to satisfy the downstream State’s threshold burden to prove injury from consumption in the upstream State, and therefore warrant an equitable apportionment.”¹⁴⁰ It continued to argue that drought levels

131. Motion, Complaint & Brief in Support, *supra* note 6, Brief at 11–12, 13 n.8.

132. *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1983); *accord* Grant, *supra* note 120, at 45-32.

133. Grant, *supra* note 120, at 45-32.

134. *Id.* at 45-32 to 45-33.

135. Clear and convincing proof is “that proof which results in reasonable certainty of the truth of the ultimate fact in controversy. Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt.” BLACK’S LAW DICTIONARY 172 (6th ed. 1991).

136. Brief of the State of North Carolina in Opposition on Motion for Leave to File Bill of Complaint, *supra* note 58, at 10, 18–20.

137. Opening Letter Brief, *supra* note 92, at Ex. A, B. (The First Set of Contention Interrogatories, dated Feb. 23, 2010, are not available on the Special Master’s docket sheet at <http://www.mto.com/sm>.)

138. *New Jersey v. New York*, 283 U.S. 336 (1931).

139. *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

140. Opening Letter Brief, *supra* note 92, at 5.

should be the baseline standard from which to determine the apportionment, and that North Carolina was not legally justified in asserting a tortious standard of proximate causation in the injury showing. And yet, it is not clear in the pleadings whether the harms are actually caused by drought, the upstream uses, or a combination of both. Isolating the causal factors would have bolstered South Carolina's harm argument.

In the July 30, 2010, brief, South Carolina also tried to show the magnitude of the injury to reach the "clear and convincing evidence" standard for both existing and future uses. But it used speculative language like "might have had to curtail production,"¹⁴¹ "would have had to de-rate,"¹⁴² and "can adversely affect the quality of recreational outings"¹⁴³ for the existing uses, suggesting that the harm was not as severe as it seemed. Additionally, South Carolina identified harms to recreational uses on lakes, including boat ramp closures and associated repair costs. But the same occurred during drought on lakes on the Savannah River as well. Lake Hartwell was particularly affected in order to maintain water levels on Lake Keowee, the upstream lake with a nuclear power plant, and for downstream users (e.g., cities and another nuclear power plant).¹⁴⁴ South Carolina has a significant IBT on Lake Keowee, which is located in the headwaters of the Savannah, and is therefore potentially subject to the same arguments it presented against North Carolina.¹⁴⁵

Even if South Carolina could have shown that North Carolina's IBTs and cumulative uses were the primary cause of the harm, it also neglected the fact that North Carolina's injurious IBT was primarily for municipal and domestic use. Despite being riparian, there is a general hierarchy in the purpose of use in some states when examining the reasonableness of the use (i.e., domestic over economic).¹⁴⁶ South Carolina's harms occurred during low flows to "industrial and commercial users, water-based recreational users and businesses, and water utilities."¹⁴⁷ The harm to the water utilities was revenue-based, as people learned to

141. *Id.* at Ex. B at 9.

142. *Id.* at Ex. B at 11.

143. *Id.* at Ex. B at 13–14.

144. JEFFERY S. ALLEN, ROBERT T. CAREY, LORI A. DICKES, ELLEN W. SALTZMAN & COREY N. ALLEN, U.S. ARMY CORPS OF ENGINEERS, AN ECONOMIC ANALYSIS OF LOW WATER LEVELS IN HARWELL LAKE (2010), available at <http://www.sas.usace.army.mil/Lake%20Hartwell%20FINAL%2011-9-10.pdf> (last visited Jan. 17, 2011).

145. South Carolina also has an IBT on the Catawba-Wateree in Lancaster County, South Carolina. See Transcript of Oral Argument before the U.S. Supreme Court, *supra* note 67, at 55–56.

146. GETCHES, *supra* note 96, at 50, 60.

147. Opening Letter Brief, *supra* note 92, at 7.

conserve water and reduced their use, which happened throughout the southeastern states under drought conditions. The drought also affected the utilities' water quality, but again, this was experienced throughout the state of South Carolina on various river systems.

In addition to the lack of clarity as to the causation of the harm, South Carolina's pleadings were also opaque in whether it sought equitable apportionment of the water itself, or of the benefits from the water flow of the Catawba-Wateree River. The Court's January 20, 2010, holding stated that South Carolina requested an equitable apportionment for the Catawba-Wateree River's waters.¹⁴⁸ This suggests that either the Court, South Carolina, or both, did not follow the congressional definition of equitable apportionment, which "does not mean literally a division of the waters; in its pristine form it meant 'the equitable apportionment of benefits . . . resulting from the flow of the river.'" ¹⁴⁹ North Carolina mentioned this fact in its briefing, arguing that should South Carolina have met the threshold injury standard, it would have had to consider the benefits that accrue to each state from the use of the water in the Catawba-Wateree and the Yadkin-Pee Dee rivers.¹⁵⁰

For instance, if an IBT transfers water from the Catawba River basin, it is used in the Yadkin-Pee Dee River basin and returned to that system, which brings benefit to South Carolina.¹⁵¹ In fact, South Carolina needs water most in this system, given the seasonal shortages and associated water quality problems in South Carolina's north coast cities (see discussion in Part V and note 217). North Carolina merely adhered to the traditional congressional definition of "equitable apportionment" that examines benefits such as shared electric power, water utilized in each state by commuters from the other state, and value that the IBT creates for South Carolina, as well as costs to each state.¹⁵² The subtle difference in the meaning of equitable apportionment was a source of contention and could have produced an outcome that South Carolina did not anticipate when it filed the bill of complaint.

148. *South Carolina v. North Carolina*, 130 S. Ct. 854 (overruling in part and sustaining in part South Carolina's exceptions to the Special Master's report on the intervenor status of non-state entities), *and complaint dismissed*, 131 S. Ct. 855 (2010) (mem.), *and* 131 S. Ct. 975 (2011) (mem.) (discharging the Special Master).

149. Trelease, *supra* note 87, at 183 (quoting *Kansas v. Colorado*, 206 U.S. 46 (1907)).

150. Opening Letter Brief, *supra* note 92, at 3 (stating that "North Carolina erroneously contends that an equitable apportionment should consider whether its interbasin transfers bring benefits to South Carolina citizens in adjacent river basins.").

151. North Carolina's Brief in Support of Continued Bifurcation of the Litigation, *supra* note 111, at 15 (quoting e-mail communication between Danny Johnson and Thomas C. Fransen).

