

IN THE  
**Supreme Court of the United States**

---

STATE OF MISSISSIPPI,  
*Plaintiff,*  
v.

STATE OF TENNESSEE, CITY OF MEMPHIS, TENNESSEE,  
AND MEMPHIS LIGHT, GAS & WATER DIVISION,  
*Defendants.*

---

**On Bill of Complaint**

---

**ANSWER OF  
DEFENDANT STATE OF TENNESSEE**

---

DAVID C. FREDERICK  
DEREK T. HO  
JOSHUA D. BRANSON  
BRADLEY E. OPPENHEIMER  
KELLOGG, HUBER, HANSEN,  
TODD, EVANS & FIGEL,  
P.L.L.C.  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 326-7900

*Special Counsel to the  
State of Tennessee*

September 14, 2015

HERBERT H. SLATERY III  
*Attorney General*  
ANDRÉE S. BLUMSTEIN  
*Solicitor General*  
BARRY TURNER  
*Deputy Attorney General  
Counsel of Record*  
SOHNIA W. HONG  
*Senior Counsel*  
P.O. Box 20207  
Nashville, TN 37202-0207  
(615) 741-3491  
(barry.turner@ag.tn.gov)

*Counsel for the  
State of Tennessee*

---

---

No. 143, Original

---

IN THE  
**Supreme Court of the United States**

---

STATE OF MISSISSIPPI,  
*Plaintiff,*

v.

STATE OF TENNESSEE, CITY OF MEMPHIS, TENNESSEE,  
AND MEMPHIS LIGHT, GAS & WATER DIVISION,  
*Defendants.*

---

**On Bill of Complaint**

---

**ANSWER OF  
DEFENDANT STATE OF TENNESSEE**

---

The State of Tennessee, by its Attorney General and special counsel, and pursuant to this Court's order dated June 29, 2015, for its Answer admits, denies, and alleges as follows:

1. Tennessee admits the first sentence of paragraph 1 of the Complaint. Tennessee lacks information sufficient to admit or deny the second sentence.
2. Tennessee admits the allegations set forth in paragraph 2.
3. Tennessee admits the second sentence of paragraph 3. Tennessee further admits that Memphis, as a municipal corporation within Tennessee's borders,

acts as a “political subdivision of the state” with respect to governmental functions. *Smiddy v. City of Memphis*, 203 S.W. 512, 513 (Tenn. 1918). MLGW’s extraction and sale of groundwater, however, are proprietary functions rather than governmental ones and so are not imputable to Tennessee. *See Memphis Power & Light Co. v. City of Memphis*, 112 S.W.2d 817, 821 (Tenn. 1937). Under Tennessee law, municipalities are separate and distinct from the State, and Memphis and MLGW do not conduct proprietary activities like groundwater extraction as Tennessee’s agent or instrumentality.

4. Tennessee admits the allegations set forth in paragraph 4.

5. Tennessee denies that this Court possesses exclusive and original jurisdiction over Mississippi’s claims as currently pleaded, because they do not allege a bona fide “controvers[y] between two or more States.” 28 U.S.C. § 1251(a). When stripped of conclusory and implausible allegations, the Complaint fails to allege that Tennessee has converted any water belonging to Mississippi.

6. Tennessee denies that this Court possesses exclusive and original jurisdiction over Mississippi’s claims as currently pleaded. Although the Court has concurrent original jurisdiction over disputes that include non-State parties alongside State parties, the Court in its discretion should decline to exercise that jurisdiction here. Because Mississippi has disclaimed any equitable apportionment, Tennessee is not a proper defendant in this purported state-law tort action, which in any event fails as a matter of law as to all defendants in the absence of an equitable apportionment. Without Tennessee’s presence as a defendant, this action lacks the gravity necessary

to warrant the exercise of the Court's concurrent jurisdiction.

7. Tennessee denies the allegations set forth in paragraph 7, except admits that the Court possesses jurisdiction to adjudicate controversies between States. Tennessee denies that Mississippi has properly invoked the Court's jurisdiction with respect to any of the relief it seeks.

8. Tennessee denies the allegations set forth in paragraph 8, except admits that Mississippi was admitted to the United States on December 10, 1817. Tennessee specifically denies that Mississippi has exclusive ownership rights to any of the groundwater in the Aquifer.

