

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING DEFENDANTS

JOHN C. CRUDEN
Assistant Attorney General
JAMES J. DUBOIS
STEPHEN M. MACFARLANE
JUDITH E. COLEMAN
Attorneys
Environment and Natural
Resources Division

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor
General

U.S. Department of Justice
Washington, D.C. 20530-0001
SupremeCourtBriefs@usdoj.gov
(202) 514-2217

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INTEREST OF THE UNITED STATES

This case presents the question whether a State can allege a cognizable cause of action for wrongful conversion of groundwater based on another State's pumping, within its own borders, of groundwater from an interstate aquifer that has not yet been equitably apportioned. The United States has a substantial interest in the proper legal standards governing uses of interstate water resources. At the Court's invitation, the United States filed a brief as amicus curiae at a preliminary stage of this case and now files a brief as amicus curiae in support of defendants' motions for judgment on the pleadings.

STATEMENT

The State of Mississippi initiated these proceedings by seeking leave to file a bill of complaint against the State of Tennessee, the City of Memphis (Memphis), and Memphis Light, Gas & Water Division (MLGW) (defendants) for wrongful conversion of groundwater from an aquifer that extends beneath both States. Mississippi alleges that it has an exclusive right to groundwater that accumulates in Mississippi's territory and would remain in Mississippi's territory but for MLGW's pumping operations in Tennessee. Based on theories of conversion and trespass, Mississippi seeks declaratory and injunctive relief, as well as over \$600 million in damages. On June 29, 2015, the Court granted Mississippi's motion for leave to file a bill of complaint and allowed defendants to file their answers. After

the answers were filed, the Court appointed the Honorable Eugene E. Siler, Jr., as Special Master and referred the case to him. The Special Master allowed the parties to file preliminary dispositive motions and invited *amicus curiae* briefs in support of either side.

Defendants have filed motions for judgment on the pleadings in the nature of motions under Rule 12(c) of the Federal Rules of Civil Procedure.¹ Defendants contend that Mississippi has failed to state a claim because the groundwater is an interstate water resource that must be apportioned equitably among the States before Mississippi (or any other State) can claim a legal entitlement to a particular share of it. Defendants also argue that the doctrine of issue preclusion bars Mississippi from litigating its claims because its theory of territorial ownership was rejected by the Fifth Circuit in *Hood v. City of Memphis*, 570 F.3d 625 (5th Cir. 2009), *cert. denied*, 559 U.S. 904 (2010). In addition, Memphis and MLGW argue

¹ In original actions, the Federal Rules of Civil Procedure “may be taken as guides.” S. Ct. R. 17(2). Federal Rule of Civil Procedure 12(c) permits a party to move for judgment on the pleadings “[a]fter the pleadings are closed—but early enough not to delay trial.” Rule 12(c) may be employed by a defendant as a vehicle for raising, after the close of the pleadings, a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(h)(2)(B); *see* Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367, at 216 (3d ed. 2004). Defendants contend that they are entitled to judgment on the pleadings because Mississippi has failed to state a claim upon which relief can be granted.

that Mississippi's trespass and conversion claims fail as a matter of state law. This brief is filed in support of defendants' motions for judgment on the pleadings.

1. The groundwater at issue originates in the Sparta Sand, a water-bearing layer of sand extending from northern Mississippi into western Tennessee. Compl. ¶¶ 15, 18, 22; Compl. App. 24a-25a (Dkt. No. 1).² In Tennessee, the Sparta Sand merges into the equivalent Memphis Sand. Compl. ¶ 18; Compl. App. 21a, 25a.³ The Sparta Sand is hydrologically correlated to the Memphis Sand, *id.*, and they are considered to be one and the same aquifer (hereinafter, "the Aquifer"). *See id.* at 67a (depicting the "Sparta/Memphis Sand Aquifer"); *id.* at 71a (depicting Memphis Sand and its equivalents as the "Memphis/Sparta Aquifer"); *see also Mississippi v. City of Memphis*, Complaint, No. 139 Orig., ¶ 1 (referring to "Memphis Sand" and "'Sparta' Aquifer"). The Aquifer is part of a larger system of equivalent sands, known as the Middle Claiborne Group, which extends under Arkansas and other States. Compl. App. 24a, 68a, 102a.