152. See North Carolina Letter Brief Advocating Bifurcated Discovery at 5–6, *South Carolina v. North Carolina*, 130 S. Ct. 854.

b. Wavering on Bifurcation

As previously mentioned, *South Carolina v. North Carolina* was initially bifurcated in its case management plan, with phased discovery.¹⁵³ However, South Carolina later argued that a “single discovery period” and not bifurcating the case made sense for the following reasons: (1) to promote judicial economy, eliminating the need for two sets of testimony from the same set of witnesses and experts; (2) to “facilitate early settlement” without prejudice to any party or intervenor; (3) to address the disagreement on the legal standard for the showing of harm in an equitable apportionment suit; and, (4) to reach the contentious issue of including benefits that South Carolina receives in other river basins from the Catawba-Wateree River IBT in North Carolina.¹⁵⁴ Both North Carolina and the intervenors, Duke Energy and CRWSP, advocated for the continued bifurcation. In telephonic conferences after South Carolina’s request to reverse the bifurcation order, Special Master Myles indicated an intent to consider one consolidated trial, with a summary judgment phase at the beginning. That would have avoided “the potential for overlap between Phase I and Phase II discovery,” which was repeatedly raised in South Carolina’s briefs.¹⁵⁵ Consequently, the issue became whether to have “either or both of (1) phased discovery; or (2) a clearly delineated summary judgment phase that would include the threshold question of injury.”¹⁵⁶

After this communication, the Special Master then proposed a new procedural structure in the August 20, 2010, telephonic conference with the counsel for the parties. She discussed the fact that each state had a different view of the entitlement needed for a remedy, with South Carolina perceiving it to be light, and North Carolina arguing that it is broader and more substantial. She agreed with

North Carolina’s view in the sense that . . . if the question is solely when is the complaining state entitled to a decree, then I think there is a broader ranging inquiry that leads up to that conclusion.

One doesn’t just show injury in the abstract or as South Carolina’s defined it and then proceed directly to the appor-

153. Case Management Order No. 9 Regarding Case Management Plan at 4, *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) (No. 06-138), available at http://www.mto.com/sm/docs/6724979_1.pdf.

154. Opening Letter Brief, *supra* note 92, at 2–4.

155. North Carolina Letter Brief, *supra* note 152, at 4.

156. Opening Letter Brief, *supra* note 92, at 1 (quoting an e-mail from Special Master Myles to Counsel for the Parties (July 22, 2010)).

tionment phase. One has to show an entitlement to apportionment that is broader ranging than that.¹⁵⁷

Special Master Myles was concerned about the concreteness of injury (i.e., existing versus future uses and harms), and the concept of causation.¹⁵⁸ Consequently, she proposed a “trial on the question of entitlement to a remedy,” which would “include any and all issues that either party thinks are relevant” (e.g., causation, and a summary judgment phase).¹⁵⁹ After this phase, there could be a second trial that “shaped the decree.”¹⁶⁰ This would have resolved the states’ dispute over the burden of proof, and “the beauty of this approach . . . may be that it minimizes disputes over trying to define issues in phases that will or won’t be included It allows people to proceed somewhat at their peril.”¹⁶¹ In an order issued on Nov. 17, 2010, she solidified this single, broader proceeding to gauge liability and improve efficiency.¹⁶²

c. Intervenors

The suits also differed significantly in their approach to intervention, and the associated implications for *parens patriae* jurisprudence. Arizona named Colorado River water users in California, in addition to the State itself, when it filed the bill of complaint for the *parens patriae* lawsuit in 1952. This suggests that Arizona was cognizant of the users and individual interests that would be affected—and which might be distinguished from the State’s interests—to avoid intervention. After being named, California began encouraging intervention by approaching the Upper Basin states, suggesting that they join the lawsuit. However, most were reluctant to do so, and Arizona was able to exclude the majority, because the Colorado River Compact of 1922 separated the river into two basins. Consequently, only the State of Nevada intervened, along with the United States, which was primarily representing Native American tribal interests. New Mexico and Utah were impleaded because parts of the lower basin are located in their states.

Compared to California’s active role in seeking intervention from other Colorado River states, North Carolina was relatively indifferent to the intervention efforts of the intervenors (both successful and unsuc-

157. Telephonic Conference Before Special Master Kristin Linsley Myles at 8, *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) (No. 06-138), available at <http://www.mto.com/sm/docs/CONF0820.pdf>.

158. *Id.*

159. *Id.* at 11–12.

160. *Id.* at 12.

161. *Id.* at 39–40.

162. Order Regarding Structure of Trial and Discovery, *supra* note 69, at 2.

cessful).¹⁶³ In contrast, in its original bill of complaint, South Carolina did not name Duke Energy, Catawba River Water Supply, and the City of Charlotte as defendants, and opposed their intervention as nonsovereign parties in a *parens patriae* suit when the Special Master admitted them. To do so, Special Master Myles culled from original actions more generally, where nonsovereign entities were permitted to enter the suit as parties. She also promulgated the following rule for intervenors in her First Interim Report:

Although the Court's original jurisdiction presumptively is reserved for disputes between sovereign states over sovereign matters, non-state entities may become parties to such original disputes in appropriate and compelling circumstances, such as where the non-state entity is the instrumentality authorized to carry out the wrongful conduct or injury for which the complaining states seeks relief¹⁶⁴

However, the Court declined to follow her new standard, saying that, "the Special Master crafted a rule of intervention that accounts for the full compass of our precedents."¹⁶⁵ Instead, the Court applied the *New Jersey v. New York*¹⁶⁶ standard, which says that "[a]n intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state"¹⁶⁷ And yet, in applying the general rule, the Court extended the intervention standard in original actions over interstate waters by allowing nonsovereign intervenors. Comparatively, *Arizona v. California* involved only sovereign intervenors, whether other states, the United States, or the Native American tribes represented by the United States.

163. See Transcript of Oral Argument before the U.S. Supreme Court, *supra* note 67, at 48 (Regarding North Carolina's position on the intervenors, Chief Justice Roberts said to North Carolina's counsel, "You didn't even want to be here. As they view the case and as you view the case, it's got so little to do with the State that the State didn't even want to come here and argue the case." The Justices go on to question North Carolina about its ability to represent the proposed intervenors' interests, pressing North Carolina's weak statements about its inability to do so.)

164. First Interim Report of the Special Master, *supra* note 66, at 20–21.

165. *South Carolina v. North Carolina*, 130 S. Ct. 854, 862 (2010).

166. *New Jersey v. New York*, 283 U.S. 336 (1931).

