

The Conflict Over the Atuel River in Argentina

by Ricardo Lorenzetti

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I. The Atuel River: An Introduction to the Case

In a historic ruling¹ that began to shape the solution to a conflict that has been going on for more than 70 years, the Supreme Court of Argentina ordered in 2017 that the province of Mendoza, together with the province of La Pampa, should allocate the water flow of the Atuel River within 30 days in order to enable restoration of the ecosystem that was affected in the northwest of La Pampa by the Los Nihuiles dams. In the ruling, the Argentine high court ordered that the two provinces, together with the national government, submit a work plan for allocation of the waters of the Atuel River.² The court imposed a deadline of 120 days to submit the plan.

This conflict is old. At the beginning of the 20th century, the Atuel River's flow began to diminish due to the construction of private water works and dams, but in 1947, Mendoza started the construction of a dam that ended up drying out the northwest of La Pampa province. The waters of the Atuel River stopped reaching the Pampean towns of Santa Isabel and Algarroba del Águila. Therefore, a diaspora began and hundreds of settlers abandoned their towns, unlike the Mendoza department of General Alvear, which managed to continue developing. La Pampa began to depend economically on Mendoza.

The Supreme Court had already ruled in 1987 that the river was interprovincial. In addition, the ruling granted to Mendoza a quota for the irrigation of 72,000 hectares in southern Mendoza, in the areas of General Alvear and San Rafael, and exhorted it to enact measures to make this irrigation more efficient, such as leak-proofing, conduc-

tion, and execution of marginal channels. Thus, the surplus water for Mendoza resulting from the quota granted by the ruling would force the province to negotiate and to make "interprovincial agreements" in order to benefit La Pampa at the same time. La Pampa alleged that the ruling was never implemented, and initiated a lawsuit in 2014 for environmental and social damage. It demanded a continuous flow of five cubic meters per second to repair the environmental damage, an improvement of the efficiency of irrigation in Mendoza and leak-proofing of the riverbed, and the construction of a reservoir.

During public hearings that were held at the Supreme Court in 2017, La Pampa alleged that it was robbed of the Atuel River, which caused an environmental catastrophe, in addition to profound social, economic, and emotional damage suffered by the inhabitants in the western part of the province. Mendoza, on the other hand, arguing that it was not reasonable to ask the desert for water,³ stated that 97% of the territory was desert, and pointed out—in order to indicate its efficient use of water—that the Diamante, Mendoza, Tunuyán, and Atuel Rivers had a combined flow that was 1% of the Paraná River, South America's second-longest river.⁴ Mendoza accused La Pampa of only doing waterworks in the eastern part of the province.

3. During the Public Hearing held at the Supreme Court of Argentina, after all the parties presented their grounds before the Tribunal, the Governor of Mendoza explained:

There are possibilities of agreement. Mendoza is always open to agreements. La Pampa has built a myth about a stolen river that harms the northwest of La Pampa, but they have done nothing to make that sector of their province not arid. They could have redirected the Colorado River or made a dam for the water that comes from the Atuel sporadically, and then distribute it.

In this context, he added, "It is not reasonable to ask the desert to deliver water." Prensa Gobierno de Mendoza, Cornejo: "No Es Razonable Pedirle al Desierto que Entregue Agua," MENDOZA GOBIERNO (June 14, 2017), <http://www.prensa.mendoza.gov.ar/cornejo-no-es-razonable-pedirle-al-desierto-que-entregue-agua/>.

4. The Paraná River rises on the plateau of southeast-central Brazil and flows generally south to the point where, after a course of 4,880 km, it joins the Uruguay River to form the extensive Río de la Plata estuary of the Atlantic Ocean.

1. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 243/2014 (50-L), "Province of La Pampa vs Province of Mendoza on the Use of Water" (Arg.). See complete ruling in Spanish at <http://www.cij.gov.ar/nota-28698-Conflicto-Río-Atuel--la-Corte-orden--a-las-provincias-de-La-Pampa-y-Mendoza-la-presentación-de-un-programa-de-obras-con-la-participación-del-Estado-Nacional.html>.

2. The Atuel River rises in the Andes, fed by snow. In 1914, it had a route of almost 800 kilometers (km) and ended at the Colorado River after crossing La Pampa.

According to the Supreme Court's latest decision, the program to be developed by the provinces with the national government should contemplate technical alternatives for the river's specific ecological characteristics, the costs of construction of the works, and its mode of distribution among the three governments. It must also anticipate the benefits of use, the needs of neighboring populations, the need to defend populations' access to drinking water, participation of the original communities located in the region, and productive economic activity. The decision implies a change in the management of the river. The Court required Mendoza, La Pampa, and the national government to reach an agreement to implement the plan and to finance works that mitigate desertification and improve the efficiency of the use of water.