² The statement of facts in this brief is drawn from the allegations in the complaint and documents incorporated therein by reference. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (in reviewing motion under Rule 12(b)(6), court considers the complaint, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice").

³ Geologic formations are called "equivalent" if they are "contemporaneous in time of formation or deposition." Klaus K.E. Neuendorf et al., *Glossary of Geology* 216 (5th ed. 2005).

The water in the Aquifer enters as rain from outcrop areas and geologic units that link surface water and groundwater, and once it reaches the sand layer the water moves slowly through that sand in a generally westward direction toward the Mississippi River and the Tennessee border. Compl. ¶ 16; Compl. App. 20a, 24a-25a, 70a. Memphis began pumping water out of the Aquifer for municipal use in 1886 and continues to rely upon the Aquifer as its primary source of municipal water. Compl. App. 32a. MLGW, the city's utility, has more than 160 wells and pumps 140 million gallons of groundwater per day to serve the city and the surrounding area of nearly 1 million people. Compl. ¶ 20; Memphis & MLGW Answer (Dkt. No. 14) ¶ 20; Mot. of Def. State of Tenn. For J. on the Pleadings (Tenn. MJOP) 4 & n.2. MLGW's wellfields are located in Tennessee. Compl. ¶ 19. *See also* Memphis & MLGW Answer ¶ 14.

According to Mississippi, MLGW's pumping removes water from the Aquifer faster than it is recharged. Compl. App. 32a. As a result, the water level and water pressure under Memphis have been declining, allegedly creating a hydraulic gradient that draws water from the surrounding area. *Id.* As that water moves toward Memphis, the water pressure drops in those surrounding areas. *Id.* Over time, the area of low pressure extends outward more broadly under the surface, as well as downward, in depth underground, a phenomenon represented visually as a "cone of depression." *Id.* Mississippi alleges that the cone of

depression under Shelby County (Memphis) extends out through the Aquifer into Mississippi, Arkansas, and other parts of Tennessee. *Id.* at 66a, 73a; Compl. ¶ 25.

2. a. In 2005, Mississippi, through its Attorney General, brought an action for trespass and wrongful conversion against Memphis and MLGW (but not Tennessee) in the United States District Court for the Northern District of Mississippi. *Hood v. City of Memphis*, No. 2:05CV32-D-B, Compl., (N.D. Miss. Feb. 1, 2005). In its complaint, Mississippi alleged that some portion of the groundwater that is pumped out of the Aquifer by MLGW is Mississippi's sovereign property, and that Mississippi must therefore be compensated. Br. of Def. State of Tenn. in Opp'n to State of Miss.'s Mot for leave to File Bill of Compl. in Original Action (Tenn.) (Dkt. No. 4) App. 12a.

The district court dismissed the action. Tenn. App. 1a-10a. The court concluded that, absent an equitable apportionment between Mississippi and Tennessee of the water in the Aquifer, the court could not evaluate whether Memphis and MLGW had pumped water belonging to Mississippi. *Id.* at 4a-5a. The court explained that the relief requested by Mississippi would require the court to “engag[e] in a *de facto* apportionment of the . . . [A]quifer,” that such an apportionment would require the joinder of the State of Tennessee as a defendant, and that such a dispute would fall within the exclusive jurisdiction of this Court. *Id.* at 5a, 7a (citing 28 U.S.C. § 1251).

b. The court of appeals affirmed. Tenn. App. 11a-25a. The court held that the action could not proceed in Tennessee's absence because the Aquifer is an "interstate water source" that would have to be apportioned before any State had a judicially enforceable right to a particular share of water within it. *Id.* at 17a-20a. The court explained that "[t]he Aquifer flows, if slowly, under several states," and in that respect "it is indistinguishable from a lake bordered by multiple states or from a river bordering several states depending on it for water." *Id.* at 18a. The court further explained that Tennessee could not be joined without depriving the district court of subject matter jurisdiction, because suits between States fall within this Court's exclusive original jurisdiction. *Id.* at 23a. This Court denied a petition for a writ of certiorari. 559 U.S. 901 (2010).

c. Simultaneously with filing its petition for a writ of certiorari, Mississippi filed a motion in this Court for leave to file a bill of complaint against Tennessee, the City of Memphis, and MLGW, seeking approximately \$1 billion in damages. *See* No. 139, Orig. Compl. ¶ 5. Mississippi alleged that Tennessee had committed trespass and conversion because MLGW's pumping had the effect of taking groundwater from beneath Mississippi. *Id.* ¶¶ 1, 24; No. 139 Orig., Br. in Supp. of Mot. 13-14 & n.1. Mississippi contended that an equitable apportionment was unnecessary because there had already been an "inherent apportionment" of the groundwater in the Aquifer upon Mississippi's admission to the Union. No.

