

Preparing for Apportionment: Lessons from the Catawba River

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“A river is more than an amenity, it is a treasure.”
Justice Oliver Wendell Holmes, Jr.²

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I. Introduction

The history and development of the lower Mississippi River Valley states has been closely linked to their relationships with rivers and water. The same will be true for their futures. Environmental, agricultural, energy, and transportation pressures are already forcing changes to the ways rivers and groundwater resources are viewed, managed, and used. Beyond that, growing populations in drier western states, drought cycles, and concerns over the effects of climate change are already spurring interest in diverting water from rivers, including the Mississippi. In short, there is a growing gap between where freshwater is and where it is wanted. Balancing the rights, duties, and needs of the various players is an increasingly high stakes game.

As competition for these water resources grows, riparian states will need to be prepared to assert their rights to and need of those resources in a clear, prompt, and forceful manner if they wish to benefit from what some are describing as the emerging “water economy.” They also should anticipate more collaborative regional approaches to managing interstate waters. Those voluntary collaborative efforts should be encouraged, but if the history of American water law teaches anything it is that there are limits to just how far voluntary collaboration can take us. At some point the respective rights of states and their citizens tend to need to be clarified or fixed, and in this realm that task falls on the federal government either through interstate compacts, direct congressional apportionment, or judicial apportionment. Compacts are voluntary, judicial apportionments are not. Compacts are negotiated agreements that through Congressional approval take on both the characteristics of contracts and enforceable federal law. Congressional apportionment is a potentially powerful vehicle for allocating water resources, but it is something Congress has shown little appetite for using.³ Judicial apportionments, almost by default, are the realm

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² From Justice Holmes’s opinion in *New Jersey v. New York*, 283 U.S. 336, 342 (1931).

³ Congress’s power to allocate rivers as an incident of its Commerce Clause power was only made clear in 1963 in *Arizona v. California*, 373 U.S. 546 (1963), in which the Supreme Court found that the Boulder Canyon Project Act worked a complete statutory apportionment of the Colorado River.

where the thorniest conflicts over water are sorted out. These are creatures of equity and federal common law which makes their outcomes unpredictable and their initiation something of a gamble. But as conflicts over water heat up it is likely that judicial apportionment will be a gamble increasingly worth taking by some states. That certainly is what South Carolina concluded when it filed suit against North Carolina seeking an equitable apportionment of the Catawba River. The case, *South Carolina v. North Carolina*,⁴ is currently pending before the Supreme Court of the United States, having been accepted by the Court as an original jurisdiction case.

The development and outcome of the case will be instructive to states well beyond the Carolinas as they consider how to frame and pursue their rights and interests to the waters of their interstate rivers, not the least of which would be the Mississippi River and its tributaries. If the prospect of apportioning rivers (by judgment or compact) was not intriguing enough, there is the very real prospect that multistate aquifers will be brought into the future mix as well.

II. Divvying up the Catawba: *South Carolina v North Carolina*

The Catawba River rises in the mountains of western North Carolina flowing southward some two hundred miles into South Carolina where it joins the Wateree River and later the Santee River before ultimately reaching the sea north of Charleston. As rivers go, the Catawba River is not one of our most storied. It has not been etched into American consciousness through songs and poems. Painters have been less attentive to it than they have to the Hudson, the Ohio, and even the Delaware Rivers. And the struggles to control and manage it have not been as iconic as those over the Mississippi, Missouri, and Colorado Rivers.

The river may not be famous, but it is an important river. Important to the communities, including the City of Charlotte, that depend on it for their water supply. Important to growing communities that see it as a future source of water supply. Important to the power plants that depend on it as a source of cooling water. Important to those who care about the health of our nation's rivers.⁵ And important to anyone interested in the rules by which America's water resources will be apportioned and prioritized in the future.

Prior to that time it was often assumed (based in part on earlier U.S. Supreme Court precedent, specifically *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) and *Kansas v. Colorado*, 206 U.S. 46, 85-95 (1907)) that state-owned waters were beyond the reach of federal control except for protecting and promoting navigation and to equitably determine the rights of states to intrastate resources. See, e.g., DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 10:28.

