

Mississippi v. Tennessee: Anatomy of a Groundwater War

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““A dispute between States over the rights to water” is a serious matter- so serious, in fact, that it might be “grounds for war if the States were truly sovereign.””

Citing

South Carolina v. North Carolina, 558 U.S. 256, 289 (2010)

Overview

- Background
- History
- Sparta Sand Aquifer
- The Present Litigation
- Mississippi’s Theory of the Case
- Causes of Action
- Key Issue
- Equitable Apportionment
- Equal Footing
- Rulings
- Why is Mississippi proceeding in this way?
- Conclusions

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Background

- Memphis Light, Gas & Water (“MLGW”) provides water utility services to residents of Memphis
- Between 1965 and 1985, groundwater pumping increased from 72 MGD to 131 MGD
- Pumping from well within 3 miles of Mississippi border increased from 4 MGD to over 21 MGD and two additional wells developed within 3 miles of the border, collectively pumping about 11.5 MGD

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History

- Mississippi filed suit against Memphis and Memphis Light, Gas & Water (“MLGW”) in 2005 in United States District Court pleading conversion, trespass, unjust enrichment, constructive trust and nuisance based on MLGW’s pumping of groundwater
- In 2008, case dismissed by USDC for failure to join Tennessee- equitable apportionment
- Fifth Circuit Court of Appeals affirmed in 2009
- SCOTUS denied cert and motion to leave to file amended complaint in 2010

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Sparta Sand Aquifer

- Begins at a surface outcrop within north Mississippi and descends with an east-to-west/southwest slope while thickening as it moves towards the Mississippi River
- Rainwater falling within Mississippi collects on the outcrops and is drawn into the aquifer and stored within Mississippi
- Mississippi admits that the Aquifer extends into Western Tennessee and that the Memphis Sand Aquifer was supplied in large part by the Sparta Sand

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The Present Litigation

- June 6, 2014- Mississippi filed a motion for leave to file a bill of complaint with SCOTUS
- Tennessee, Memphis, MLGW and the United States oppose motion, but motion is granted
- Mississippi alleges that defendants have “forcibly siphoned into Tennessee hundreds of billions of gallons of high quality groundwater owned by Mississippi and held by Mississippi for its people”
- Mississippi claims “sovereign right, title and exclusive interest in the groundwater”
- Seeks declaratory and injunctive relief, along with damages of not less than \$615 million

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Mississippi's Theory of the Case

Groundwater at issue

- Is a “finite, confined intrastate natural resource” that would remain in Mississippi under natural conditions
- “was naturally collected and stored in a distinct deep sandstone geological formation...sandwiched between upper and lower clay formations [that] are impermeable, or of very low permeability”

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Mississippi's Theory of the Case

- Aquifer “saturated with ... groundwater stored as a fairly constant volume residing under significant hydrostatic pressure within Mississippi's borders”
- The mechanical pumping operations wrongfully draw the water from Mississippi into Tennessee
- Cone of depression in Mississippi- imposes greater costs on groundwater users in Mississippi



Mississippi's Theory of the Case

- Distinction between the Aquifer's geological formation on the one hand (extends into Tennessee) and the source, location and hydrologic characteristics of the groundwater stored in the formation under natural conditions
- MLGW taking between 20 MGD and 27 MGD of Mississippi's groundwater storage out of the Sparta Sand, resulting in a substantial drop in pressure and corresponding drawdown of stored water in the Sparta Sand

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Mississippi's Theory of the Case

As between Mississippi and Tennessee, (a) since its admission into the United States, Mississippi has owned and continues to own all right, title and interest in groundwater stored naturally in the Sparta Sand formation underneath Mississippi's borders which does not cross into Tennessee under natural predevelopment conditions; and, (b) since its admission into the United States, Tennessee has owned and continues to own all right, title and interest in groundwater stored naturally in the Sparta Sand formation underneath Tennessee's borders which does not cross into Mississippi under natural predevelopment conditions

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Causes of Action

- Trespass: enter the owner's land or property without property
- Conversion: a civil wrong (tort) in which one converts another's property to his/her own use, which is a fancy way of saying "steals."
- Tortious Interference includes trespass, conversion and nuisance
- Nuisance: causing a substantial and unreasonable interference with someone's property or the use or enjoyment of that property



Key Issue

- Is the resource INTERstate or INTRAsate?
- If INTERstate, equitable apportionment is the only remedy
- If INTRAsate, Mississippi's claims can go forward
- Mississippi goes to great lengths to portray the aquifer as INTERstate

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Equitable Apportionment

- SCOTUS has original jurisdiction in suits between states
- Principal means of resolving disputes interstate water disputes where negotiation fails
- *Kansas v. Colorado* (1907) was the first: equality of right
- Interstate Common Law
- *New Jersey v. New York* (1921): "the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence"; greater than "injury-in-fact"
- U.S. Government may be an indispensable party



Equitable Apportionment Factors

- Physical and climatic conditions
- Consumptive use of water
- Character and rate of return flows
- Extent of established uses
- Availability of storage water
- Practical effect of wasteful uses on downstream areas
- Damage to upstream areas as compared to the benefits to downstream areas if limitation is imposed on the former

Does Equitable Apportionment Apply to Groundwater?

- No court ruling on the issue
- Surface water similar to groundwater
- Equitable apportionment should apply to groundwater

Equal Footing Doctrine

- Mississippi claims that the equal footing doctrine applies instead= upon entry into the Union, each state becomes vested with all the legal characteristics and capabilities of the first state
- Equal footing applies to beds of streams and other waters, not the water itself

Why is Mississippi Proceeding in this Way?

- Would Mississippi prevail under Equitable Apportionment?
- If Mississippi did prevail in an Equitable Apportionment action, what would the remedy be?

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Special Master's Conclusions

- Order filed August 12, 2016
- Complaint “fail[s] to plausibly allege that the Sparta Sand Aquifer or the water in it is not an interstate resource”
- Equitable apportionment is necessary in absence of a compact
- Evidentiary hearing to be held on the limited issue of whether the Aquifer is interstate

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Conclusions

- Tennessee likely to prevail
- Mississippi may be acting rationally given the likely result of Equitable Apportionment
- What incentives does this give to states?
- Compare to claims between private parties
- Will this prompt changes in water law?

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