139, Orig. Compl. ¶ 5. Mississippi requested an equitable apportionment as an alternative form of relief, “if and only if th[e] Court determines that Mississippi does not own and control the ground water resources within its borders.” *Id.*

This Court denied Mississippi’s motion for leave to file a complaint. *Mississippi v. City of Memphis*, 559 U.S. 901 (2010). The Court’s order stated:

Motion for leave to file a bill of complaint denied without prejudice. See *Virginia v. Maryland*, 540 U.S. 56, 74, n. 9 (2003); *Colorado v. New Mexico*, 459 U.S. 176, 187, n. 13 (1982).

Id. at 901-902. Footnote 9 in *Virginia v. Maryland* states that “[f]ederal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other’s interest in the river.” 540 U.S. at 74 n.9. Footnote 13 in *Colorado v. New Mexico* states that “a state seeking to prevent or enjoin a diversion by another State bears the burden of proving that the diversion will cause it real or substantial injury or damage.” 459 U.S. at 187 n.13 (citation and internal quotation marks omitted).

3. a. Mississippi’s complaint in the present action is premised on the allegation that groundwater is “naturally collected and stored” in Mississippi, and “[u]nder natural conditions, [that water] would not leave Mississippi’s groundwater storage.” Compl. ¶¶ 14-15, 17. Mississippi alleges a “cone of depression” caused by MLGW’s pumping causes water in Mississippi to move north toward Memphis, “altering the water’s natural east-to-west path” and leading

to a “drawdown of stored groundwater in . . . substantially all of DeSoto County,” which is situated in Mississippi at the border with Tennessee. *Id.* ¶¶ 24-25. Mississippi contends that, by pumping groundwater from the Aquifer, MLGW and Tennessee have removed more than 252 billion gallons of water from Mississippi since 1985, *id.* ¶ 26, and that they continue to “permanently tak[e]” more than 20 million gallons of water from Mississippi every day. *Id.* ¶ 22.

Mississippi’s claims depend upon a legal theory that, as an incident of statehood, Mississippi owns the water that MLGW’s pumping is causing to be removed from Mississippi’s territory. Mississippi maintains that when it was admitted to the Union in 1817, it “became vested with ownership, control, and dominion over the land and waters within its territorial boundaries.” Compl. ¶ 8; *see id.* ¶¶ 9-10, 42-45. Mississippi thus contends that defendants’ pumping in Tennessee of groundwater that in its natural state would remain in Mississippi violates Mississippi’s “retained sovereign rights under the United States Constitution” and “constitute[s] . . . trespass upon, and conversion, taking and misappropriation of, [Mississippi’s] property.” *Id.* ¶ 52.

Unlike its 2009 complaint, Mississippi’s present complaint does not seek an equitable apportionment of the groundwater at issue, even in the alternative. *See* Compl. at 23-24 (prayer for relief). Mississippi instead contends that “[t]his case does not fall within the Court’s equitable apportionment jurisprudence” because,

although “[t]he geologic formation in which the groundwater is stored straddles two states,” the water “is not a shared natural resource.” Compl. ¶¶ 38, 41, 48-49. According to Mississippi, the water “(a) naturally accumulated within Mississippi’s sovereign territory before the formation of the States; and (b) would never through ‘the agency of natural laws’ have moved into, or been available in Tennessee.” *Id.* ¶ 38 (quoting *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907)).

Mississippi alleges that it “has suffered actual, present, and substantial injury and damages as the proximate result of [d]efendants’ wrongful conduct,” including (i) the “permanent[] los[s]” of 252 billion gallons of groundwater that has been pumped by Tennessee since 1985; (ii) “well installation and electric operations costs” incurred by Mississippi residents who must lower their pumps in order to reach the groundwater in the Sparta Sand; and (iii) the ‘material[] alter[ation] [of] Mississippi’s groundwater . . . inventory” by defendants’ altering the “natural steady state equilibrium of groundwater in the Sparta Sand,” thereby “siphoning water at an accelerated, unnatural velocity and northward direction out of Mississippi.” Compl. ¶ 54.