167. *South Carolina v. North Carolina*, 130 S. Ct. at 870 (quoting *New Jersey v. New York*, 345 U.S. at 373).

d. Water Rights Systems

Furthermore, there is a simple difference in the nature of the water rights involved in each river system. Arizona and California were appropriative and hybrid water rights systems, respectively.¹⁶⁸ South Carolina and North Carolina are regulated riparian systems (although South Carolina was riparian at the start of the litigation). The common property nature of the riparian doctrine, even under a regulated riparian structure, means that in one respect South Carolina has a more substantial and equal legal platform than Arizona with California's perfected, priority-based, appropriative rights. Theoretically, an upstream riparian is not allowed to harm a downstream riparian,¹⁶⁹ but that is changing with more consumptive uses and IBTs on riparian systems.

One of the questions at issue was whether the respective water laws of the states affect the standard of harm required under equitable apportionment. North Carolina argued that it would, in that there is a reasonableness standard for riparians, which means that actual volumes are not defined, and it can be harder to reach the burden of proof for equitable apportionment.¹⁷⁰ South Carolina argued that it would not, and that they would have to show enough to meet a prior appropriative standard, which the Special Master refuted.¹⁷¹

Although both states now use a form of regulated riparianism, definitions and applicability of the concept vary by state. Under a general regulated riparian system, water withdrawal requires a permit from the state at the location where the withdrawal occurs, similar to prior appropriation.¹⁷² So water rights are no longer determined by land ownership, but are still subject to the reasonableness doctrine—for social policy and for potential effect on other permitted uses.¹⁷³

South Carolina passed its Water Withdrawal, Permitting, Use, and Reporting Act (S. 452) on June 11, 2010, effective January 1, 2011.¹⁷⁴ The act introduced a regulated riparian system for withdrawals of over 3 million gallons per month, which is a standard volume from the American Society of Civil Engineers—regulated riparian model code.¹⁷⁵ In addition, states often adopt a set of minimum flow requirements to be used in

168. GETCHES, *supra* note 96, at 7–8, 84–85.

169. *See id.* at 50–51.

170. Order Regarding Structure of Trial and Discovery, *supra* note 69, at 4–5.

171. *Id.*

172. AM. SOC'Y OF CIVIL ENG'RS, REGULATED RIPARIAN MODEL WATER CODE, § 4R-1-06 at 46–47, § 6R-2-01 at 100–102 (2004).

173. *See id.* § 2R-1-01 at 14, § 6R-3-01 at 106–107, § 6R-3-02 at 108–110.

174. A former version of this bill, S. 428, was introduced in 2007–2008 but did not pass through the legislature. *See discussion, infra* note 200.

175. AM. SOC'Y OF CIVIL ENG'RS, *supra* note 172, § 6R-1-02 at 94–96.

conjunction with the permitting system. For instance, in Georgia, withdrawers have three options: (1) maintain a monthly 7Q10 minimum flow,¹⁷⁶ (2) maintain minimum flows determined by a site-specific study, or (3) maintain mean annual minimum flows.¹⁷⁷ South Carolina's definition of "minimum flows" is variable and seasonally based, and is determined by each stretch of a water system, with "forty percent of the mean annual daily flow for the months of January, February, March, and April; thirty percent . . . for the months of May, June, and December; and twenty percent . . . for the months of July through November"¹⁷⁸ In the event of drought, South Carolina can dip into these minimum flows, as long as the users don't permanently compromise the water body. The permit duration is quite long, from 20–50 years to reflect "the economic life of any capital investments made by the permittee necessary to carry out the permittee's use of the withdrawn water."¹⁷⁹

But that means that the reasonableness of use, which might have changed over a 20-year period, may not be revisited until the permit expires. The statute contains a provision for determining reasonableness when issuing a permit, enumerating several criteria.¹⁸⁰ The permit application must also contain an estimated ratio between water withdrawn and the consumptive use of that water, which aids in assessing remaining available water.¹⁸¹ Registered surface water withdrawers under the older statute can continue withdrawing at their highest capacity, which grandfathers-in existing over-allocations and maintains the disputed status quo. Also, current IBTs are treated as existing surface water withdrawers, and accordingly, any renewal goes through the same process. But new IBTs that require permits must have a noticed public hearing.¹⁸²

North Carolina's system, while technically regulated riparian and one of the first in the Southeast under the Water Use Act of 1967,¹⁸³ is limited to designated capacity use areas. The permitting requirement applies to both surface water and groundwater in these areas, which are primarily in the state's coastal plain. The remainder of the water is gov-

176. GA. COMP. R. & REGS. 391-3-6-.07(2)(j) (2010) (stating that "'7Q10 Flow' shall mean that lowest average stream flow expected to occur for seven consecutive days with an average frequency of once in ten years.").

177. GA. COMP. R. & REGS. 391-3-6-.07(4)(b)(9)(iii)(II) (2010) (instream flow protection obligation); GA. DEP'T OF NATURAL RES., WATER ISSUES WHITE PAPER 28–29 (2001) (enumerating the three instream flow assessment options which were adopted by the Georgia Department of Natural Resources Board as interim instream flow policy).

178. S.C. CODE ANN. § 49-4-20(14) (2010).

179. S.C. CODE ANN. § 49-4-100(B) (2010).

180. S.C. CODE ANN. § 49-4-80(B) (2010).

181. S.C. CODE ANN. § 49-4-80(A)(5) (2010).

182. S.C. CODE ANN. § 49-4-90 (2010).

183. N.C. GEN. STAT. § 143-215.11 (2010).

erned under riparian law, limiting place of use. In 2009, the North Carolina Legislature introduced a Water Resource Policy Act of 2009 (SB 907) that would have created a comprehensive water policy and introduced regulated riparianism throughout the state, consolidated water-related statutes, improved water supply planning through river-based organizations, and introduced hydrologic modeling for all of the state's water sources.¹⁸⁴ However, the bill died in committee. But one aspect of SB 907, river basin modeling, passed in the 2009–2010 legislative session as HB 1743.¹⁸⁵

Both of these pieces of legislation are integral components of more efficient interstate and intrastate water management, particularly with mounting demand from population growth, more consumptive uses, and IBTs, as well as more limited supply caused by repetitive and enduring droughts in the Southeast. Instituting a regulated riparian system creates a structure to manage an increasingly scarce resource. According to Davis, the “troika of persistent drought, booming demand and interstate dispute has generated tremendous political horsepower.”¹⁸⁶

The pressure created by interstate dispute propelled South Carolina into drafting and introducing S. 428, the precursor to S. 452.¹⁸⁷ Arguably, given the interconnection of the two states, North Carolina responded to South Carolina's efforts and introduced its own legislation. Both South Carolina and North Carolina are clearly trying to record and quantify their usage, which is both a component of the remedy phase of equitable apportionment, and a socially useful by-product of the lawsuit.

e. Outcomes

Finally, the largest difference between the two lawsuits lies in the actual outcome. *South Carolina v. North Carolina* settled, while *Arizona v. California* ended in a holding that on the surface appeared to benefit Arizona, but was difficult to realize in actual acre-feet. The settlement itself, while not precluding future *parens patriae* suits over shared water, lays the groundwork for a cooperative relationship between the states and the intervenors. It does so by relying on all of the following previous agreements and/or current commitments, for the duration of the FERC license.