Thus, the ruling aims to finally reach an agreement after decades of litigation. For that reason, it asks that the governments come to a consensus on the management of the Atuel River and the works necessary to regulate it. But the key is a requirement to guarantee a minimum flow of water that allows the environmental restoration of the La Pampa area, particularly Santa Isabel and its surroundings. The Court emphasized the environmental problems that communities face due to climate change. In this sense, it explained that the problem was not so much the "demand" for water that Mendoza and La Pampa might have, but that the supply would increasingly diminish.

The Court emphasized that it was necessary to change the confrontational approach taken by the two provinces to one of cooperation. In this context, it wrote, "[I]n the face of the existence of tensions in interjurisdictional relations, it is necessary to assume a conjunctive or cooperative perception, typical of a concerted federalism, that overcomes disjunctive or separatist approaches."⁵ The Court also made reaching an agreement mandatory, stating that in 120 days there must be a management plan and works to improve the management of and guarantee water from the Atuel River for the two provinces.

In the following parts, I will discuss each of the main elements of the 2017 decision: La Pampa's original lawsuit of 2014; the ruling competence of the Supreme Court of Argentina; its rejection of the defense of *res judicata* raised by Mendoza; the human right of access to drinking water; the fight against desertification; the integral vision of a water basin; and the establishment of the Lower Atuel Interprovincial Commission (CIAI) as a conflict resolution body. I conclude by reflecting on the importance of a paradigm shift in the management of shared water resources.

II. La Pampa's 2014 Lawsuit

In its lawsuit, La Pampa claimed that Mendoza violated the obligation to negotiate and observe in good faith the agreements to regulate the uses of the Atuel River. The province offered that the greatest proof of Mendoza's bad faith was the intentional delay in the consideration and the subsequent rejection by its legislature of the framework agreement of 2008, which provided for a plan of works to be carried out and financed by the two provinces and the national government. It requested that environmental damage be declared a consequence of the aforementioned noncompliance, and that its cessation and restoration of the environment be ordered. It also claimed that a minimum water flow to La Pampa territory must be established, taking into account the human right to water, and to harmonious and balanced growth among the provinces.

As mentioned in Part I, the Supreme Court ruled that these two provinces—jointly with the national government—must establish through the CIAI a program for the execution of measures to resolve the conflict over the river. The program must be submitted to the Supreme Court for approval within a period of 120 days. It must consider various technical alternatives in relation to the problem of the Atuel River, with any construction costs divided between the three governments. The program must also contemplate its benefits, the needs of the surrounding populations and access to drinking water, the participation of the original communities located in the region, and the sustainability of productive economic activity and of the ecosystem. The Court also ordered, in a precautionary manner, the establishment of a suitable water flow for the recomposition of the affected ecosystem in the northwest of La Pampa province.

III. Ruling Competence of the Court

The Supreme Court held that its intervention in the litigation is framed under Article 127 of Argentina's National Constitution, according to which the complaints of the provinces "must be submitted to the Supreme Court of Justice and settled by it."⁶ The Court emphasized the need to respect the principle of federal loyalty or good faith to advance the resolution of the conflict, according to which in the harmonious exercise of power, abuses must be avoided in order to reach cooperatively the functionality of the federal structure as a whole. In this context, the Court concluded that, in light of interjurisdictional tensions, it is necessary to assume a perception of a concerted federalism that goes beyond disjunctive or separatist approaches.

5. *Supra* note 1.

6. Art. 127, Constitución Nacional [Const. Nac.] (Arg.).

IV. Rejection of Res Judicata

The Court rejected the argument that this conflict was identical to the one resolved in 1987 between the two provinces, and therefore denied the defense of *res judicata* raised by Mendoza. In deciding this, it took into consideration that although in both cases there was a conflict over the use of the Atuel River, the issues submitted in this case were different from those described in the decision of December 3, 1987,⁷ because, over the years, the conflict began to involve aspects related to the integral vision of the environment that emanates from the environmental clause of Argentina's 1994 constitutional reform.

This distinction, explained the Court, "substantially changes the focus of the problem, whose solution should not only address the claims of the provincial states, since those affected are multiple and include a broad region."⁸ For this reason, the solution cannot be limited to solving the past issues, but rather, and fundamentally, must focus on future sustainability. The Court emphasized that the legal regulation of water has gone from an anthropocentric, purely ownership model, which was largely present in the conflict resolved by the 1987 ruling, to an ecocentric, systemic model.

V. The Human Right of Access to Drinking Water

The Court also emphasized that in the more recent conflict the human right to drinking water was a central consideration. It argued that access to drinking water directly affects the life and health of people, which is why it should be protected by judges and in the area of collective rights; therefore, it is essential to protect water so that nature maintains its functioning as a system and its capacity for regeneration and resilience. Both the United Nations and the Organization of American States have recognized the right to water with resolutions on The Human Right to Water and Sanitation⁹ and The Human Right to Safe Drinking Water and Sanitation,¹⁰ passed in 2010 and 2012, respectively. This declaration of a human right has been reiterated in numerous rulings of the Inter-American Court of Human Rights and at international and national conferences. In this case, the right to drinking water is specified in the right to a water flow that ensures environmental restoration.