⁴ U.S. Supreme Court case number 06-138, Original. An electronic docket for this case is available at <http://www.mto.com/sm>. The orders and other proceedings referred to in this paper pertaining to this case are available on that website.

⁵ The conservation organization American Rivers named the Catawba-Wateree River as the most endangered river in America in 2008. See AMERICAN RIVERS, AMERICA'S MOST ENDANGERED RIVERS (2008), available at http://www.americanrivers.org/assets/pdfs/mer-past-reports/MER_Report2008optb969.pdf (last visited June 12, 2009).

The case was filed by South Carolina after efforts to reach a negotiated multi-state compact to govern the management of the river failed. In its petition, South Carolina asks the Supreme Court to use its equitable powers to allocate the river between the two states.

At the heart of the dispute is the impact of transferring water from the Catawba River to a separate river basin.⁶ In 1991, North Carolina promulgated the Interbasin Transfer Statute, allowing for the withdrawal of surface water from one river basin and its subsequent discharge into another river basin. Under the statute, if the transfer meets or exceeds 2,000,000 gallons of water per day, then a permit must be issued by the North Carolina Environmental Management Commission (EMC). Any transfers less than this amount are implicitly authorized, at least in the view of South Carolina, without any approval or oversight. In making its determination to grant a permit, the EMC must consider the necessity, reasonableness and beneficial effects, among other things, of the transfer with regard to North Carolina's interests.⁷ Importantly, there is no provision requiring an assessment of the impacts upon a downstream state, even during times of drought when a North Carolina interbasin transfer from the Catawba River is likely to limit the amount available to users downstream in South Carolina.

The suit was filed in June of 2007 and a Special Master, Kristin Linsley Myles, was appointed to administer the case. The case has been divided into two phases. Phase I will focus on whether South Carolina can show that it has been harmed. Assuming harm is established in Phase I, Phase II will address the issue of equitable apportionment of the River.

Adding to the importance (not to mention the color and complexity) of the case is the inclusion of three defendant interveners and the interplay between the apportionment case and the ongoing Federal Energy Regulatory Commission (FERC) relicensing process of the eleven reservoirs owned and operated by Duke Energy Carolinas, LLC (Duke Energy) on the Catawba.⁸ The decision of the Special Master to allow the City of Charlotte, the Catawba River Water Supply Project, and Duke Energy to intervene breaks new legal ground that could significantly affect the way equitable apportionment cases are framed and conducted. The question of whether the interventions were properly granted is now pending before the Supreme Court based on exceptions filed by the State of South Carolina.⁹ The issue of who can and cannot be parties to apportionment suits will be discussed in more detail a bit later in this article. At this point, the important point to keep

⁶ Most notably the North Carolina Environmental Management Commission has issued permits to the Charlotte-Mecklenburg Utilities and the Cities of Concord and Kannapolis to transfer up to a total of 43 million gallons of water per day from the Catawba. Unsurprisingly, North Carolina's view of the situation is different. While not denying that there have been reductions in the flow of the Catawba, North Carolina argues that they are caused by severe drought conditions rather than any acts on its part. *See*, First Interim Report of the Special Master, *South Carolina v. North Carolina*, No. 138, Original, at 5-6, (Nov. 25, 2008.)

⁷ N.C. GEN. STAT. § 143-215.22L(k).

⁸ Six of these reservoirs are located in North Carolina, four are in South Carolina, and one is located on the border between the two states. *Id.* at 3.

