

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
Before the Special Master, Hon. Eugene Siler**

**THE STATE OF MISSISSIPPI'S RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS**

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Compl.	State of Mississippi's Complaint in Original Action, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed June 6, 2014) (Dkt. No. 1)
Hr'g Tr.	Transcript of Proceedings, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed June 6, 2014) (Dkt. No. 21)
Mem. Motion	City of Memphis, Tennessee and Memphis Light, Gas & Water Division's Motion for Judgment on the Pleadings and Memorandum of Law in Support, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed February 24, 2016) (Dkt No. __)
Tenn. Motion	Motion of Defendant State of Tennessee for Judgment on the Pleadings, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed February 25, 2016) (Dkt No. __)
U.S. Br.	Brief for the United States as Amicus Curiae Supporting Defendants, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed March 3, 2016) (Dkt. No. __)

THE STATE OF MISSISSIPPI'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

This is a significant case of first impression which must be decided on Constitutional principles, not the convenient distortions, conflation and confusion of surface water law advanced by Defendants.¹ To be clear, the United States Supreme Court has never decided a single case involving a groundwater dispute between two States in which one State was pumping groundwater across state borders out of its neighboring State's sovereign territory.² That is the case presented by Mississippi's Complaint pending before this tribunal. And the Mississippi groundwater Defendants have taken and continue to take by pumping is not just water, it is high quality groundwater naturally filtered, collected and

¹This response also serves as Mississippi's response to the Brief for the United States as Amicus Curiae Supporting Defendants.

²The equitable apportionment cases all originate in disputes over the interruption of the natural flow of surface water down a path through the territory of two or more states. Groundwater has only been addressed by the Court where it was hydrologically connected to the disputed surface water. *See Kansas v. Nebraska*, 135 S. Ct. 1042 (2015) (hydrologically connected to the Republican River); *Nebraska v. Wyoming*, 534 U.S. 40 (2001) (hydrologically connected to North Platte River); *Kansas v. Colorado*, 533 U.S. 1 (2001) (hydrologically connected to Arkansas River); *Nebraska v. Wyoming*, 515 U.S. 1 (1995) (hydrologically connected to North Platte River); *Kansas v. Colorado*, 514 U.S. 673 (1995) (hydrologically connected to Colorado River); *Texas v. New Mexico*, 462 U.S. 554 (1983) (hydrologically connected to Pecos River).

stored within Mississippi's borders over thousands of years which Defendants have taken from Mississippi for economic purposes, not necessity.

Since no later than 1985 the City of Memphis ("Memphis") and Memphis Light, Gas & Water Division ("MLGW") have—with the full knowledge of the State of Tennessee—pumped over 252 billion gallons of groundwater out of Mississippi into Tennessee without as much as an application for a permit in compliance with Mississippi law. Mississippi's objections and efforts to resolve this conflict with Defendants have been consistently ignored by Defendants, which claim an absolute right to take as much groundwater as they can pump out of Mississippi until Mississippi establishes an enforceable interest in the groundwater naturally residing within Mississippi by an action for equitable apportionment.³ Under the facts as alleged in its Complaint, no such action is necessary and Mississippi is entitled to all equitable relief available from the Supreme Court in disputes between States over their sovereign rights under the United States Constitution.

On January 26, 2016, Defendants were granted leave to file dispositive motions challenging the legal sufficiency of Mississippi's Complaint, taking all the

³Memphis Motion at p. 23 ("Because the Aquifer has not been equitably apportioned Mississippi cannot state a viable claim for misappropriation.").

facts as pleaded in this Complaint as true.⁴ Initially, Defendants' Motions should be denied because they disregard this requirement, hardly mentioning the facts pleaded except to clothe them with Defendants' characterizations or to dispute them with Defendants' selected quotation from or characterization of extraneous documents.⁵ In essence, Defendants reassert the same arguments they asserted in opposition to Mississippi's Motion for Leave to File the Complaint.

