South Carolina v. North Carolina: Going with the Flow

In an already precedent-setting action for Southeastern water law, in June 2007, South Carolina brought suit in the U.S. Supreme Court (USSC) against the state of North Carolina over the approved inter-basin transfer of 13 million gallons per day from the Catawba River to two North Carolina cities in the Yadkin-Pee Dee River basin (South Carolina v. North Carolina, No. 138). The Catawba 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. Although nowhere near the volume or majesty of the nation’s larger rivers, its flow is the source of what may be the next “Case of the Century,” as it provides hydroelectric power, economic development, recreation, and drinking water for both states. Using parens patriae grounds to seek USSC review, the state of South Carolina primarily requested equitable apportionment of the Catawba River. The USSC granted certiorari, and assigned the first female Special Master to hear the case.

Although still in its relative infancy, the first part of this research examines the progression and milestones of the lawsuit to date. To do so, the author analyzed the complete motions and filings thus far, using additional legal research and other primary and secondary documents as needed. According to South Carolina’s bill of complaint, North Carolina adopted an interbasin transfer (IBT) statute in 1991 that regulates transfers over 2 million gallons per day and established a review process for affected parties in the watershed. Since 1991, North Carolina has authorized transfer of over 48 million gallons per day from the Catawba to other in-state basins (South Carolina v. North Carolina, No. 138). North Carolina uses a variation of a regulated riparian water rights system, first adopted in 1967. South Carolina was formerly a riparian state, but changed to a regulated riparian system through S. 452, South Carolina’s Water Withdrawal Act, adopted June 11, 2010 (S.C. Code of Laws § 49-4-10 et seq., 2010).

To seek equitable apportionment, South Carolina must prove to the Court that there is a threatened invasion of rights, which is serious in magnitude and can be shown. (Grant, 2008, citing to Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931)). However, North Carolina argues that South Carolina has not yet show particularized harm, including specific identification of injury and the uses that are causing it. South Carolina disagrees.

Although the suit was initially bifurcated in its case management plan, South Carolina now argues to stop the bifurcation and use a single discovery period. She makes these arguments on the grounds of judicial economy, facilitation of early settlement, and to address the disagreement between the states on the harm showing (S.C. Opening Letter Brief, 2010). Both North Carolina and the intervenors, Duke Energy and the Catawba River Water Supply Project, advocate continued bifurcation (N.C. Letter Brief, 2010; Intervenors’ Letter Reply Brief, 2010). The Special Master proposed a new procedural structure in the August 20, 2010 telephonic conference, calling for a “trial on the question of entitlement to a remedy,” followed by a second trial to “shape the decree” (Transcript of Telephone Conversation, 2010). This would resolve the states’ dispute over the burden of proof.
So far, the case has been legally precedent setting in two ways. In addition to the appointment of the first female Special Master, non-sovereign intervenors have been admitted into the proceedings, changing the dynamics of the arguments and the duration of the litigation. Special Master Myles issued an order granting Duke Energy, CRWSP, and the City of Charlotte intervenor status in May 2008. South Carolina formally opposed the order, but Special Master Myles reaffirmed her decision in her First Interim Report filed with the USSC in November 2008. The USSC heard oral argument on October 13, 2009, 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. 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.

The first part of the research laid the groundwork for the second, which focuses on an assessment of the possible impact of South Carolina’s Senate Bill 452: Surface Water Withdrawal, Permitting, Use, and Reporting Act on the SC v. NC litigation. Having passed and been signed into law on June 11, 2010, the legislation has the potential to further alter South Carolina’s litigation strategy.

The Act introduced a regulated riparian system for withdrawals of over 3 million gallons per month, which is a standard volume from the ASCE regulated riparian model code. States often adopt a set of minimum flow requirements to be used in conjunction with the permitting system; South Carolina’s definition of minimum flows is variable and seasonally based, determined by each stretch of a water system. 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” (§ 49-4-100(B), 2010). 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 (§ 49-4-80(B), 2010). 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 (§ 49-4-80(A)(5), 2010). Registered surface water withdrawers under the older statute can continue withdrawing at their highest capacity, which grandfathers existing overallocations 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 (§ 49-4-90, 2010). The minimum flow measures ultimately aid the South Carolina argument in showing harm.

And the environment may be the ultimate beneficiary in the dispute. Further bolstering her flow protection argument, the state legislature amended the South Carolina Scenic Rivers Act in 2008 to add “that portion of the Catawba River located between the Lake Wylie Dam and the South Carolina Highway 9 bridge crossing of
the Catawba River” (§ 49-4-230(9), 2010). North Carolina also proposed legislation, the “Water Resources Policy Act of 2009” (SB 907), that would have created a comprehensive set of water policy and introduced regulated riparianism throughout the state, etc. However, it died in committee. But one element of the former bill passed in the 2009 – 2010 legislative session as HB 1743, which provided comprehensive river basin modeling. Additionally, the Catawba Riverkeeper Foundation and the Protect the Catawba Coalition, which are comprised of 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 (Stabley, 2010). This outcome may have bearing on both the harm showing, and the equitable apportionment in the second trial, if it happens. Regardless, both South Carolina and North Carolina are clearly trying to record and quantify their usage, which is a societally useful by-product of the lawsuit.

Ultimately, this is a new era of actual water shortage, coupled with explosive population growth and economic development in Southeastern states. Consequently, South Carolina must be cognizant of all of its water systems’ demands and of improving its relationship with its other neighboring state, Georgia. Rather than proceed with another parrers patriae suit, it would be preferable to the USSC and to society at large to legitimately compact with Georgia over the Savannah. If there is a positive outcome for South Carolina on the Catawba, it may set a precedent upon which Georgia can capitalize on the Savannah River. 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 supply and is seeking alternate sources. South Carolina has a much larger population and economic base that rely on Savannah water.


S.C. Code of Laws § 49-4-10 et seq. (Deerings 2010).