⁹ Exceptions of the State of South Carolina to the First Interim Report of the Special Master were filed in the Supreme Court of the United States on February 13, 2009. These exceptions have been supported by the United States in an amicus curiae brief filed with the Court in February of 2009.

in mind is that there is no cookbook for how these cases develop and are decided. These are complex cases that touch many interests and that can, and do, turn on the facts and circumstances of each case and the interplay and evolution of state and federal laws. Regardless of how the Court rules on the exceptions and final merits of this case, the value of this case to other riparian states will lie in its instructive qualities as to the elements of an equitable apportionment case in today's world, particularly in the eastern half of the United States.¹⁰

III. Equitable Apportionment: Basic Elements and Applicable Law

Equitable apportionment is a doctrine of federal common law that governs disputes between states over their respective rights to use interstate streams (and arguably other interstate waters).¹¹ The U.S. Supreme Court has original jurisdiction over these cases by virtue of Article III, §2 cl. 2 of the U.S. Constitution.

Whether the Court accepts an apportionment case is a matter of discretion, not of right.¹² Traditionally, the Court has taken these cases only sparingly, with its first decision coming only in 1907.¹³ Between 1945 and 1982, no equitable apportionment decisions were issued.¹⁴ There are several reasons for this reluctance, including a preference for resolving multi-state disputes in other forums, concerns about undercutting the immunity afforded to states by the Eleventh Amendment against suits brought by citizens of other states, as well as concerns about ripeness. There is also the simple truth that these are complex cases that do not often lend themselves to the clear cut sort of dispute resolutions that judicial proceedings tend to favor.¹⁵

Needless to say, this is tricky territory for the Court to enter. While there are no hard and fast rules that govern the Court's decision to take and rule on a case, there are three principles that seem to consistently stand behind the Court's actions:

¹⁰ The Supreme Court has been very sparing in exercising its authority and discretion in taking and ruling on equitable apportionment cases and other original jurisdiction cases. *See*, *Utah v. U.S.*, 394 U.S. 89 (1969). Since the 1930s the overwhelming preponderance of equitable allocation jurisprudence has dealt with water disputes in western states which largely jettisoned riparian legal theory in favor of various versions of the prior appropriation doctrine for establishing and prioritizing water use rights.

¹¹ *Colorado v. New Mexico*, 459 U.S. 176 (1982).

¹² The Court also has broad discretion over how an equitable apportionment case is shaped by controlling who may be a party to the action and the range of disputes issue to be considered. For a broader discussion of Court's discretion in original jurisdiction cases, *see* V.L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185 (1993).

¹³ *Kansas v. Colorado*, 206 U.S. 46 (1907).

¹⁴ *See*, *Tarlock*, *supra* note 3, at § 10:19.

¹⁵ This point was candidly made by the Court in *Colorado v. Kansas* where Justice Robert wrote "The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of hard and fast rule." 320 U.S. 383, 391 (1943).

- 1) There must be a bona fide dispute over interstate water between two or more states;¹⁶
- 2) The injury to the petitioning state must be serious and clearly established;¹⁷ and
- 3) All riparian states have the right to a “fair share” of an interstate stream and are viewed as equals in the eyes of the Court.¹⁸

Historically, the Court has shown a degree of permissiveness in allowing states to file equitable apportionment suits, allowing the facts of the dispute and the evidence of injury to be developed before a Special Master. That permissiveness has not translated into relaxation of the strict standards that must be met to win one these suits. But what are those standards? Perhaps the best way to approach that question is by considering the following questions.

What Waters are Subject to Apportionment? At the core of all equitable apportionment cases is a dispute among riparian states over some interstate water. Traditionally, this has meant surface streams and their tributaries. Whether it also applies to disputes over interstate groundwater is presently not resolved, though the better view is that it does.¹⁹

Whose Party is It? (Bringing and Defending Apportionment Actions). Only states, as quasi-sovereigns, have the right to seek apportionment. The right does not extend to political subdivisions nor to the citizens of a state. As discussed earlier, the Eleventh Amendment prohibits citizens of one state from suing another state in federal court. This can be a troublesome matter where water disputes are concerned since, invariably, what is at stake are the water uses or planned uses of a petitioning state’s citizens. To permit a state to merely channel the claims of those citizens would effectively undermine the Eleventh Amendment, clearly not something to be countenanced.