The sole basis for Defendants' claim that they are entitled to pump groundwater out of Mississippi under the Court's equitable apportionment case law is found in the opinions issued in the prior district court proceeding dismissed for lack of subject matter jurisdiction case for failure to join Tennessee as a party. That decision was made before any determination on the merits of Mississippi's case, and only confuses the Supreme Court case law. While it is obvious that Mississippi could have presented its case better in those proceedings, no decisions

⁴Hr'g Tr. 25:4-9 ("Mr. Ellingburg: What they said they are going to file is a motion to dismiss which means that all the facts in our complaint are taken as true? THE COURT: Right, that's correct, sure. That's the way I think we have done for years, and I think we'll try to do it that way too.").

⁵Mississippi has simultaneously filed a Motion to Strike the extraneous material and all references to it in the Motions. Even the few paragraphs of the Complaint cited as supporting text of the Motions are often unrecognizable when read in connection with the text.

were made on the merits of Mississippi's claims now before this tribunal.⁶ At best, Defendants' current Motions demonstrate significant factual disputes between the parties on a matter of first impression before the Court and no more.⁷

Mississippi's Complaint alleges facts which, if proved, entitle Mississippi to all equitable remedies available in the United States Supreme Court for Defendants' intentional invasion of Mississippi's sovereign territory, violation of Mississippi's sovereign authority to regulate the appropriation, use, and control of all water within its territorial borders, and wrongful taking of Mississippi groundwater for over 30 years. Defendants and the United States have tendered no legal authority supporting Defendants' unauthorized pumping of groundwater located within Mississippi out of Mississippi and into Tennessee. Accordingly, Defendants' motions for judgment on the pleadings should be denied.

⁶*Hood ex rel. Mississippi v. City of Memphis*, 533 F. Supp. 2d 646 (N.D. Miss. 2008) (opening paragraph). Despite this fact, as a harbinger of things to come, Memphis and MLGW state three times in the first four pages of their motion that Mississippi's Complaint had failed, it had lost on its tort claims, and that its positions had been rejected in the litigation dismissed for lack of jurisdiction.

⁷Very few Supreme Court cases prosecuted under its original and exclusive jurisdiction address a motion for judgment on the pleadings; however, the few that do present narrow issues absent any factual disputes. For example, *California v. United States*, 457 U.S. 273, 278 (1982), cited by Tennessee, was a case in which the Court stated "No essential facts being in dispute, a special master was not appointed and the case was briefed and argued" on a choice of law issue which determined the outcome. *Id.* See also *Maryland v. Louisiana*, 451 U.S. 725, 751-52 (1981) (constitutionality of first use tax); *Ohio v. Kentucky*, 410 U.S. 641, 645 (1973) (allegations of proposed amended complaint taken as true).

II. SUMMARY OF CASE PRESENTED IN MISSISSIPPI'S COMPLAINT

Mississippi refers the Special Master to the Complaint filed with leave of Court for the detailed factual allegations supporting Mississippi's claims for relief. For the purposes of this Response, core allegations of fact contained in the Complaint are summarized as follows:

Mississippi's territorial borders were established at the time of its admission to the United States on December 10, 1817. Under the United States Constitution, laws, and decisions of the Supreme Court, Mississippi holds all sovereign right, title, interest in, lawful possession of, and "full jurisdiction over lands within its borders, including the beds of streams and other waters." Compl. ¶¶ 8-13. The Sparta Sand in northwest Mississippi is a confined geological formation with outcrops in Mississippi which descend into the earth with natural east-to-west slope within the territorial borders of the State of Mississippi. Over thousands of years a finite amount of high quality groundwater was naturally accumulated and stored under pressure in this formation within the area of Mississippi's sovereign borders as an intrastate natural resource not available in Tennessee under natural conditions. Compl. ¶¶ 14-17. Under Mississippi's public trust doctrine it holds all waters within its boundaries in trust for the preservation, use and benefit of its citizens. One of the core prerogatives of Mississippi's sovereignty over its waters

is the exclusive right to control the taking and use of all waters residing within its borders. *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132-33 (2013).

