Mississippi v. Tennessee: Anatomy of a Groundwater War
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Overview
- Background
- History
- Sparta Sand Aquifer
- The Present Litigation
- Causes of Action
- Key Issue
- Equitable Apportionment
- Equal Footing
- Rulings
- Why is Mississippi proceeding in this way?
- Conclusions

Background
- Memphs 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

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

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
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

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”

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

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 INTRAstate?
- If INTERstate, equitable apportionment is the only remedy
- If INTRAstate, 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

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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

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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

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?