184. Susan Stabley, *Water Legislation Would Open Door To Sweeping Shift in N.C.*, CHARLOTTE BUS. J., June 5, 2009, available at <http://www.bizjournals.com/charlotte/stories/2009/06/08/story3.html>.

185. N.C. GEN. STAT. §§ 143-350 (2010), N.C. GEN. STAT. §§ 143-355 (2010).

186. Davis, *supra* note 7, at 2.

187. *Id.* at 45–46.

First, each state agreed to regulate their use and water withdrawal, sharing information between their resource agencies and conserving water during drought.¹⁸⁸ The parties also rely heavily on the Comprehensive Relicensing Agreement (CRA) itself, and the states agreed to enforce withdrawal reductions during drought per the CRA's Low Inflow Protocol (LIP).¹⁸⁹ This includes implementing drought response plans for withdrawers that use the CRA's LIP requirements as a baseline for stringency. Within the CRA, the parties particularly supported the proposed license articles and the projected withdrawals and returns in 2058, which are included in Appendix A and Appendix H of the agreement, respectively.¹⁹⁰

The states also agreed to a mutual updating process for the associated Catawba-Wateree River Basin Water Supply study on a decadal cycle.¹⁹¹ And they will coordinate their state-level IBT approval policies and processes, which includes using notice, the Environmental Impact Statement process from the National Environmental Policy Act,¹⁹² public review, findings of fact, and annual reporting.¹⁹³ Finally, the states agreed to create a memorandum of agreement to guide permitting for bi-state water providers.¹⁹⁴ Even a later motion to file another *parens patriae* suit requires additional negotiation for 90 days before (and to dissuade) an actual filing, with the Bi-State Commission acting as the arbiter.¹⁹⁵ These attributes are novel, promoting voluntary interstate cooperation, while in the *Arizona v. California* holding, the Court had to order Arizona to share its entitlement with sovereign Native American tribes.¹⁹⁶

From a procedural standpoint, in *Arizona v. California*, the Court issued a holding, while the *South Carolina v. North Carolina* settlement agreement corresponds to a Rule 46 dismissal of the proceedings.¹⁹⁷ This means that the Court did not examine the substance of the settlement agreement, and did not issue an order that the parties can later enforce against each other. Additionally, neither of the state legislatures had to grant approval.¹⁹⁸

188. Settlement Agreement, *supra* note 10.

189. *Id.*

190. *Id.* at 3–4.

191. *Id.*

192. National Environmental Policy Act (1969, 1970), 42 U.S.C. § 4331 (1970).

193. *Id.*

194. *Id.*

195. Settlement Agreement, *supra* note 10, at 3–4.

196. *Arizona v. California*, 373 U.S. 546 (1963).

197. SUP. CT. R. 46.

198. Telephonic Conference Nov. 22, 2010, *supra* note 71, at 17.

V. FROM ARIZONA TO SOUTH CAROLINA: LESSONS

While *Arizona v. California* ultimately “turned on the interpretation of federal legislation, not on common law of equitable apportionment,”¹⁹⁹ and *South Carolina v. North Carolina* reached a settlement, there are lessons from each case for future *parens patriae* suits to address interstate water conflicts.

The first is that South Carolina’s original position might have been stronger if it had proverbially “cleaned its own house” before engaging in the litigation. At the start of the *parens patriae* suit, the South Carolina Legislature had proposed a regulated riparian system, which would have allocated water through a permitting system and protected minimum environmental flows.²⁰⁰ Had South Carolina carefully examined its own uses, determined whether to permit surface water before the drought, and adopted S. 428 or similar legislation protecting flows (in addition to establishing the permitting system), the state might have had more equal footing when it challenged North Carolina.

Having passed S. 452, South Carolina created protection for minimum environmental flows.²⁰¹ As a legal strategy different from Arizona’s, South Carolina could have shown harm through interference with these reasonable minimum flows, regardless of drought. Because North Carolina challenged the actual harm to South Carolina based on their description of events during drought, this strategy might have established stronger grounds for proving harm. However, it is not clear if this legislation would have applied retroactively; regardless, South Carolina could have used the argument to show potential future harms.

199. GRANT, *supra* note 128, § 45.04(a), at 45-35.

200. South Carolina’s Senate Bill 428, which was originally drafted in 2005, and introduced to the Legislature by Senator Wes Hayes and Representative Carl Gullick in 2007, was known as the “Surface Water Withdrawal, Permitting, Use and Reporting Act.” It did not pass, and was instead tabled, as the South Carolina Department of Health and Environmental Control’s Water Monitoring Division worked with the state’s Department of Natural Resources to revise the language, which eventually generated S. 452 (2010). The bills are quite similar in content. The impetus for S. 428 came from a combination of factors, including climate change and altered precipitation patterns that generated appreciable drought, affecting both ground and surface water availability. Additionally, the nature of the state’s water demand has shifted from non-consumptive to consumptive uses (a trend throughout the country), coupled with sprawling growth high in the source watersheds (and a 30 percent population increase projected by 2030). Finally, an appointed group, the Commission to Review Water Rights, issued the Governor’s Water Law Report in 2004, and their findings coincided with social realizations about water management, e.g., the need for permitting surface water withdrawals, instituting a regulated riparian system, etc. For further discussion of the impetus and nuances of S. 428, see J. Blanding Holman IV, *The Advent of Modified Riparianism in South Carolina*, 16 SOUTHEASTERN ENVTL. L.J. 291 (2008).

201. S.C. CODE ANN. § 49-4-20(14) (2010).

South Carolina's new minimum flow levels might have directly conflicted with North Carolina's IBT statute, pitting state legislation against state legislation on the shared water body, and creating another factor for which equitable apportionment must account.