MLGW is the nation's largest three-service municipal utility and operates one of the world's largest commercial groundwater pumping and distribution systems, including three well fields it constructed within three miles of the Mississippi border.⁸ Compl. ¶¶ 18-20. Memphis has ample sources of water to meet all of its needs within the State of Tennessee without pumping groundwater out of Mississippi into Tennessee. In addition to the groundwater naturally occurring within Tennessee in the Memphis area, MLGW could obtain any additional groundwater needed from north and east of MLGW's distribution system within Tennessee, and from Mississippi River surface water. Compl. ¶ 27.

Rather than develop additional water resources in Tennessee, beginning no later than 1985 Memphis and MLGW have, with the full knowledge and approval of Tennessee, knowingly and intentionally trespassed on Mississippi's sovereign

⁸The fact that Defendants' well fields are located in Tennessee is irrelevant to the analysis of Mississippi's claims. Mississippi has alleged that Defendants were knowingly and intentionally pumping groundwater out of Mississippi's sovereign territory into Tennessee in violation of Mississippi's sovereign authority. This constitutes common law trespass; and, State violations of prohibited acts under the Constitution and laws of the United States are commonly evidenced by the effects of the activity. *See Healy v. Beer Inst.*, 491 U.S. 324, 335-337 (1989) (Commerce Clause violation); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (Commerce Clause violation).

territory by pumping over 20 million gallons a day of high quality groundwater out of Mississippi into Tennessee without permission from or compensation to Mississippi. Compl. *id.*, ¶¶ 29-36. The Mississippi groundwater taken by Defendants is pure, high quality groundwater naturally collected and stored deep beneath the surface over thousands of years under natural conditions. This groundwater, absent pumping, would never be available in Tennessee. The Mississippi groundwater taken by Defendants in intentional violation of Mississippi's sovereignty is permanently lost to Mississippi and its citizens. Compl. ¶¶ 14-17, 20-24, 26. At the time of the filing of the Motion for Leave to file the Original Complaint Mississippi calculated that Defendants had pumped over 252 billion gallons of high quality Mississippi groundwater out of Mississippi natural storage. Compl. ¶ 26.

Under the facts as alleged by Mississippi in the Complaint and the Constitution and laws of the United States, Mississippi is entitled to the declaratory relief requested, damages for Defendants' intentional violation of Mississippi's territorial sovereignty and wrongful taking of Mississippi groundwater, and all other equitable relief available from the Supreme Court. As set out below, all of Defendants' and the United States' arguments to the contrary fail under the law applicable to the specific facts of this case, to which the equitable apportionment remedy does not apply.

III. ARGUMENT

A. Mississippi's Complaint States A Claim For Defendants' Violation of Mississippi's Sovereign Authority Over Its Land and Waters Within Its Borders and Defendants' Wrongful Taking of Mississippi Groundwater for the Economic Benefit of Tennessee and Its Citizens

As discussed in part B. below, Defendants' argument that Mississippi has to obtain an "equitable apportionment of the aquifer" before it can seek relief from three decades of Defendants' intentional, continuous violation of Mississippi's sovereign territory and taking of Mississippi groundwater finds no support in the United States Constitution or the Supreme Court authority. Mississippi's Complaint alleges violations of Mississippi's retained sovereignty under Article IV, Section 3, Clause 1, of the United States Constitution and the Tenth Amendment as interpreted by the Supreme Court. Mississippi's claims as pleaded in the Complaint are discussed in this section.