9. Tennessee denies the allegations set forth in paragraph 9, which call for a legal conclusion.

10. Tennessee denies the allegations set forth in paragraph 10, including Mississippi's legal characterization of the decisions in *Cinque Bambini Partnership v. State*, 491 So. 2d 508 (Miss. 1986), and *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

11. Tennessee denies the allegations set forth in paragraph 11. Tennessee specifically denies that the Aquifer, or the groundwater within it, qualifies as one of "Mississippi's natural resources" that Mississippi law governs. The groundwater at issue forms part of an interstate water resource, and a State's right to the exclusive use of any of that water may be determined only through an interstate compact or equitable apportionment. Without an allocation through one of those mechanisms, Mississippi possesses no inherent property right to any specific portion of the Aquifer, and it possesses no right to exclude other States and their political subdivisions

from (or to charge them for obtaining) any of the groundwater within the Aquifer.

12. Tennessee admits the allegations set forth in paragraph 12 insofar as they quote from Miss. Code Ann. § 51-3-1 (2003) and from Richard J. McLaughlin, *Mississippi*, in 6 *Water and Water Rights* 712 (Robert E. Beck ed., 1991 ed., repl. vol. 2005). Tennessee denies the allegations insofar as they purport to characterize the legal import of those sources, specifically including any suggestion that groundwater in the Aquifer belongs to Mississippi.

13. Tennessee admits that Tennessee was admitted to the Union on June 1, 1796. Tennessee further admits that there is no existing dispute between Mississippi and Tennessee regarding the border. Tennessee denies the remaining allegations in paragraph 13. Although the border between Tennessee and Mississippi was intended to be established at the 35° latitude, the official border survey establishes the border between Mississippi and Tennessee as slightly south of the 35° latitude.

14. Tennessee admits that MLGW has constructed and operated well pumping fields within Tennessee that extract groundwater from the Aquifer. Tennessee denies the remaining allegations set forth in paragraph 14. MLGW's wells reach water that resides underneath Tennessee's side of the Tennessee-Mississippi border. Tennessee therefore denies that MLGW's pumping "forcibly extracts high quality groundwater from Mississippi into Tennessee." Because of the groundwater gradient of the Aquifer, that groundwater would have naturally moved from Mississippi into Tennessee without any pumping by MLGW. Tennessee further denies that the alleged

groundwater pumping has effected a trespass, conversion, or any other violation of law.

15. Tennessee admits that there exists a geological formation comprised primarily of sand known as the “Sparta Sand” or the “Memphis Sand” aquifer, which lies beneath Mississippi, Tennessee, and several other States. Tennessee further admits that the Aquifer is encased by clay formations, but denies that those clay formations are entirely impermeable and contiguous across the entire extent of the Aquifer. Tennessee lacks sufficient information to admit or deny the second sentence of paragraph 15. Tennessee denies the remaining allegations in paragraph 15, including the allegation in the first sentence that the groundwater “at issue” is “Mississippi’s groundwater.”

16. Tennessee denies the allegations set forth in paragraph 16, including the allegation that the referenced United States Geological Survey (“USGS”) reports support Mississippi’s allegations. In fact, more recent and comprehensive reports show that, under pre-development conditions, the groundwater in the Aquifer flowed naturally in a northwesterly direction from Mississippi into Tennessee. *See* Brian Waldron & Daniel Larsen, *Pre-Development Groundwater Conditions Surrounding Memphis, Tennessee: Controversy and Unexpected Outcomes*, 51 J. Am. Water Resources Ass’n 133 (Feb. 2015).

17. Tennessee denies the allegations set forth in paragraph 17. Under natural conditions, the groundwater in the Aquifer did not remain static, but rather flowed from Mississippi into Tennessee. *See supra* ¶ 16. Moreover, the groundwater in the Aquifer does not exist in isolation, but rather forms part of a hydrologically interconnected regional water-

shed. *See* USGS, *Water Levels and Selected Water-Quality Conditions in the Sparta-Memphis Aquifer (Middle Claiborne Aquifer) in Arkansas, Spring-Summer 2007* (2009). Several surface rivers and their corresponding watersheds, including the Wolf River, play key roles in recharging the Aquifer. Similarly, the Aquifer is hydrologically connected with other aquifers in this multi-state aquifer system. *See* USGS, *Ground Water Atlas of the United States, Hydrologic Investigations Atlas 730-K, Segment 10, Illinois, Indiana, Kentucky, Ohio, Tennessee*, at K27 (1995); USGS, *Ground Water Atlas of the United States, Hydrologic Investigations Atlas 730-F, Segment 5, Arkansas, Louisiana, Mississippi*, at F16 (1998). Because the groundwater in the Aquifer forms part of a broader water system that traverses several States, it is not a “finite, confined intrastate natural resource over which Mississippi became sovereign.”