On the other hand, the well-being of a state is clearly tied to the uses to which its citizens put that state’s waters. To deny states an effective means of redressing injuries to the waters relied on by its current and future citizens would undermine the role of states as quasi-sovereigns and trustees of public resources and public health and welfare, which is not something to be lightly countenanced.

A solution to this dilemma has been found in the doctrine of *parens patriae*. Under this doctrine, the Court has allowed states in their quasi-sovereign status to bring original

¹⁶ It is clear that the Court requires more than the abstract assertion of a right by a state or the advancement of the interests of a state’s citizens who are mere users of water. In *Kansas v Colorado*, the Court in rejecting Kansas’s petition noted that it was not enough to assert some technical right to water but rather one that would produce actual benefits to offset the negative impacts on Colorado. 185 U.S. 125 (1907) (analyzed in *Colorado v Kansas*, 320 U.S. 383, 385 (1943)). The need for a case to involve state interest beyond those of its citizens is attributable in part to preventing apportionment suits from serving as the equivalent of a class action suit that would otherwise be barred by the Eleventh Amendment. For a more thorough discussion of these points, see Tarlock, *supra* note 3, §§ 10:7-10:14.

¹⁷ See, e.g., *Connecticut v Massachusetts*, 282 U.S. 660 (1931)

¹⁸ See, e.g., *Kansas v. Colorado*, 206 U.S. 46, 100 (1907); *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931); *Colorado v. Kansas*, 320 U.S. 383, 385 (1943). See also, Tarlock, *supra* note 3, § 10:2.

¹⁹ *Id.* at § 10:6.

jurisdiction actions based on the premise (some might say the fiction) that the state is asserting broader interests of all the state's citizens over and above and beyond those of the users of the disputed water.²⁰ These would include the broader interests of all of the state's citizens and future generations. They can also include a state's duties and interests as a trustee of its natural resources.²¹ Because a state is presumed to be representing the interests of all of its citizens, political subdivisions and private persons are not allowed to be plaintiffs in an equitable apportionment action.

None of this should be taken to mean that political subdivisions and private persons cannot be parties to an equitable apportionment action. They can be named as defendants or intervene as defendants but the simple fact is that no interventions have ever been allowed in an equitable apportionment suit, until now (with the exception of Indian tribes).²²

The issue of when a non-state party may be joined or allowed to intervene is confused and controversial for several reasons. First, because equitable apportionment cases are considered to involve "unique interests" of sovereign states.²³ Second, because under the doctrine of *parens patriae* states are presumed to be representing—and binding—the interests of the state and all of its citizens, the Court has been reluctant to open the doors to additional parties. This is both for reasons of administrative convenience and out of deference to the quasi-sovereign status of the states. Clearly, the Court has refused their participation when it was based solely on their status as a "mere user" of water.²⁴ The general rule for intervention was set forth in the case of *New Jersey v. New York*²⁵ in which the Court found that intervention by non-state persons (whose state is already a party to the action) may be appropriate if that person can meet the burden of showing:

- 1) It has a compelling interest at stake in its own right;
- 2) That compelling interest is apart from the party's interest in the class with all other citizens and creatures of the state; and
- 3) That interest is not properly represented by the state.

In articulating these standards (and in denying intervention by the City of Philadelphia in the process), the Court made clear its reluctance to create the potential for intramural disputes between a state and certain of its citizens and political subdivisions. It also sought to avoid the inevitable flood of intervention requests if one non-state interest was admitted.

²⁰ See, *New Jersey v. New York*, 345 U.S. 369 (1953) (citing *Kentucky v. Indiana*, 281 U.S. 163 (1930)).

²¹ The nature and application of the doctrine is best described by Justice Holmes in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

²² See, *Arizona v. California*, 460 U.S. 605 (1983).

²³ "Unique interests" have been described by the Court as those that would be settled by treaty or force between sovereigns. Because states have yielded their treaty- and war-making sovereignty to the federal government, the states are accorded a degree of deference in pursuing their interstate disputes in the realm that the Constitution as left to them, that rises above a mere question of local private rights. See, e.g., *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984), *Kansas v. Colorado*, 206 U.S. 46, 98 (1907), and *Wyoming v. Colorado*, 286 U.S. 494, 508-509 (1932).