For relief, Mississippi requests a declaration of its sovereign ownership of “the groundwater stored naturally in the Sparta Sand formation underlying Mississippi,” Compl. ¶¶ 40, 46, and damages “in an amount equal to the value of the Mississippi groundwater” taken by defendants plus prejudgment interest, which

Mississippi estimates would total \$615 million, *id.* ¶ 55. Mississippi requests in the alternative to damages an accounting and disgorgement of monies received or saved by defendants from their use of the groundwater. *Id.* ¶ 56. Finally, Mississippi requests a mandatory injunction requiring defendants “to prospectively take all actions necessary to eliminate the cone of depression *vis-à-vis* Mississippi,” including “the funding, construction and modification or restructuring of Memphis-MLGW’s groundwater pumping systems.” *Id.* ¶ 57.

b. At the Court’s invitation, the United States filed an amicus brief (Dkt. No. 9) expressing the view that Mississippi’s motion for leave to file a bill of complaint should be denied. The United States explained that Mississippi has no cognizable cause of action against defendants for pumping water from the Aquifer because the Aquifer is an interstate water resource that has not yet been apportioned among the relevant States. U.S. Invitation Br. 13-19. The United States further submitted that Mississippi’s alleged injuries were not sufficiently concrete or substantial to justify an exercise of this Court’s original jurisdiction. *Id.* at 20-23.

The United States recommended that “[t]he Court should deny Mississippi leave to file its complaint without prejudice to refileing a properly framed complaint for an equitable apportionment of the Aquifer premised on concrete allegations of real and substantial injury.” U.S. Invitation Br. 23. The United States further

suggested that, “[i]n theory, the Court could grant Mississippi leave to file its complaint, invite the defendants to file a motion to dismiss, and confirm in a written opinion that the Aquifer is an interstate water source that must be equitably apportioned before one State has any rights to enforce against another State’s use of water in the Aquifer.” *Id.* at 20.

c. On June 29, 2015, the Court granted Mississippi leave to file its complaint and allowed the defendants to file answers. 135 S. Ct. 2916 (2015) (Mem.) (Dkt. No. 12). Defendants filed answers in September, 2015. The Court then referred the case to a Special Master. 136 S. Ct. 499 (2015) (Mem.) (Dkt. No. 17). After a status conference on January 26, 2016, the Special Master issued an order that allowed the parties to file preliminary dispositive motions, invited *amicus curiae* briefs, and stayed discovery. Dkt. No. 25.

d. Defendants have now filed motions for judgment on the pleadings (MJOP) in the nature of motions under Federal Rule of Civil Procedure 12(c). Defendants argue that Mississippi has conceded that the Aquifer is an interstate resource and, therefore, Mississippi’s theory of sovereign ownership of certain groundwater in the Aquifer lacks merit. Memphis & MLGW MJOP 15-24; Tenn. MJOP 14-27. Defendants also contend that Mississippi’s claims are barred by the doctrine of issue preclusion because the Fifth Circuit rejected Mississippi’s territorial-property-rights theory in *Hood*. Memphis & MLGW MJOP 24-28;

Tenn. MJOP 35-47. In addition, defendants argue that Mississippi's conversion and trespass claims fail under state law. Memphis & MLGW MJOP 32-42; Tenn. MJOP 27-29.

SUMMARY OF ARGUMENT

Mississippi's complaint does not state a cognizable cause of action because the Aquifer is an interstate water resource that has not yet been equitably apportioned among the relevant States. The factual allegations in Mississippi's complaint suffice to demonstrate that the water is an interstate water resource. Mississippi acknowledges that the Aquifer underlies both Mississippi and Tennessee, and that when MLGW pumps groundwater from the Aquifer in Tennessee, that pumping influences the movement of groundwater in Mississippi. Furthermore, the expert report attached to Mississippi's complaint shows that water flowed between Mississippi and Tennessee within the Aquifer even before the development of groundwater resources in Tennessee.