In another form of "cleaning house," South Carolina would have—and might still²⁰²—benefit from a compact. Had one been in place, as in Arizona, South Carolina could have invoked the federal allocation of the river through congressional imprimatur, instead of relying on riparianism and a plea for equitable apportionment. This begs the question of whether both states actually exhausted their compacting efforts and whether they had an obligation to do so.²⁰³ And it suggests that, regionally, South Carolina would benefit from entering a compact with Georgia over the Savannah River. "Equitable apportionment litigation has been much criticized as a method of resolving interstate water conflicts. Foremost among the critics is the Supreme Court itself. The Court has urged states to settle their water disputes by compact if possible."²⁰⁴ Despite the critiques of the compact structure,²⁰⁵ they are actually prov-

202. As Special Master Myles clarified in the final telephonic conference on Nov. 22, 2010, the settlement is not equivalent to a compact, since neither state "enhanced their position or power vis-à-vis other states that were not parties with respect to an issue, or which invade the province of the Federal Government." Telephonic Conference Nov. 22, 2010, *supra* note 71, at 31. Additionally, there was no congressional approval of the settlement terms.

203. Riddle, *supra* note 46 (quoting Dr. Moreau).

204. GRANT, *supra* note 120, § 45.01, at 45-7 (citing *Texas v. New Mexico*, 462 U.S. 554, 567 n.13 (1983) and *Colorado v. Kansas*, 320 U.S. 383, 392 (1943)). The Court prefers not to take on these cases because of the vagueness of the standards associated with apportionment; the need for continuing supervision and the Court's lack of desire to play "referee"; the mass of technical data and the Court's lack of expertise with it; and finally, the expense of the litigation and the cost of the Special Master. JOSEPH W. DELLAPENNA, *THE LAW, INTERSTATE COMPACTS, AND THE SOUTHEASTERN WATER COMPACT* (Jeffrey L. Jordan & Aaron T. Wolf eds., 2006). In addition to article I, § 10, clause 3 of the Constitution, that encourages interstate compacts, "the Supreme Court has made its position abundantly clear: states should resolve their conflicts among themselves." GEORGE WILLIAM SHERK, *DIVIDING THE WATERS: THE RESOLUTION OF INTERSTATE WATER CONFLICTS IN THE UNITED STATES* 29 (2000).

205. Most of the compacts are western, although some of the most enduring and successful have occurred on eastern or midwestern water bodies. SHERK, *supra* note 204; DELLAPENNA, *supra* note 204. Invariably, most states will see conflict over interstate water at some point in time, as "[o]f the fifty states that comprise the United States of America, only two—Alaska and Hawaii—do not share a ground or surface water resource with another state. Accordingly, with regard to conflicts over interstate water resources, the forty-eight contiguous states fall into one of two categories: those states that are (or have been) involved in an interstate water conflict or those states that are going to be involved in an interstate water conflict." George William Sherk, *Transboundary Water Allocation in the Twenty-First Century: Colloquium Article: The Management of Interstate Water Conflicts in the Twenty-First Century: Is It Time to Call Uncle?* 12 N.Y.U. ENVTL. L.J. 764, 765 (2005). The

ing to be adept in resolving distributional conflicts, even with unanimity clauses.²⁰⁶ In fact, in contrast to the 26 water allocation compacts,²⁰⁷ seven single-purpose pollution control compacts,²⁰⁸ 12 planning and flood-control compacts,²⁰⁹ and three multipurpose regulatory compacts,²¹⁰ there are only eight equitably apportioned interstate rivers in the United States, given the associated cost and time of the equitable apportionment process.²¹¹

In thinking more broadly about the implications of *Arizona v. California* for the Catawba dispute and other, future *parens patriae* suits over disputed interstate waters, one must ask whether the outcome was the right one in terms of water use for Arizona, 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 annually, on average, 1.5 million acre-feet lower than projected and accordingly allocated.²¹²

Additionally, winning the lawsuit does not assure victory in the battle. Arizona suffered in its construction of the water conveyance system (the Central Arizona Project) thanks to California’s subsequent congressional interference.²¹³ Water shortage was a reality, regardless of the legal holding. And the Native American intervenors ultimately benefited the most, receiving a substantial portion of Arizona’s allocation. As Reisner intimated, after discussing the legal issues in the case, “[t]he *real*

compacting process and the compacts themselves have been challenged and critiqued in terms of their institutional structure, their rigidity over time, their omission of important issues, and their potential to be ineffectual through unanimity clauses and later congressional nullification (either entirely or partially). DELLAPENNA, *supra* note 204; Lynn A. Mandarano, Jeffrey P. Featherstone & Kurt Paulsen, *Institutions for Interstate Water Resources Management*, 44 J. AM. WATER RESOURCES ASS’N 136 (2008). But recent research is showing that compacting can be a viable tool to resolve interstate water conflicts, particularly in terms of allocation, when the compact commissions are viable institutions and have broad powers to carry out their mandates. See Mandarano, Featherstone, & Paulson, *supra*, at 136; Edella Schlager & Tanya Heikkila, *Resolving Water Conflicts: A Comparative Analysis of Interstate River Compacts*, 37 POL’Y STUD. J. 367 (2009).

206. Schlager & Heikkila, *supra* note 205, at 385.

207. SHERK, *supra* note 204, at 30 n.14.

208. *Id.* at 31, n.15.

209. *Id.* at 32, n.23.

210. *Id.* at 35, n.50.

211. GRANT, *supra* note 120, § 45.01, at 45-2 to 45-3 (identifying the following equitably apportioned main stem rivers: Arkansas, Colorado, Connecticut, Delaware, Laramie, North Platte, Vermejo, and Walla Walla).

212. Sue McClurg, *How Is the Colorado River Shortage Agreement Working?*, RIVER REPORT, Fall 2008, at 6; SAX ET AL., *supra* note 18, at 811–13; REISNER, *supra* note 3, at 262–63.