²⁴ This standard for exclusion was made clear in the Court's refusal to allow Philadelphia to intervene in an apportionment case over the Delaware River to which the State of Pennsylvania was already an intervening party. See, *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

²⁵ 345 U.S. 369 (1953).

Perhaps the most straight-forward situations in which non-state persons have been allowed to be parties are cases in which a political subdivision such as a city are joined as defendants to an action in such a way as to be subordinate to the state-defendant and where it is effectively the agent of the state in conducting the activity that gave rise to the complaint. The most notable example of this is the forced joinder of New York City in *New Jersey v. New York*.²⁶ In that case the proposed diversion that gave rise to New Jersey's objection was planned and would be executed by New York City. This "authorized agent of injury" doctrine does not trigger any Eleventh Amendment concerns and is so clearly defined that it would not seem to run afoul of any of the other reasons that weigh against allowing non-state persons to be parties. That fact that New York City was forcibly joined as a defendant distinguishes it from cases in which cities and other political subdivisions have sought to participate by intervention, but that does not necessarily mean that the outcome would be different. The question of whether an "authorized agent of injury" would be allowed to intervene as easily as being forced to join is apparently an open one, though the Special Master in the case is clearly of the mind that there is distinction between an "agent of injury" who is named or joined in an action and one who seeks to intervene.

In granting three interventions in the Catawba case, the Special Master has squarely raised the question of when intervention is permissible and what it takes to meet the *New Jersey v. New York* standard. Reduced to its essence, at stake is whether there is a stricter standard for non-state entities to be part of an equitable apportionment case than of other original jurisdiction cases and what the terms "compelling interest" and "not properly represented by the state" really mean in this context.

To the question of whether the standards for intervention in equitable apportionment cases are higher than in other original jurisdiction cases, the Special Master answers "no."²⁷ In the First Interim Report to the Court she notes, and discusses at some length, the Court's history of allowing non-state entities to intervene in other original jurisdiction matter (boundary disputes, interstate taxation cases). She also acknowledges that the Court has never permitted private persons or non-sovereign entities, including municipalities, to intervene in an equitable apportionment case, but concludes that does not matter and that if anything the Court's precedents establish that non-state entities may intervene in appropriate circumstances.²⁸

In counter point, South Carolina and the United States contend that the intervention standards in equitable apportionment cases are indeed different because the nature of the disputes and the interests asserted are different when states are asserting the collective

²⁶ *Id.*

²⁷ First Interim Report, *supra* note 6, at 24. Even if there are not different standards, the baseline rule as set forth by the Court is that ordinarily individuals have no right to intervene in original actions in the Supreme Court. *See*, U.S. v Nevada, 412 U.S. 534 (1973).

²⁸ First Interim Report, *supra* note 6, at 24. In reaching this conclusion the Special Master seems to answer a question that is not at issue. There is no debate that the Court has allowed non-state entities to intervene in original jurisdiction cases under appropriate circumstance. The real question is what are those appropriate circumstances and are there differences between different types of original jurisdiction questions.

interests of its citizens (and thus binding those citizens) than when they are asserting rights akin to private rights.²⁹

As to the matter of what it takes to meet the *New Jersey v. New York* standards, the Special Master had to contend with the fact that there were no clear definitions of what a “direct stake” is, what constitutes a “compelling interest,” or what constitutes inadequate representation of those interests by a state. Borrowing heavily from the body of all original jurisdiction cases, the Special Master confected four rules that she applied to rule on the intervention motions.³⁰ Under her four rules, intervention may be appropriate when:

- 1) The non-state entity is the instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief. (This is “agent of injury” standard articulated in *New Jersey v. New York*);
- 2) The non-state entity has an independent property that is directly implicated or is a substantial factor in the original dispute;
- 3) The non-state entity otherwise has a “direct stake” in the outcome of the action;³¹
or
- 4) The presence of the non-state entity, together with one or more of the above circumstances, would advance the full exposition of the issues in the case.