18. Tennessee lacks sufficient information to admit or deny the first sentence of paragraph 18. Tennessee denies the remaining allegations set forth in paragraph 18, including the suggestion that MLGW’s pumping was responsible for alleged changes to groundwater storage or pressure in “Mississippi’s Sparta Sand,” as well as the suggestion that the Sparta Sand and Memphis Sand aquifers are discrete intrastate formations. In reality, both form part of a single, interconnected, interstate water resource (referred to here as the “Aquifer”) that does not inherently belong to any single State.

19. Although Tennessee admits that it exercises general supervision over the construction, operation, and maintenance of public water systems throughout the State under the Safe Drinking Water Act of 1983,

*see* Tenn. Code Ann. § 68-221-701 *et seq.*, it denies that it oversees the location of MLGW's groundwater wells, the drilling of MLGW's wells, or the volume of water withdrawn from those wells. Tennessee lacks sufficient information to admit or deny the remaining allegations set forth in paragraph 19, which concern details of pumping operations conducted by MLGW rather than Tennessee.

20. Tennessee denies the allegations set forth in paragraph 20, except that it lacks sufficient information to admit or deny the allegations concerning statistical details of pumping operations conducted by MLGW rather than Tennessee.

21. Tennessee denies the allegations set forth in paragraph 21. Although Tennessee admits that it exercises general supervision over the construction, operation, and maintenance of public water systems throughout the State under the Safe Drinking Water Act of 1983, *see* Tenn. Code Ann. § 68-221-701 *et seq.*, it denies that the State's supervision extends to "all features relating to quantity and source" of Memphis's water supply. Tennessee also specifically denies that it controls the location of groundwater wells, Memphis's or MLGW's drilling of wells, or the volume of water withdrawn from those wells.

22. Tennessee admits the allegations in the first sentence of paragraph 22. Tennessee further admits that MLGW has generally increased its capacity and pumping from well fields near the Mississippi-Tennessee border, but lacks sufficient information to admit or deny Mississippi's allegations about the numerical volumes of water extracted by MLGW. Tennessee denies the remaining allegations set forth in paragraph 22.

23. Tennessee denies the allegations set forth in paragraph 23. Absent an equitable apportionment, Mississippi does not have an exclusive right to use any water in the Aquifer. And Mississippi cannot obtain an equitable apportionment because it has not alleged any harm from MLGW's alleged pumping of water from the Aquifer.

24. Tennessee denies the allegations set forth in paragraph 24. Tennessee has not participated in MLGW's alleged groundwater pumping and so denies Mississippi's allegations about "Defendants' mechanical pumping." Tennessee further denies that MLGW's pumping has pulled water into Tennessee "at an accelerated velocity substantially in excess of the water's natural seepage rate." In fact, the current rate of groundwater flow from Mississippi to Tennessee is slower than under pre-pumping conditions. *See* Waldron & Larsen, *supra* ¶ 16, at 151.

25. Tennessee denies the allegations set forth in paragraph 25. Specifically, Tennessee denies that any defendant has engaged in any "wrongful taking" of Mississippi's water or that MLGW's pumping has caused any material drop in the groundwater available to Mississippi.

26. Tennessee denies the allegations set forth in paragraph 26, except that it lacks sufficient information to admit or deny the allegations that concern statistical details of Memphis's water supply.

27. Tennessee denies the allegations in the last sentence of paragraph 27. MLGW's well fields are exclusively on Tennessee's side of the Mississippi-Tennessee border, not "essentially on the Mississippi-Tennessee border," and the groundwater extracted by them forms part of an interstate water resource rather than "Mississippi's natural groundwater

storage.” Tennessee lacks sufficient information to admit or deny the remaining allegations set forth in paragraph 27, which concern Memphis’s “water needs” and the alternatives available to it.