Mississippi contends that under the equal-footing doctrine it gained ownership of the groundwater under its territory upon statehood. Compl. ¶¶ 8, 44. But although the equal-footing doctrine gives States title to the lands within their boundaries, no decision of the Court holds that any one State has title, to the exclusion of any entitlement of another State, to subsurface groundwater that is flowing through an aquifer spanning several States. Instead, the Court has held

that an equitable apportionment is required to reconcile competing rights whenever “the action of one state reaches, through the agency of natural laws, into the territory of another state.” *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907). That is the case here, where Mississippi alleges that defendants’ pumping of groundwater from the Aquifer in Tennessee reaches, through the natural law of hydraulics, into the Aquifer in Mississippi. The applicability of equitable apportionment does not turn on whether groundwater in the Aquifer would remain in Mississippi but for defendants’ pumping.

Mississippi’s attempt to avoid equitable apportionment by distinguishing between “the geologic formation” and the water it contains (Compl. ¶¶ 38, 41) is inconsistent with the Court’s practical approach to assessing whether a natural resource is interstate in character. Mississippi’s concept of its ownership of water in the Aquifer would logically mean that Tennessee could not pump *any* water from the Aquifer because doing so would cause water to flow out of Mississippi. Mississippi’s acknowledgement (see p. 22-23, *infra*) that Tennessee is entitled to pump some water from the Aquifer confirms that the Aquifer is an interstate water resource and therefore that it must be equitably apportioned before Mississippi can assert a legal entitlement to any particular amount of water therein.

Allowing Mississippi to proceed on its theory of sovereign ownership of water in an interstate aquifer would contravene basic principles of water law.

Because Mississippi's claims fail on the face of the complaint, and because Mississippi has expressly disclaimed equitable apportionment as the basis for its claim or as the remedy it seeks, the claims should be dismissed now, prior to discovery, so as not to waste the resources of the Court and the parties.

ARGUMENT

In original actions, the Federal Rules of Civil Procedure “may be taken as guides.” S. Ct. R. 17(2). Federal Rule of Civil Procedure 12(c) permits a party to move for judgment on the pleadings “[a]fter the pleadings are closed—but early enough not to delay trial.” Defendants have moved for judgment on the pleadings on the ground that Mississippi has failed to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(h)(2)(B) (stating that Rule 12(c) may be employed by a defendant as a vehicle for raising, after responsive pleadings have been filed, a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted); Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367, at 216 (3d ed. 2004).

A complaint states a claim for which relief can be granted only if it contains “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In an action between States, the complaining State must demonstrate a right to relief on a cognizable cause of

action. *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). Under that standard, defendants are entitled to judgment on the pleadings. Mississippi has not alleged a cognizable cause of action because Mississippi cannot claim that Tennessee is taking Mississippi's water until the Aquifer has been equitably apportioned, and Mississippi definitively disclaims equitable apportionment here.

I. MISSISSIPPI'S COMPLAINT DOES NOT ALLEGE A COGNIZABLE CAUSE OF ACTION AGAINST DEFENDANTS.

For a complaint to present a "justiciable controversy" within this Court's original jurisdiction, "it must appear that the complaining State has suffered a wrong . . . furnishing ground for judicial redress" or that the State "is asserting a right against the other State which is susceptible of judicial enforcement" *Massachusetts v. Missouri*, 308 U.S. at 15. Thus, at the threshold, the Court must "determine whether there is any principle of law, and, if any, what, on which the plaintiff can recover." *Missouri v. Illinois*, 200 U.S. 496, 519 (1906). As the Court implied in its 2010 order, *Mississippi v. City of Memphis*, 559 U.S. 901, Mississippi has no cognizable cause of action against defendants for pumping water from the Aquifer because the Aquifer is an interstate water source that has not yet been apportioned among the relevant States. *See id.* at 901-902 (citing *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003)). Yet Mississippi unequivocally disclaims equitable apportionment as the basis for its claims or the remedy it seeks

in the present action. Compl. ¶¶ 38, 50. The complaint thus fails to state a cause of action under which this Court can afford relief.