Whether these rules are a fair interpretation of the *New Jersey v. New York* standards or a new test altogether is a matter open to debate and is being disputed by South Carolina. Regardless of the outcome of that dispute, the Special Master’s analysis of the three interveners’ interests is at least instructive as to what sort of stake a non-state entity will need to have if it is to have any chance of intervening.

In the cases of the City of Charlotte and Catawba River Supply Water Project, the Special Master found that as recipients of Catawba River water under the interbasin transfers complained of by South Carolina, they are in the same situation as New York City in *New Jersey v. New York*. In short, they are agents of injury and this gives them a compelling interest in the case.³²

Duke Energy’s situation is different. It is not transferring water out of the Catawba basin nor is it using transferred water. It does however effectively control the flow of the Catawba River through its reservoir system and the flow requirements contained in its federal license. Accordingly, the Special Master concluded that the outcome of the appropriation action would directly affect Duke Energy’s management of the River’s flows. That direct stake combined with a certain commonality of factors being considered in Duke’s FERC relicensing process would, in the Master’s view, foster a “full exposition of the issues” in the

²⁹ See, e.g., Brief for the United States as Amicus Curiae in Support of Plaintiff’s Exceptions, *South Carolina v. North Carolina*, No. 138 Original, at 10 (Feb. 20, 2009) (citing *Wyoming v. Colorado*, 286 U.S. 494, 508-509 (1932)).

³⁰ See, First Interim Report, *supra* note 6, at 20-21.

³¹ The Special Master explains that the term “direct stake” should be construed in the context of the Court’s original actions as she has discussed them in her Report. It is hard to see how this rule adds any helpful guidance since the Special Master herself acknowledged on page 19 of her Report that “there is little precedent for what type of “direct stake” will suffice.

³² *Id.* at 26-27.

case.³³ Based on those factors, and the application of the third and fourth rules articulated by the Special Master, Duke Energy was allowed to intervene.

The point of this discussion is not intended to be exhaustive nor conclusive. Indeed, given the pending nature of Catawba case, it cannot be. Rather, it should be taken as instructive as to the complex and compelling nature of the rights and interests of states and non-state actors where water is concerned. The conditions that drove the parties to litigate the apportionment of the Catawba are not unique to it. Increasing demand for fresh water, the need to manage and maintain instream flows, and the shifting role of water in energy, transportation, agricultural, and environmental policy clearly suggest that such disputes will become more common. The strains can already be seen on the Apalachicola, Tennessee, Missouri, and Mississippi Rivers where the balancing of equities and interests only become more challenging.

A. *Injury/Benefit*

Convincing the Court to accept an equitable apportionment case is one thing. Proving an injury or benefit sufficient to warrant apportionment is quite another. The history of apportionment cases clearly shows that the Court will take and rule on hard cases but it is also clear that the Court will not intervene to control the conduct of any state unless the harm to another state's rights/interests is serious and clearly established.³⁴ Proving an injury is easier said than done and the apportionment battlefield is littered with the dismissed complaints of states that could not meet the burden.

There is no formula for meeting the injury test. The nature of the injury can vary from case to case. Among those that have been alleged are injuries to property, navigation, water quality, and fisheries.³⁵ Irrespective of the nature of the alleged injury, no apportionment decree will be issued unless the petitioning State can show by clear and convincing evidence that the injury to it from not apportioning the water is clear and substantial.³⁶

In cases in which apportionment is sought by a State proposing to divert water (as opposed to the more common Catawba-like situation in which a downstream state seeks apportionment to prevent or respond to an upstream state's water diversion) the nominal defendant state has the burden of showing that the diversion would cause substantial injury to it. If that burden is met, it becomes the petitioning state's burden to show that the diversion should nonetheless be allowed. According to the Court, this would require a showing by clear and convincing evidence that the benefits to the diverting state would substantially outweigh the harms to other state(s).³⁷

³³ *Id.* at 30.