28. Tennessee admits that it has provided funding to the University of Memphis’s Ground Water Institute. Tennessee lacks sufficient information to admit or deny the allegations in the last sentence of paragraph 28, which asserts that “Defendants” have provided “funding and assistance” for an unidentified number of unnamed “research and studies” performed by USGS. Tennessee denies the remaining allegations set forth in paragraph 28, specifically including that any publications have “confirm[ed]” MLGW’s alleged extraction of groundwater “from Mississippi into Tennessee.” Tennessee also specifically denies the allegations about “Defendants’ huge forced extractions of groundwater.”

29. Tennessee denies that it refused to participate in a cooperative effort with Mississippi and Arkansas to evaluate the groundwater resources in the Aquifer. The environmental agencies for Tennessee, Mississippi, and Arkansas, MLGW, the USGS branches in Tennessee, Mississippi, and Arkansas, and the University of Memphis’s Ground Water Institute participated in the evaluation of groundwater resources and the effects of groundwater movement from recharge areas and across state lines. The evaluation was referred to as the Mississippi Arkansas Tennessee Regional Aquifer Study (MATRAS). Part of the funding for MATRAS was provided by Tennessee. Tennessee denies all remaining allegations set forth in paragraph 29.

30. Tennessee lacks sufficient information to admit or deny the allegations set forth in paragraph 30,

which purport to describe unidentified and undated “news media . . . articles” about MLGW’s pumping.

31. Tennessee admits that a political scientist and a law student at the University of Tennessee-Knoxville prepared a paper, dated June 2000, entitled “Water Supply Challenges Facing Tennessee: Case Study Analyses and the Need for Long-Term Planning.” That paper was directed to the Tennessee Department of Environment & Conservation’s Environmental Policy Office. Tennessee denies Mississippi’s characterization of that paper. Tennessee denies all remaining allegations set forth in paragraph 31, including Mississippi’s characterization of MLGW’s pumping as a “forcible taking of groundwater from within Mississippi.”

32. Tennessee lacks sufficient information to admit or deny the allegations set forth in paragraph 32, which concern actions taken by MLGW rather than Tennessee.

33. Tennessee admits that the Tennessee Comptroller’s Office of Research prepared a report, dated March 2002, entitled “Tennessee’s Water Supply: Toward A Long-Term Water Policy For Tennessee.” Tennessee denies Mississippi’s characterization of that report. Tennessee denies all remaining allegations set forth in paragraph 33, including Mississippi’s characterization of MLGW’s pumping as a “forcible taking of a Mississippi natural resource.”

34. Tennessee admits that officials in Mississippi and Tennessee have at various times called for a comprehensive study of groundwater use, including with respect to groundwater in the Aquifer. Those calls in part led to MATRAS. Tennessee denies all remaining allegations set forth in paragraph 34,

including the allegation that Tennessee “authorized” MLGW’s pumping.

35. Tennessee admits the allegations set forth in paragraph 35. Mississippi’s prior attempts to allege conversion of the groundwater in the Aquifer have been rejected by three different federal courts in the decisions cited in paragraph 35. Those decisions not only persuasively illustrate the flaws in the merits of Mississippi’s theory, but also bar Mississippi’s claims as a matter of issue preclusion.

36. Tennessee admits that Mississippi’s Attorney General sent Tennessee’s Attorney General a letter, dated May 4, 2010, discussing the groundwater in the Aquifer. Tennessee denies Mississippi’s characterization of that letter. Tennessee notes that the first issue that the letter identified as an issue on which both “states generally agree” concerned Tennessee’s acknowledgment that “she would be a proper party to an equitable apportionment action initiated by Mississippi.” Because Mississippi has disclaimed the sole theory that its Attorney General recognized as the basis for Tennessee’s participation, Tennessee is not a proper party to Mississippi’s purported state-law tort action. Tennessee further admits that settlement discussions have previously been unsuccessful, but denies Mississippi’s implication that Tennessee has refused to consider in good faith any fair and equitable proposal by Mississippi. Mississippi has made no such proposal to date.