A. When no federal statute or congressionally approved interstate compact defines a State's rights in an interstate water source, federal common law determines the extent of such rights. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (citing *Kansas v. Colorado*, 206 U.S. at 95, 97, 98); *Arizona v. California*, 373 U.S. 546, 560, 569-589 (1963) (discussing the Boulder Canyon Project Act, ch. 42, 45 Stat. 1057 (1928) (codified as amended at 43 U.S.C. § 617 *et seq.*), which apportioned water in the Colorado River Basin). The federal common-law doctrine of equitable apportionment governs disputes between States concerning their rights to an interstate water source. *Virginia v. Maryland*, 540 U.S. at 74 n.9; *Colorado v. New Mexico*, 459 U.S. at 183.

The doctrine of equitable apportionment reflects the fundamental principle that “a State may not preserve solely for its own inhabitants [the] natural resources located within its borders.” *Idaho v. Oregon*, 462 U.S. 1017, 1025 (1983) (citation omitted). Although territorial boundaries are relevant in an equitable apportionment, the Court considers a multitude of other factors, including the uses already occurring within each State, the balance of the potential harms to each State from the loss of use, and the possibility of conservation. *Colorado v. New Mexico*, 459 U.S. at 183, 186-88.

B. Mississippi contends that an equitable apportionment of the Aquifer is not appropriate because the groundwater in the Sparta Sand in Mississippi is intrastate water. Compl. ¶¶ 38, 41, 48-49. According to Mississippi, absent pumping by MLGW, the water in the Sparta Sand “would never[,] through the agency of natural laws[,] have moved into, or been available in Tennessee.” *Id.* ¶ 38 (internal quotation marks omitted).

Other allegations in Mississippi’s complaint, however, suffice to demonstrate that, to the contrary, the Aquifer is an interstate water resource and thus subject to equitable apportionment. Mississippi acknowledges that the Sparta Sand formation “underlies both Mississippi and Tennessee.” Compl. ¶ 50. Mississippi also alleges that when Tennessee pumps groundwater from the Aquifer in Tennessee, the pumping influences the movement of groundwater in Mississippi. *See, e.g., id.* ¶¶ 22, 26. Thus, in both its location and hydraulic characteristics, the Aquifer is an interstate water resource. *See Hood v. City of Memphis*, 570 F.3d at 630 (“[t]he Aquifer flows, if slowly, under several states” and in that respect “it is indistinguishable from a lake bordered by multiple states or from a river bordering several states depending on it for water”).

Moreover, Mississippi’s own expert report shows that water flowed between States within the Aquifer even before the development of groundwater resources in Tennessee. A figure in the report depicts a “limited natural flow” of water from

Mississippi into Tennessee under predevelopment conditions. Compl. App. 70a; *see id.* at 20a; *see also* Gerald K. Moore, *Geology and Hydrology of the Claiborne Group in Western Tennessee*, Geological Survey Water-Supply Paper 1809-F, F28 (1965), <http://pubs.usgs.gov/wsp/1809f/report.pdf> (referenced impliedly at Compl. ¶ 18) (estimating, in 1965, that 25 million gallons of water per day were flowing into the Memphis Sand from the Sparta Sand in Mississippi). Mississippi has declared that any water depicted in that figure entering Tennessee from Mississippi under natural conditions “is not included in [its] claim.” Miss. Br. in Supp. of Mot. for Leave to File (Miss. Br.) (Dkt. No. 1) 9 n.7. But the figure undermines Mississippi’s core theory that the groundwater is a purely intrastate resource and cannot be cast aside by artful pleading.

Mississippi’s allegations, in sum, demonstrate that the Aquifer is an interstate water resource. The Court’s 2010 order also suggested as much by citing footnote 9 in *Virginia v. Maryland*, which states that “[f]ederal common law governs *interstate bodies of water*, ensuring that the water is equitably apportioned between the States and that neither State harms the other’s interest” *Virginia v. Maryland*, 540 U.S. at 74 n.9, *cited in Mississippi v. City of Memphis*, 559 U.S. at 901-902 (emphasis added).

C. Mississippi also contends that it has “exclusive dominion and control” of the groundwater underlying the territory within its borders under the equal-footing

doctrine. Compl. ¶ 44. *See also, e.g.*, Compl. ¶ 8. In support of that proposition, Mississippi has previously cited *Kansas v. Colorado*, which states that “each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters,” 206 U.S. at 93 (citations omitted). *See* Miss. Br. 17. But the Court in *Kansas v. Colorado* was referring to the States’ ownership of *the lands* within their respective borders, including the beds of streams and the beds of other waters, not the waters themselves. *Id.*; *see United States v. Alaska*, 521 U.S. 1, 5 (1997) (equal-footing doctrine gives the States “title to *the beds* of navigable waters within their boundaries”) (emphasis added).