213. AUGUST, *supra* note 2, at 99–108; HUNDLEY, *supra* note 2, at 312.

issues had much more to do with nature and economics than with law, and they were just beginning to make themselves felt.”²¹⁴

Economic development did follow the water for Arizona after the suit, and that was South Carolina’s ultimate objective when she filed her bill of complaint. In the July 30, 2010, Opening Letter Brief regarding the continuation of bifurcation, South Carolina argued that “a single proceeding consisting of a single discovery period and a single trial will be the most effective and efficient means of bringing the certainty sought by South Carolina citizens *concerning their future water needs*.”²¹⁵ The focus was clearly on future economic development, enabled by water supply. According to Trelease, “[w]ith so much land, and so little water, the major problem in the Colorado basin is which acres shall receive the water.”²¹⁶ While it is not quite analogous in the Catawba basin, with so much population in Charlotte, North Carolina, and the desire for growth in South Carolina, the same underlying issue exists. And yet, it is not clear why South Carolina initiated suit instead of negotiating return flow from the Catawba-Wateree IBT into the Yadkin-Pee Dee basin, where South Carolina’s larger city, Myrtle Beach, needed it more.²¹⁷

Having initiated the suit, South Carolina narrowly avoided setting a precedent upon which Georgia could have capitalized on the Savannah River (e.g., the cities of Augusta and Savannah, as well as the potential for Atlanta’s straw in the system). South Carolina has a substantial IBT from Lake Keowee on the Upper Savannah River and Georgia does not. However, the City of Atlanta was recently legally cut off from its Lake Lanier supply²¹⁸ and is seeking alternate sources. Should South Carolina

214. See REISNER, *supra* note 3, at 259.

215. Opening Letter Brief, *supra* note 92, at 7 (emphasis added).

216. Trelease, *supra* note 87, at 160.

217. North Carolina’s Brief in Support of Continued Bifurcation of the Litigation, *supra* note 111, at 15 (quoting an e-mail regarding the need on the Yadkin-Pee Dee River). The problem on the Yadkin-Pee Dee River is sufficiently severe that Franck and Pompe recommended that the FERC relicensing process for the dams on that system include a water transfer framework. See David Francke & Jeffrey Pompe, *Water Transfer Between North and South Carolina: An Option for Policy Reform*, 45 NAT. RESOURCES J. 441 (2005).

218. In a July 17, 2009, holding by a U.S. District Court judge in Florida on the ACT/ACF dispute, the court limited Atlanta’s Lake Lanier water use to levels in the 1970s, effective in July 2012. The judge held that “[h]aving thoroughly reviewed the legislative history and the record, the Court comes to the inescapable conclusion that water supply, at least in the form of withdrawals from Lake Lanier, is not an authorized purpose of the Buford project. Therefore, if the Corps’ actions to support water supply constitute ‘major structural or operational changes’ or ‘seriously affect’ the project’s authorized purposes, the Corps was required to seek congressional approval for those actions and its failure to do so renders the actions illegal.” *In re Tri-State Water Rights Litigation*, 639 F. Supp. 2d 1308, 1347 (M.D. Fla. July 17, 2009) (internal citation omitted). “Thus, without any Congressional authorization, the Corps has reallocated nearly a quarter of Lake Lanier’s conservation stor-

have prevailed in contesting North Carolina's IBT from the Catawba, Georgia could have had grounds on which to sue, using a similar argument. And South Carolina has a much larger population and economic base that relies more on Savannah water (i.e., the city of Greenville, which is a hub in the Atlanta to Charlotte mega-region²¹⁹) than it does on the Catawba-Wataree. However, the fact that the U.S. Army Corps of Engineers built and controls the Savannah dams could provide South Carolina with a statutory apportionment argument analogous to the one in *Arizona v. California*, should there be a *parens patriae* suit with Georgia. If North Carolina had prevailed, Georgia could have made a move to institute IBTs for Atlanta on the Savannah.

In addition to avoiding setting precedent with Georgia, the settlement was the best possible outcome for the state of South Carolina and possibly other *parens patriae* suits, in terms of promoting a cooperative relationship at the state level on a shared watercourse, improving public process in water management, and a more equal balancing of human and ecosystem needs (and corresponding environmental protection). The cooperation established in the settlement is a vast improvement over equitable apportionment, which potentially yields lower net economic benefits in use of water that is reserved for an area anticipating growth.²²⁰ From an urban-planning perspective, the density and sustainability of the growth on each side of the political border is the ultimate goal, so that the associated natural resources are utilized most efficiently (and preferably, minimally). Reserving a right in unused water to promote single-family homes on large lots is much less efficient than supplying water to a dense urban core with a lower environmental footprint.²²¹ And

age to support water supply." *Id.* at 1350. He also stated that "[a]t the end of three years, absent Congressional authorization or some other resolution of this dispute, the terms of this Order will take effect. For Atlanta and the communities surrounding Lake Lanier, this means that the operation of Buford Dam will return to the 'baseline' operation of the mid-1970s. Thus, the required off-peak flow will be 600 cfs and only Gainesville and Buford will be allowed to withdraw water from the lake. The Court recognizes that this is a draconian result. It is, however, the only result that recognizes how far the operation of the Buford project has strayed from the original authorization." *Id.* at 1355.

219. Catherine L. Ross & Myungje Woo, *Identifying Megaregions in the United States: Implications for Infrastructure Investment*, in MEGAREGIONS: PLANNING FOR GLOBAL COMPETITIVENESS 53–83 (2009).

220. Trelease, *supra* note 87.

221. JOE DiSTEFANO, ERIKA LEW, & GARLYNN WOODSONG, CALTHORPE ASSOCIATES, VISION CALIFORNIA: MODELING CALIFORNIA'S FUTURE (2011), available at <http://www.visioncalifornia.org/reports.php> (showing that residential water consumption is projected to drop with higher density housing through smart growth and smaller lot sizes). See also Jamie Patterson & Elizabeth A. Wentz, *Forecasting Single-Family Residential Water Consumption for Phoenix and Paradise Valley, Arizona*, available at http://geodacenter.asu.edu/system/files/200809_PattersonWentz.doc (GeoDa Ctr., Ariz. State Univ., Working Paper

yet, should the uses in that reserved water be utilized more efficiently than in the dense urban core, there is an argument for reserving that right. But to simply reserve it on a competitive principle, or because of a societal sense of entitlement and right, is a questionable use of the natural resource.

Arizona will not concede that Los Angeles may grow while Phoenix must stand still, just because the cost of bringing water to central Arizona is higher than the cost of taking it to southern California. This emotional reaction of the people of the state is transformed into a legal claim of the state to the river, and this vestigial riparian claim, based on access to water, has been elevated into a water right.²²²

South Carolina's sense of entitlement caused the *parens patriae* litigation, which is generally considered a last resort given the associated cost, antagonism, and uncertainty in the resulting resource allocation, not to mention the Court's reluctance to take these cases and act as a trial court. But in this circumstance, the litigation appears to have had utility in generating a beneficial outcome for all of the parties, which is something that the prolonged drought, the CRA preparation, and the formation of the Bi-State Commission had been unable to coalesce.