37. Tennessee admits the allegations set forth in paragraph 37 insofar as they allege that neither Tennessee’s nor Mississippi’s legal regime governs this dispute. As Tennessee explained in its brief opposing Mississippi’s motion for leave to file the Complaint – and as both this Court and the Fifth

Circuit have previously held – disputes over an unallocated interstate water resource like the Aquifer may be litigated only as equitable apportionment actions in this Court. Because Mississippi has not sought an equitable apportionment – and because it has not pleaded the sort of sovereign injury that an equitable apportionment action demands – this action should be dismissed with prejudice. Tennessee therefore denies the allegations set forth in paragraph 37 insofar as they imply that Mississippi’s claims belong in this Court.

38. Tennessee denies the allegations set forth in paragraph 38. As the Fifth Circuit held in disposing of Mississippi’s prior attempt to bring these same claims, the groundwater in the Aquifer “flows, if slowly, under several states, and it is indistinguishable from a lake bordered by multiple states or from a river bordering several states depending upon it for water.” *Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625, 630 (5th Cir. 2009). Indeed, the groundwater in the Aquifer has the same fundamental hydrological characteristics as surface water, which this Court repeatedly has held is subject to the doctrine of equitable apportionment. Contrary to Mississippi’s allegation, that groundwater did not “naturally accumulate[] within Mississippi’s sovereign territory,” but rather forms part of an interstate Aquifer that should be allocated (if at all) through equitable apportionment like other shared interstate water resources. Without an interstate compact or equitable apportionment allocating to Mississippi a specified portion of the Aquifer, Mississippi has no sovereign right to exclude other States (or their political subdivisions) from using the Aquifer’s groundwater.

39. Tennessee denies the allegations set forth in paragraph 39. Tennessee itself has not engaged in the groundwater pumping that Mississippi asserts has depleted the Aquifer, and so denies Mississippi's blanket allegations about the actions of "Defendants." Moreover, for the reasons explained above, MLGW's pumping activities have not "reached into and invaded Mississippi's sovereign territory." MLGW pumps water from the Aquifer only on Tennessee's side of the Mississippi-Tennessee border.

40. Tennessee denies the allegations set forth in paragraph 40, except insofar as they quote from the Fifth Circuit's decision in *Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625 (5th Cir. 2009). Tennessee denies Mississippi's characterization of that decision, specifically including its assertion that *Hood* held that "Tennessee would be a necessary and indispensable party to any judicial proceeding" involving rights to the groundwater in the Aquifer. *Hood* correctly held that Tennessee was a necessary party to Mississippi's lawsuit because the Aquifer "must be allocated like other interstate water resources" via "interstate compact or equitable allocation." *Id.* at 631. Such an allocation, according to this Court's precedents, is inextricably intertwined with Tennessee's sovereign interests and so demands Tennessee's participation as a party. *See id.* at 629-31. But, because Mississippi continues to disclaim the legal framework that the Fifth Circuit held was applicable, Tennessee is not a necessary (or proper) party to this lawsuit. Moreover, even if Tennessee were a proper party to this lawsuit, Mississippi would not be entitled to the relief it seeks because territorial boundaries are not dispositive of a State's

entitlement to an interstate water resource like the Aquifer.

41. Tennessee admits the first clause of the first sentence of paragraph 41, which alleges that “[t]he geologic formation in which the groundwater is stored straddles two states.” That allegation constitutes an admission by Mississippi that the Aquifer is a shared interstate resource; it is thus subject to this Court’s doctrine of equitable apportionment rather than state tort law. Tennessee denies the remaining allegations set forth in paragraph 41.

42. Tennessee admits the allegations set forth in paragraph 42 insofar as they quote from Miss. Code Ann. § 51-3-1 (2003). Tennessee denies that the quoted provisions should control this Court’s allocation of the Aquifer, which is subject not to state law but to the federal doctrine of equitable apportionment.

43. Tennessee admits the allegations set forth in paragraph 43 insofar as they quote from the cited sections of Miss. Code Ann. § 51-3-3(n) (2003). Tennessee denies that the cited provisions should control this Court’s allocation of the Aquifer, which is subject not to state law but to the federal doctrine of equitable apportionment.

44. Tennessee denies the allegations set forth in paragraph 44. As explained above, because the Aquifer is an interstate water resource, no State possesses an inherent sovereign right to the groundwater in the Aquifer in the absence of an interstate compact or an equitable apportionment.

45. Tennessee admits the allegations set forth in paragraph 45 insofar as they quote from the cited provisions of Tenn. Code Ann. § 68-221-702 (2013). Tennessee denies that the cited provisions should

control this Court's allocation of the Aquifer, which is subject not to state law but to the federal doctrine of equitable apportionment.