³⁴ *See, e.g.,* Connecticut v. Massachusetts, 282 U.S. 660 (1931), Colorado v. New Mexico, 459 U.S. 176 (1982), Idaho v. Oregon, 462 U.S. 1017 (1983).

³⁵ *See, e.g.,* Connecticut v. Massachusetts, 282 U.S. 660 (1931).

³⁶ Idaho v. Oregon, 462 U.S. 1017 at 1027 (1983).

³⁷ *See, Colorado v. New Mexico*, 459 U.S. 176, 188 n 13 (1982) and *Colorado v. New Mexico*, 467 U.S. 310 (1984).

B. The Law of the Case

In deciding these cases, the Court is not bound by state laws. Rather, these cases are determined based on equitable principles and tenets of federal common law. It is clear from jurisprudence that while all affected states have equal rights before the Court it does not follow that they are entitled to an equal share of the river at stake.³⁸ This means the Court will balance the relative benefits, injuries, and interests of the states in reaching a decision.

While state law is not binding, it may play a role in shaping the Court's decision. In the Catawba case, the Special Master noted that the "Court has consistently held that state law, and water uses authorized by state law, are to be considered and weighed as the circumstances require."³⁹ This has been particularly true with regard to disputes between states that share a common approach to dealing with water. For example, in disputes between two states that follow the prior appropriation doctrine for defining and prioritizing water rights, the Court generally will work within that tradition and place a premium on protecting established uses.⁴⁰ This convention is both a natural rule of convenience and rooted in the doctrine of estoppel, thus guarding against states complaining against one another about that which they themselves allow under their laws.⁴¹

IV. Searching for Balance: Factors Influencing Apportionment

The purpose of equitable apportionment is not to rectify some past harm but to deal with present harm and prevent future injuries to the complaining state.⁴² In deciding if and how to apportion a waterway, the Court considers any number of factors. History or priority of use has traditionally been one, but so are physical and climatic conditions, the rate and character of water use, return flows, the availability of storage water, the effects of wasteful use, and the respective benefits or harms of limiting flows or diversions.⁴³

The selection and weighing of factors can vary from case to case and time to time. The importance of maintaining instream flows for navigation purposes has long been recognized. The value of maintaining flows to maintain or enhance ecosystems has not traditionally gotten much attention in these balancing tests,⁴⁴ but that could be very different today with the greater state and national emphasis on wetlands, fisheries, endangered species, and managing for sea level rise.

There are, however, two factors that deserve special mention because of the attention they have been given by the Court. The first is the impact on drinking water and domestic water supply. The second is the conservation of water.

³⁸ *E.g.*, *Connecticut v. Massachusetts*, 282 U.S. 660 (1931).

³⁹ First Interim Report, *supra* note 6, at 37; *see also*, *Tarlock*, *supra* note 3, at § 10:15.

⁴⁰ *Wyoming v. Colorado*, 259 U.S. 419 (1922); *see also* *Tarlock*, *supra* note 3, at § 10:17.

⁴¹ *Id.*

⁴² *Idaho v. Oregon*, 462 U.S. 1017 (1983).

⁴³ *See, e.g.*, *Nebraska v. Wyoming*, 325 U.S. 589 (which also makes clear these factors are illustrative and not exhaustive) and *Idaho v. Wyoming*, 462 U.S. 1017 (1983).

⁴⁴ The Court was unconvinced about the risk of material injury to fisheries and water quality, particularly in light of the competing benefits in *Connecticut v. Massachusetts*, 282 U.S. 660 (1931) and *Wisconsin v. Illinois*, 281 U.S. 179 (1930).

Previous Supreme Court decisions have held that drinking water and domestic water supply are the highest value uses of water.⁴⁵ Though that rule is not determinative of a given case (particularly in the face of more recent federal legislation granting special emphasis on protecting endangered species and ecosystems), it is clearly a weighty and compelling factor.