Despite the absence of a Court order, the environment invariably prevailed through the pressure created by the proceedings and in the settlement itself, comparable to the Native American intervenors in *Arizona v. California*. While not a named party, the environment may become the de facto winner in this legal dispute, with restoration and protected quality and allocation that are prioritized over other uses on the Catawba-Wateree system, much like the Native Americans' volumetric boon. Although there were no federally reserved water rights involved and a public trust doctrine argument was not employed,²²³ in the remedy phase South Carolina could have argued that the minimum environmental flows established in S. 452 must be protected and balanced with the other forms of benefits (primarily economic) accruing to each state from the Catawba-Wateree River. Additionally, in 2008, the state legislature amended the South Carolina Scenic Rivers Act to add "that portion of the Catawba River located between the Lake Wylie Dam and the South Car-

2008–09) (showing that smaller lot sizes correspond to lower water consumption in housing units).

222. Trelease, *supra* note 87, at 167.

223. See generally *Nat'l Audubon Soc'y v. Sup. Ct. of Alpine Cnty*, 658 P.2d 709 (Cal. 1983) (holding that the public trust doctrine provided an independent basis for the water diversion challenge).

olina Highway 9 bridge crossing of the Catawba River,”²²⁴ further protecting environmental quality and flows. These actions bolstered South Carolina’s future harms argument, and effectively added another, albeit silent, interest in the proceedings.

The environment was further protected through Duke Energy’s intervention, which incorporated the CRA from the FERC relicensing process. Although this is not a direct federal action, it will allocate the system through the eventual FERC approval for flows and pool levels in energy production, as well as federally mandated habitat and water quality protection. In fact, the CRA establishes several forms of environmental safeguards, the most important of which are the habitat flow agreements associated with the flow and water quality implementation plans.²²⁵ The CRA states that where dams have impacts in North Carolina, Duke Energy will provide “100-foot wide perpetual conservation easements (measured horizontally from the top of the bank) on approximately 22 bank miles,” as well as public access, open space, and trail planning.²²⁶ There is a similar flow mitigation package in South Carolina, with conservation easements on 5.5 bank miles and a \$1 million environmental mitigation fund to be maintained by the South Carolina Department of Natural Resources.²²⁷ Minimum continuous flows, in cubic feet per second, are to be maintained below each of the dams on the Catawba-Wateree system, although the LIP can temporarily modify them, after notification to all interested parties.²²⁸ To meet flow and quality requirements at each dam, the flow and water quality implementation plan mandates consultation with state and federal resource agencies, and FERC can alter the plan accordingly.²²⁹ Correspondingly, the CRA includes a water quality monitoring plan, and annual flow and reservoir reporting to maintain accountability.²³⁰

Ultimately, the *South Carolina v. North Carolina parens patriae* lawsuit engendered a long-overdue awareness of, and improvement in, water resources management and environmental protection on both sides of the border. South Carolina and North Carolina became more cognizant of the entire water system’s demands. According to Amy Pickle of the Nicholas Institute for Environmental Policy Solutions at Duke University in early 2010, “[t]he Carolinas are behind in water management. Now is a good time to make the transition to a more orderly

224. S.C. CODE ANN. § 49-29-230(9) (2010).

225. COMPREHENSIVE RELICENSING AGREEMENT, *supra* note 50, at 4-1.

226. *Id.*

227. *Id.* at 4-2 to 4-3.

228. *Id.* at A-8 to A-11.

229. *Id.* at A-12.

230. *Id.* at A-13 to A-15.

water withdrawal policy.”²³¹ With S. 452 in South Carolina and a settlement focused on the CRA and the associated minimum flow volumes, as well as drought-planning processes, it is less likely that unsustainable development will be enabled as South Carolina’s consumptive uses increase.

VI. CONCLUSIONS AND FURTHER RESEARCH

As in most water disputes, the basis of controversy for both *Arizona v. California* and *South Carolina v. North Carolina* is a tradeoff of immediate versus future growth potential. One state seeks to preserve resources for future growth, usurping continued growth of a dominant area (e.g., Charlotte, North Carolina, or Los Angeles, California), but at an unknown social cost.

Quite possibly, on a comparison of the benefits and costs of the uses in the two areas, it would be found that greater benefits at less cost could be obtained from use in California, and hence that the switch of the water to Arizona would be a departure from the maximization principle. The nation would be less well off, if tangible economic benefits alone were counted. . . . So here, a strong California and a strong Arizona may outweigh a still stronger California and a depressed Arizona, although the total economic avoiddupois of the latter combination is greater than that of the former.²³²

Like a trial court, the Supreme Court—through the Special Master—had to assume the burden of distributing those costs and managing tradeoffs, when they might better be left to the states—and their urban planners and water managers—to negotiate themselves. According to the judge who cut back Atlanta’s Lake Lanier water supply in the holding of *In re Tri-State Litigation*,

[t]oo often, state, local, and even national government actors do not consider the long-term consequences of their decisions. Local governments allow unchecked growth because it in-

231. Stabley, *supra* note 184. In another development that could have influenced South Carolina’s harm argument and the remedy trial in the lawsuit, the Catawba Riverkeeper Foundation and the Protect the Catawba Coalition, which comprises smaller municipalities from both South Carolina and North Carolina, appealed the permit allowing North Carolina’s contested IBT. They prevailed, and the cities of Concord and Kannapolis must lower their withdrawal levels during drought. See Susan Stabley, *Concord, Kannapolis Settle Catawba Water Dispute*, CHARLOTTE BUS. J., Jan. 20, 2010, <http://www.bizjournals.com/charlotte/stories/2010/01/18/daily22.html>.

232. Trelease, *supra* note 87, at 168.

creases tax revenue, but these same governments do not sufficiently plan for the resources such unchecked growth will require. Nor do individual citizens consider frequently enough their consumption of our scarce resources, absent a crisis situation such as that experienced in the ACF basin in the last few years. The problems faced in the ACF basin will continue to be repeated throughout this country, as the population grows and more undeveloped land is developed. Only by cooperating, planning, and conserving can we avoid situations that gave rise to this litigation.²³³

But the court system is increasingly becoming the locus of these decisions in the absence of cooperation. And in making allocations that change uses, associated property rights, and growth itself, the U.S. Supreme Court impacts the rest of the country's water management.