46. Tennessee denies that the Court should issue the declaration that Mississippi requests in paragraph 46.

47. Tennessee denies that the Court should issue the declaration that Mississippi requests in paragraph 47.

48. Tennessee denies the allegations set forth in paragraph 48. This Court has applied equitable apportionment principles in numerous cases involving groundwater. *See, e.g., Nebraska v. Wyoming*, 515 U.S. 1 (1995); *Texas v. New Mexico*, 462 U.S. 554 (1983); *Washington v. Oregon*, 297 U.S. 517 (1936); *Kansas v. Colorado*, 206 U.S. 46 (1907). It likewise has applied those principles to the relatively stationary surface water in Lake Michigan. *See Wisconsin v. Illinois*, 449 U.S. 48 (1980). Moreover, equitable apportionment principles are not limited to water resources. *See Idaho v. Oregon*, 462 U.S. 1017 (1983).

49. Tennessee denies the allegations set forth in paragraph 49. Contrary to Mississippi's assertion, Mississippi's allegations implicate the "fundamental premise of this Court's equitable apportionment jurisprudence." As an interstate resource spanning multiple States, the Aquifer is subject to this Court's historical recognition that all States bordering on a shared interstate water resource possess "equal rights" to the water within it. *Kansas v. Colorado*, 206 U.S. at 97-98. Any allocation of those waters should respect the equal sovereignty of all bordering States. To be clear, Tennessee is not suggesting that this Court should engage in an equitable apportionment of the Aquifer; Mississippi has not articulated

the type of injury that would warrant one. But, in the absence of an equitable apportionment (or an interstate compact), Mississippi has no sovereign right to the groundwater at issue capable of supporting its tort claims. Those claims should thus be dismissed.

50. Tennessee denies the allegations set forth in paragraph 50, except insofar as they allege that the Aquifer “underlies both Mississippi and Tennessee.” The groundwater shares the same hydrological characteristics as the surface water that this Court has held subject to equitable apportionment. Moreover, the Aquifer is hydrologically interconnected with numerous bodies of surface water, including (but not limited to) the Wolf River. Because those surface waters are instrumental to recharging and replenishing the Aquifer, any allocation of the Aquifer must take place within a broader framework that accounts for all the surface waters within the regional watershed.

51. Tennessee denies the allegations set forth in paragraph 51, for the reasons set forth above. *See supra* ¶ 49.

52. Tennessee denies that the Court should issue the declaration that Mississippi requests in paragraph 52.

53. Tennessee denies the allegations set forth in paragraph 53.

54. Tennessee denies the allegations set forth in paragraph 54, except as indicated below. Mississippi has suffered no cognizable injury due to MLGW’s groundwater pumping.

(a) Tennessee lacks sufficient information to admit or deny the allegations in subpart (a) concerning the present volume of MLGW’s pumping. Tennessee

denies that any of MLGW's pumping has resulted in groundwater being "wrongfully taken from Mississippi into Tennessee."

(b) Tennessee lacks sufficient information to admit or deny the allegations in subpart (b).

(c) Tennessee denies the allegations in subpart (c). MLGW's pumping has not materially altered the amount of groundwater available to Mississippi. Even if MLGW's pumping was responsible for causing groundwater to flow from Mississippi into Tennessee – and Tennessee denies that it is, *see supra* ¶¶ 16, 24 – that flow has not meaningfully interfered with Mississippi's ability to extract groundwater from the Aquifer. As a practical matter, MLGW's groundwater pumping from Tennessee's side of the Aquifer has not materially reduced Mississippi's groundwater budget and inventory.

55. Tennessee denies the allegations set forth in paragraph 55. Mississippi is not entitled to any damages, and Tennessee is neither jointly nor severally liable for any alleged damages.

56. Tennessee denies the allegations set forth in paragraph 56. Because Tennessee has never possessed the groundwater at issue, it cannot be subject to a claim for restitution or unjust enrichment. Tennessee further denies that it has ever acted as a "conscious" wrongdoer. Tennessee has not taken any action with respect to the Aquifer with knowledge that its conduct "violates Mississippi's rights."