No decision of this Court holds that a State has title to subsurface groundwater within its borders that is flowing through an aquifer spanning multiple States. To the contrary, the Court has rejected that contention. In *Sporhase v. Nebraska*, 458 U.S. 941 (1982), the Court declared the theory of state ownership of water a “legal fiction” and held that Nebraska’s regulation of groundwater within its borders was subject to the constraints of the Commerce Clause. *Id.* at 951; *see* First Report of the Special Master (Subject: Nebraska’s Motion to Dismiss) 44-45, in *Kansas v. Nebraska*, No. 126, Orig. (Jan. 28, 2000) (recommending that Nebraska’s motion to dismiss Kansas’s complaint be denied because groundwater pumping that impacts streamflow in the Republican River Basin must be included in the pumping State’s compact apportionment); *Kansas v. Nebraska*, 530 U.S.

1272 (2000) (denying Nebraska’s motion to dismiss); *Kansas v. Colorado*, 514 U.S. 673, 693-694 (1995) (agreeing with Special Master’s conclusion that post-compact pumping in Colorado had caused material depletions of the usable state-line flow of the Arkansas River, in violation of the Arkansas River Compact).

Furthermore, the need for an equitable apportionment before Mississippi can claim a legal entitlement to water in the Aquifer, so as to restrict use by Tennessee, does not turn on whether the groundwater at issue would remain in Mississippi but for defendants’ pumping. *See, e.g.*, Compl. ¶ 41 (alleging that groundwater in the Sparta Sand is not “naturally shared” with Tennessee and suggesting that the water would observe political boundaries if not for the effect of Tennessee’s pumps). Equitable apportionment governs when “the action of one state reaches, through the agency of natural laws, into the territory of another state.” *Kansas v. Colorado*, 206 U.S. at 97-98. That is the case here. Mississippi alleges that defendants’ pumping of groundwater from the Aquifer within Tennessee’s territory reaches, by operation of the natural law of hydraulics, into the Aquifer in Mississippi’s territory. *See* Compl. ¶¶ 18-20, 26, 28, 54.

D. Mississippi’s attempt to avoid equitable apportionment by distinguishing between an interstate geologic formation and the water contained within it, which Mississippi contends would observe political boundaries but for Tennessee’s pumping (Compl. ¶¶ 38, 41), is in tension with the Court’s pragmatic

approach to assessing whether a natural resource is interstate in character. *See, e.g., Kansas v. Colorado*, 206 U.S. at 115 (rejecting claim that a river with intermittent flow between two reaches in different States was actually “two rivers”); *cf. Idaho v. Oregon*, 462 U.S. at 1024 (holding that anadromous fish moving seasonally between States did not belong to Idaho where they hatched).

Furthermore, under Mississippi’s concept of its ownership of water in the Aquifer, Tennessee could not pump any water from the Aquifer because doing so would cause water to flow out of Mississippi and into Tennessee. Mississippi stops short of taking its argument to this logical (but untenable) conclusion, as it does not seek an injunction halting defendants’ withdrawal of water from the Aquifer. *See* Compl. at 23-24; *see* Miss. Suppl. Br. in Supp. of Mot. for Leave to File (Dkt. No. 10) 4 (stating that “Tennessee is clearly entitled to the groundwater naturally stored within its borders in the Sparta Sand,” but that defendants should have built their pumping operations “further from the Mississippi/Tennessee border”). Mississippi’s implicit acknowledgement that Tennessee is entitled to pump some water from the Aquifer confirms that the Aquifer is an interconnected, interstate resource that requires equitable apportionment before Mississippi can claim legal entitlement to any specific share of the water therein and, correspondingly, to restrict pumping in Tennessee.