Through the landmark precedent, settlement achievement, and the elements within the settlement agreement itself, *South Carolina v. North Carolina* will potentially alter the course of eastern water law. Arguably, the stakes in this suit were as high as those in the *Arizona v. California* suit because of the likely affect on IBT statutes on shared watercourses (particularly for growing urban consumers) and on the course of the FERC relicensing process on contested interstate water bodies. Admitting the nonsovereign intervenors sets legal precedent and expands the dimensions of the lawsuit, while providing the grounds for the settlement. It also changed the state-federal relationship, with nonsovereigns permitted in a suit traditionally limited to sovereigns (whether tribal, state, or federal). Both the content of the settlement agreement, and the settlement achievement itself provide a model for other cooperative arrangements on interstate water bodies, and create a divergent but comparable modern legacy to *Arizona v. California*. But the settlement comes with a caveat: the precipitating circumstances were quite fortuitous, and may not be replicable; using litigation in lieu of negotiation is rarely preferable.²³⁴

Both states, but particularly South Carolina, will be irrevocably changed by the suit; it now has a long-awaited regulated riparian water rights structure, a framework for cooperative state-level water management, and a settlement that avoided precedent which could make South Carolina vulnerable to challenge by Georgia on the Savannah. It also spent millions of dollars and years of time to achieve these outcomes.

233. *In re Tri-State Water Rights Litigation*, 639 F. Supp. 2d 1308, 1355 (M.D. Fla. July 17, 2009).

234. But the ability to litigate must be preserved for times when negotiation fails or an upstream state resists sharing. See GRANT, *supra* note 120, § 45.01, at 45-7.

Ultimately, the improved environmental protection (i.e., habitat flow agreements, flow and water quality implementation plans, etc.) may be analogous to the Native American intervenors' allocation from the federally reserved water right; both are the unintentional but primary beneficiaries of the litigation. The water management policy, law, and institutions in both Carolinas are now catching up to their western counterparts. Precipitated by drought and growth, this case should have been avoided through compact, given the environmental, scenic, and economic values associated with the Catawba-Wateree system in each state. The most important legacy that can be transferred from *Arizona v. California* and this suit is a need for, and focus on, holistic, basin-wide sustainable and equitable water management policies between and within states. Tools to realize such policies are now incorporated into the Carolinas' new legislation, institutions, and processes embedded in the *South Carolina v. North Carolina* settlement agreement, all of which should deter future litigation and promote scientifically- and process-based growth patterns.

APPENDIX

TABLE 1: Case Timeline for *South Carolina v. North Carolina*

SIGNIFICANT ACTION/EVENT	DATE
South Carolina files a motion for leave to file complaint and an application for a preliminary injunction in the U.S. Supreme Court.	June 7, 2007
North Carolina files response and opposition briefs in U.S. Supreme Court.	Aug. 7, 2007
U.S. Supreme Court grants South Carolina's motion.	Oct. 1, 2007
Duke Energy and CRWSP file motions to intervene and answer.	Nov. 30, 2007
South Carolina opposes Duke Energy and CRWSP motions.	Dec. 11 & 13, 2007
Kristin Linsley Myles appointed by U.S. Supreme Court as Special Master.	Jan. 15, 2008
City of Charlotte files motion to intervene.	Feb. 1, 2008
South Carolina opposes City of Charlotte motion.	Feb. 25, 2008
Hearing in front of Special Master Myles in Richmond, VA.	Mar. 28, 2008
Special Master Myles issues an order granting limited intervenor status for City of Charlotte, CRWSP, and Duke Energy.	May 27, 2008
South Carolina files the Joint Case Management Plan, and both states file briefs concerning the Case Management Plan disputes.	June 4, 2008
South Carolina files a motion for clarification or reconsideration of the order granting limited intervention.	June 27, 2008
Special Master Myles issues first interim report to the U.S. Supreme Court, reaffirming her order of limited intervenor status.	Nov. 25, 2008
South Carolina files a motion for leave to file exceptions to the Special Master's first interim report with the U.S. Supreme Court.	Dec. 9, 2008
North Carolina files an opposition brief to South Carolina's motion to file exceptions to the Special Master's first interim report.	Dec. 19, 2008
South Carolina files a reply brief.	Dec. 22, 2008
Special Master Myles files the Case Management Plan in Case Management Order No. 9.	Jan. 7, 2009
South Carolina files exceptions to the Special Master's first interim report with the U.S. Supreme Court.	Feb. 13, 2009
U.S. files an <i>amicus curiae</i> brief in support of South Carolina's exceptions to the Special Master's first interim report.	Feb. 20, 2009
Intervenors file individual replies to South Carolina's exceptions.	Mar. 9, 2009
North Carolina opposes South Carolina's exceptions.	Mar. 9, 2009
U.S. makes a motion to participate in the possible oral argument for South Carolina's exceptions to the Special Master's first interim report.	Mar. 10, 2009
North Carolina and intervenors make a motion for a divided oral argument, should it occur.	Mar. 23, 2009
Oral argument before the U.S. Supreme Court.	Oct. 13, 2009
U.S. Supreme Court holds that Duke Energy and CRWSP have met the intervenor standard but City of Charlotte has not.	Jan. 20, 2010
South Carolina requests reversal of order bifurcating proceedings during telephonic conference.	Jan. 27, 2010

(continued)

(continued)

SIGNIFICANT ACTION/EVENT	DATE
City of Charlotte makes a motion to participate as an <i>amicus curiae</i> .	Feb. 19, 2010
North Carolina and intervenors support continued bifurcation.	Mar. 12, 2010
North Carolina and South Carolina serve First Set of Contention Interrogatories.	Apr. 2, 2010
Hearing before Special Master Myles in Raleigh, NC, on the states' and intervenors' bifurcation and discovery arguments.	Apr. 23, 2010
Special Master Myles grants City of Charlotte's <i>amicus curiae</i> motion.	June 16, 2010
South Carolina and intervenors file Letter Briefs on bifurcation.	July 30, 2010
Telephonic conference with Special Master Myles in which she introduces a new procedural structure and requests additional briefing.	Aug. 20, 2010
Bi-State Commission meeting in which the Duke Energy Comprehensive Relicensing Agreement is presented as a possible basis for settlement negotiations.	Aug. 27, 2010
First Amended Case Management Plan filed with Special Master Myles.	Oct. 20, 2010
South Carolina, North Carolina, and the intervenors file briefs on disputed issues in the First Amended Case Management Plan.	Oct. 29, 2010
Joint Settlement Concept submitted to the Bi-State Commission for public review.	Nov. 12, 2010
Special Master Myles issues the Order Regarding Structure of Trial and Discovery.	Nov. 17, 2010
Telephonic conference with Special Master Myles on the terms of the settlement concept and the implications for the litigation.	Nov. 22, 2010
Settlement agreement signed by the states' attorney generals, Duke Energy's associate general counsel and a vice president, and CRWSP's chief administrative staff person.	Dec. 10, 2010
Stipulation to dismiss the bill of complaint and the U.S. Supreme Court's order of dismissal are signed and filed.	Dec. 14, 2010