VI. The Fight Against Desertification

The Court also considered desertification to be a relevant legal issue. It affirmed that the images viewed in the public hearing, and the showings of the parties in the case, clearly demonstrated the state of drought and desertification that characterizes the Pampean region in the Atuel Basin.

This proven fact, said the Court, has legal implications, since Argentina signed the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa,¹¹ adopted in Paris and ratified in Argentina by Law 24701. Under this convention, Argentina must prioritize combating desertification and mitigating the effects of drought, and also allocate sufficient resources to do so according to its abilities and circumstances.

The Court added that the fight against desertification includes focusing on the supply of water, not only on the demand for water. This means that it is necessary to identify possible sources of supply with a broader scope, covering the whole basin and the affected regions. This follows from Argentina's obligation to allocate resources to combat severe drought or desertification, with a vision that includes the entire basin.

VII. The Integral Vision of a Water Basin

The Atuel River Basin is an integral system, which is reflected in the close interdependence between the various parts of the watercourse. The Court highlighted the importance of addressing the conflict from that integral perspective. It explained that the solution of the case requires the adoption of measures referring to the basin in general and not limited to territorial jurisdictions, because environmental conflicts do not coincide with political or jurisdictional divisions. It stressed that the very concept of the water basin is one of unity, in which the hydrological cycle as a whole is understood, and linked to a particular territory and environment.

The Court's decision specified that the hydrological basin must be the focus of the basin organization's required action. Basins are physical areas within which the different uses and effects of water resources and other natural resources are naturally interdependent, and they therefore must be used and conserved in an integrated manner. Therefore, the river basin should be treated as a management unit, coordinated by a basin organization, as opposed to sector-by-sector management; in Argentina, this is reflected in Principle 17, "Integrated Water Resources Management," of the Federal Water Council's *Guiding Principles of Water Policy*.¹²

The Court emphasized that this vision is part of the evolution of the concept of watershed management: it has changed from an approach oriented basically to the capture of water to other more complex levels, such as the protection of natural resources and the mitigation of the effects of extreme natural phenomena, and to the improvement of production (agricultural, industrial, livestock, mining,

7. Province of La Pampa vs Province of Mendoza, Rulings 310:2478 (1987).

8. *Supra* note 1.

9. G.A. Res. 64/292, 64th Sess., U.N. Doc. A/RES/64/292 (July 28, 2010).

10. OAS, GA/RES 2760 (XLII-O/12) (June 5, 2012).

11. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Oct. 14, 1994, 33 I.L.M. 1328 (1994).

12. CONSEJO HÍDRICO FEDERAL, PRINCIPIOS RECTORES DE POLÍTICA HÍDRICA DE LA ARGENTINA (2003), available at <http://www.cohife.org/advf/documentos/2015/10/561b1c0da79ae.pdf>.

forestry) combined with the integrated management of the basin's natural resources.

VIII. The CIAI

The Supreme Court established that the program for the implementation of remedial measures must be prepared within the framework of the CIAI, on the understanding that it is an organ created by the interested provinces themselves, precisely to respond to the conflict. To ensure that this objective is met, the Court specified that the provinces and the national government must provide the necessary resources to institutionally strengthen the CIAI.

The Court emphasized that the CIAI is the body formally constituted by the parties for the purpose of carrying out negotiations aimed at achieving an understanding regarding the use of the waters of the Atuel River, within the framework of a federalism of coordination (rather than federalism of opposition) to overcome conflicts between member states of a single nation.

IX. Conclusion

The Supreme Court's new ruling highlighted that this conflict between the two provinces was different from the one the Court resolved in 1987, and held that it must be resolved based on a concerted federalism that overcomes separatist approaches. It said that the case, in its current form, involved an environmental problem; that there was a right to water that must overcome the ownership model to be systemic and ecocentric. It found that access to drinking water directly affects the life and health of people, and

that its protection is essential for nature to maintain its functioning as a system and its regenerative capacity and resilience. It also affirmed that the fight against desertification includes focusing on the supply of water, not only on the demand for water.

For these reasons, the Court ordered the two provinces, with the participation of the national government, to submit a plan that includes the allocation of their costs, within the scope of the CIAI. The parties were also ordered to set a water flow suitable for the recomposition of the affected ecosystem in the northwest of La Pampa province. The Court emphasized the need to address the Atuel conflict from a perspective of unity—as a water basin—given that natural resources are interdependent and must be cared for in an integrated manner.

Once this decision was reached, the governors of both provinces sent formal requests for a meeting with the national government to discuss the conflict and to begin formulating the joint and cooperative mechanisms ordered by the Court. The Court's judgment overcomes historical differences and necessitates everyone in the conflict to compromise and negotiate. The Court ordered the parties to reconcile with guidelines benefiting a system in which the provinces and the nation are directly involved.

In short, there are no winners or losers in this case. The Court's ruling is about a debate on environmental approaches. There is no one owner of the environment; the environment is the responsibility of everyone. Further, the decision of the Court raised awareness about the need for a paradigm shift around the use of water, in Argentina and worldwide.