57. Tennessee denies the allegations set forth in paragraph 57. There is no basis for this Court to mandate prospectively that MLGW alter its pumping operations. This Court historically refrains from allocating interstate water resources in the absence of a substantial, cognizable injury to a State's sover-

eign interests. Because Mississippi has shown no such injury, this Court need not and should not equitably apportion the Aquifer. Even if the Court were inclined to apportion the Aquifer, however, there would be no basis to dictate how Tennessee uses its allocation of the groundwater in the Aquifer.

### **AFFIRMATIVE DEFENSES**

#### **First Affirmative Defense**

Mississippi's claims are barred because this Court either lacks or should decline to exercise jurisdiction.

#### **Second Affirmative Defense**

Mississippi's claims fail to state a claim for which relief can be granted.

#### **Third Affirmative Defense**

Mississippi's claims are barred by issue preclusion. *See Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625 (5th Cir. 2009).

#### **Fourth Affirmative Defense**

Mississippi's characterization of the Aquifer as an intrastate resource is barred by the doctrine of judicial estoppel. *See, e.g., Appellant's Br. 21, Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625 (5th Cir. filed May 14, 2008) ("The interstate nature of the aquifer confers federal question jurisdiction . . . . It is the interstate context that actually confirms the District Court's subject matter jurisdiction . . .").

#### **Fifth Affirmative Defense**

Mississippi's claims are barred by prescription, acquiescence, consent, waiver, ratification, and/or estoppel.

#### **Sixth Affirmative Defense**

Mississippi's claims are barred by laches and/or the applicable statutes of limitations.

**Seventh Affirmative Defense**

Mississippi's claims are barred because it has failed to seek an equitable apportionment of the groundwater in the Aquifer.

**Eighth Affirmative Defense**

Mississippi's claims, which purportedly arise under Mississippi state law, are preempted under the Supremacy Clause of the United States Constitution.

**Ninth Affirmative Defense**

Mississippi's claims are barred because Defendants acted with authority of law and/or were subject to a privilege in their use of the groundwater.

**Tenth Affirmative Defense**

Mississippi failed to mitigate damages.

**Eleventh Affirmative Defense**

Any award of money damages to Mississippi is barred in whole or in part by the doctrines of setoff and/or recoupment.

**Twelfth Affirmative Defense**

Mississippi's conversion claims are barred because the groundwater at issue has not been reduced to capture.

**Thirteenth Affirmative Defense**

Mississippi's claims are barred because it lacks standing.

**Fourteenth Affirmative Defense**

Mississippi's claims are barred because it has no ownership, as opposed to an usufructuary, right to the groundwater in the Aquifer. *See, e.g., Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

### **Fifteenth Affirmative Defense**

Mississippi's claims are barred because it has not been damaged or injured. Mississippi suffers from no water shortage, and the Aquifer retains sufficient groundwater to meet Mississippi's water needs. *See* Michael Bradley et al., USGS, Groundwater Network and Water-level Response in the Memphis Area (June 23, 2015).

### **Sixteenth Affirmative Defense**

Mississippi's claims are barred by the doctrine of unclean hands.

### **Prayer For Relief**

The State of Tennessee prays that judgment be entered:

- A. Dismissing Mississippi's Complaint with prejudice;
- B. Rejecting all of Mississippi's requests for relief;
- C. Affirming that Mississippi has no sovereign right to exclude other States and their political subdivisions from (or to charge them for obtaining) any of the groundwater in the Aquifer, in the absence of an allocation obtained through an interstate compact or an equitable apportionment; and
- D. Granting such further relief as this Court may deem just and proper.

Respectfully submitted,

DAVID C. FREDERICK  
DEREK T. HO  
JOSHUA D. BRANSON  
BRADLEY E. OPPENHEIMER  
KELLOGG, HUBER, HANSEN,  
TODD, EVANS & FIGEL,  
P.L.L.C.  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 326-7900

*Special Counsel to the  
State of Tennessee*

September 14, 2015

HERBERT H. SLATERY III  
*Attorney General*  
ANDRÉE S. BLUMSTEIN  
*Solicitor General*  
BARRY TURNER  
*Deputy Attorney General*  
*Counsel of Record*  
SOHNIA W. HONG  
*Senior Counsel*  
P.O. Box 20207  
Nashville, TN 37202-0207  
(615) 741-3491  
(barry.turner@ag.tn.gov)

*Counsel for the  
State of Tennessee*