Likewise the importance of conserving and augmenting water supplies has been stressed with increasing frequency by the Court in its apportionment decisions. Central to the Court's approach to equitably apportioning water is the tenet that water should not be wasted and that it will only protect rights to water that are reasonably required and applied.⁴⁶ Indeed, the Court has gone beyond using this as factor in balancing equities to imposing an affirmative duty on states to conserve and augment the flows of interstate streams.⁴⁷

This really should not be terribly surprising. It is fundamentally an application of the equitable maxim that to get equity one must do equity. Nonetheless the number of states that have lost before the Court at least in part because of this lack of conservation should be taken to heart as a cautionary note, particularly in the eastern states less steeped in tradition of viewing water as scarce and rivers as a treasure.⁴⁸

V. Relevance to Riparian States

The days of easy water in America are over. We are in a new era in which water scarcity is not a regional or occasional problem but a fundamental reality. It is an era in which in the conservation and allocation of water will touch every community and shape the development of communities and economies. It is an era long predicted but not long planned for. And it is an era that our present legal regimes and public policies are poorly suited to deal with. This is particularly true for those states with the riparian law traditions, especially those states in the Mississippi River valley which are both dealing with the challenges of meeting their own water needs and contending with the growing pressure to move water from to their watershed to other less water rich areas. For those states, the Catawba is a dress rehearsal for a show that will soon take to the road.

The case demonstrates both the increasing value placed on water and its increasing scarcity. It also offers a reminder of the complexity of the issues at stake and elements and burdens of proof that will shape the winners and losers in these emerging water wars.

In the near future these states should anticipate contending with one or more efforts to divert or allocate interstate rivers. Indeed, it is increasingly likely that these disputes will expand from competitions over interstate streams to interstate aquifers. The outcome of those cases (and the well-being of the respective states) will turn on how well those states are able to articulate and defend their rights and interests and, when necessary, prove how their interests would be imminently harmed or benefited by a diversion or allocation of

⁴⁵ *See, e.g.*, *Connecticut v. Massachusetts*, 282 U.S. 660 (1931).

⁴⁶ *Colorado v. New Mexico*, 459 U.S. 176 (1982).

⁴⁷ *Id.*

⁴⁸ *See, Colorado v. Kansas*, 320 U.S. 383, 394 (1943)

waters. And let's not forget the Court's emphasis on encouraging water conservation as a factor in its equitable appropriation decisions.

These are not conjectural problems. Plans for tapping and diverting the Missouri, Mississippi, and Tennessee Rivers already exist at some level.⁴⁹ The development of energy and transportation policies that are more in synch with lower greenhouse gas emissions and national energy independence will have (and in fact already are having) a significant impact on water usage. And the growing importance of conserving and restoring aquatic habitats as a national priority is already forcing the development of water budgets for the same interstate rivers that are being looked to sources of divertable water.

The plain lesson of the Catawba and the history of equitable apportionment is that unless states and other interested entities make clear their need for robust riverine (and in all likelihood, groundwater resources) someone else will. It is also clear from the record of equitable apportionment cases that it is not enough to claim those resources are important, states must act affirmatively like they are.

One might well infer that the Court was doing more than just agreeing to consider the complaints of South Carolina when it accepted the Catawba 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. With so much at stake, it would be a good lesson to learn.

⁴⁹ For example, the Texas Water Plan of 1968 called for the diversion of up to 15 million acre feet of water per year from the Mississippi River via two vaguely described conveyances across Louisiana. As recently as 2006 there have been discussions in some circles about resuscitating the Mississippi River diversion aspects of the Texas Plan. The State of Georgia is seeking to redraw its boundary with Tennessee so as to become riparian to the Tennessee River in connection with Georgia's efforts to secure a more dependable water supply for Atlanta. *See also*, Shaila Dewan, *Georgia Claims a Sliver of the Tennessee River*, NY TIMES, Feb. 22, 2008; Eryn Gable, *Could Midwestern Supplies be Answer to Las Vegas's Woes*, LAND LETTER (E&E Publishing), Apr. 9, 2009.