E. Tennessee correctly argues that an order allowing Mississippi to proceed on its theory of sovereign ownership would “contravene longstanding water-law precedent” and “threaten to destabilize . . . water policy across the Nation.” Tenn. MJOP 31. Equitable apportionment has provided the mechanism for resolving disputes between and among States for more than a century, and Mississippi has yet to proffer a reason, much less a sufficient justification, for applying a different doctrine to interstate groundwater. Moreover, the distinction between surface and groundwater flows in water-allocation cases is often unsupportable. *See, e.g., Texas v. New Mexico*, 462 U.S. 554, 556-57 (1983) (discussing effect of removing groundwater hydrologically connected to surface flows in the Pecos River); Complaint, *Texas v. New Mexico*, No. 141, Original (alleging New Mexico violated Rio Grande Compact by allowing withdrawals of groundwater to the detriment of downstream users dependent on efficient delivery of surface water). *See also* Tenn. Answer (Dkt. No. 15) ¶¶ 50 (alleging surface waters are “instrumental to recharging and replenishing the Aquifer”).

The groundwater at issue in this case is located in an interstate aquifer that has established interstate flows. Mississippi thus has no water right “susceptible of judicial enforcement,” *Massachusetts v. Missouri*, 308 U.S. at 15, unless and until the Aquifer is apportioned among the relevant States, taking into account not only territorial boundaries but also various equitable considerations, *Colorado v. New*

Mexico, 459 U.S. at 183. Mississippi has expressly disclaimed equitable apportionment as the basis for its claim or the remedy it seeks for its alleged injuries. Compl. ¶¶ 38, 41, 48-49. Therefore, the complaint does not allege any cognizable cause of action against defendants.⁴

F. For all the reasons above, Mississippi’s complaint should be dismissed now, at the pleading stage prior to discovery. Mississippi’s admissions concerning the interstate character of the Aquifer in both pre- and post-development conditions compel the conclusion that the Aquifer is an interstate resource to which equitable apportionment applies. Indeed, Mississippi’s claimed injury *is* that water flows across state lines by the natural forces of hydraulics. So

⁴ Because the Aquifer is an interstate water source and Mississippi has disclaimed the only claim and remedy that could be available to it, the Court does not need to address whether Mississippi’s claims are foreclosed by the doctrine of issue preclusion. *See* Memphis & MLGW MJOP 24-28; Tenn. MJOP 35-47. In *Arizona v. California*, 530 U.S. 392 (2000), *supplemented by* 531 U.S. 1 (2000), the Court appeared to assume that the doctrine of issue preclusion could bar relitigation in an original action of an issue that was already decided by the Court of Claims—although in that case, the Court concluded that the doctrine was inapplicable because the Indian tribe and the United States had reached a settlement concerning the tribe’s water rights in the Court of Claims, and those rights therefore had not been “actually litigated.” *Id.* at 414-415. In this case, however, there is some force to Mississippi’s previous observation that the application of issue preclusion (based on the decisions of the district court and court of appeals in *Hood*) on the question whether an equitable apportionment is required before Mississippi would have a cognizable cause of action against Tennessee, could be characterized as “delegat[ing]” this Court’s exclusive jurisdiction to federal district courts and courts of appeals because the very subject of an equitable apportionment *between two States* is one committed to that exclusive jurisdiction. Miss. Reply 9-10 (Dkt. No. 6).

long as that interstate flow is the basis for Mississippi's claim, discovery in aid of claims for conversion and trespass cannot help its case. Nor would discovery provide value to the defendants, who correctly argue that Mississippi's claims fail as pleaded. Dismissal prior to discovery is appropriate and would conserve the resources of the Court and the parties.

CONCLUSION

The Court should enter judgment for defendants on the pleadings.

Respectfully submitted.

DONALD B. VERRILLI, JR.

Solicitor General

Counsel of Record

EDWIN S. KNEEDLER

Deputy Solicitor General

ANN O'CONNELL

Assistant to the Solicitor General

JOHN C. CRUDEN

Assistant Attorney General

/s/ James J. DuBois

JAMES J. DUBOIS

STEPHEN M. MACFARLANE

JUDITH E. COLEMAN

Attorneys, Environment and

Natural Resources Division

U.S. Department of Justice

Washington, D.C. 20530-0001

SupremeCourtBriefs@usdoj.gov

(202) 514-2217

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2016, I electronically served the foregoing document on all those identified on the Court's Service List of February 19, 2016.

/s/ James J. DuBois
JAMES J. DUBOIS
Attorney