1. Mississippi's Sovereign Interests and Other Attributes of Ownership In All Water Residing Within Its Borders Under the United States Constitution and Laws of Mississippi

Mississippi was admitted as the twentieth State to the Union on an equal footing with the original thirteen colonies on December 10, 1817, including sovereign ownership, control, and dominion over the land and waters within its territorial boundaries. U.S. Const. art. IV, § 3, cl. 1; U.S. Const. amend. X; *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988); *Oregon v. Corvallis Sand*

& Gravel Co., 429 U.S. 363, 370-78 (1977); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892); *Pollard v. Hagan*, 44 U.S. 212, 222-23 (1845); *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842). See also *Montana v. United States*, 450 U.S. 544, 551-52 (1981); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 286-87 (1997). Mississippi was granted “full jurisdiction over the lands within its borders, including the beds of streams and other waters.” *Rhode Island v. Massachusetts*, 37 U.S. 657, 733-35, 737-40 (1838). In the absence of Congressional action, or a state imposition of an unlawful burden on interstate commerce, each State exercises complete sovereign authority over natural resources within its territorial borders. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).⁹

Under the United States Constitution Mississippi also retained the authority to determine under state law the scope of the public trust doctrine and the natural resources to which it would apply, including all waters within its borders. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012); *Phillips Petroleum Co.*, 484 U.S. at 479. In 1985 Mississippi codified the public trust over all waters in Mississippi in its “Omnibus Water Rights Act,” which declares the following as the law of Mississippi:

⁹Mississippi’s claims do not involve federal interests or a claimed burden on interstate commerce.

All water, whether occurring on the surface of the ground or underneath the surface of the ground, is hereby declared to be among the basic resources of this state to therefore belong to the people of this state, and is subject to regulation in accordance with the provisions of this chapter. The control and development and use of water for all beneficial purposes shall be in the state, which, in the exercise of its police powers, shall take such measures to effectively and efficiently manage, protect and utilize the water resources of Mississippi.

Miss. Code Ann. § 51-3-1 (2003). *See* Richard J. McLaughlin, “Mississippi” in 6 *Water and Water Rights*, 712 (Robert E. Beck, Ed., 1991 ed., repl. Vol. 2005) (under Mississippi’s Act, “[b]oth surface water and groundwater are regarded as property of the State of Mississippi”).

The public trust doctrine establishes Mississippi’s interest in and duty as a trustee to hold, manage, preserve and protect all waters within its territorial borders. Mississippi’s claims for relief pending before the Court are made in both its sovereign capacity to protect its sovereign interests and to discharge its duty as trustee to protect, preserve, control, and regulate Mississippi groundwater for the people of Mississippi.¹⁰

¹⁰Defendants’ “no ownership” arguments for dismissal of Mississippi’s claims disregard incidents of ownership held by Mississippi under the public trust doctrine, and the Supreme Court’s recognition of a state’s “greater ownership interest” in groundwater water as its most valuable natural resource. *See Sporhase v. Nebraska*, 458 U.S. 941, 952 (1982) (acknowledging the state’s “greater ownership interest” in groundwater in a Commerce Clause case).

2. Under the United States Constitution Mississippi Has Exclusive Authority As Between States To Control and Regulate the Taking and Use of All Water Naturally Located Within Its Borders

A clearly established core attribute of Mississippi's sovereignty is the authority to establish and enforce water law and policy within its borders, and to conserve, control and regulate the appropriation of all water located within its territorial borders. *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2132-33; *Kansas v. Colorado*, 206 U.S. 46, 93 (1907).

The exclusivity of each State's sovereign authority to determine and enforce its own water law and policy for water located within its borders, as between States, was affirmed in *Kansas v. Colorado*, 206 U.S. 46 (1907). After a careful explanation of the sovereign authority retained by the States under the United States Constitution, the court concluded that "[i]t is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams *and other waters*." *Id.* at 93 (emphasis added). Specifically addressing the two states before the Court, it emphasized that "[n]either State can legislate for *or impose* its own policy upon the other." *Id.* at 95 (emphasis added). More than one hundred years later the Court reaffirmed and clarified the extent of this retained sovereign authority in *Tarrant Regional Water District v. Hermann*, 133 S. Ct. 2120 (2013).

3. Defendants’ Intentional Pumping of Groundwater Out of Mississippi’s Sovereign Territory Into Tennessee is a Direct Violation of Mississippi’s Sovereignty for Which Mississippi is Entitled to All Equitable Relief

The retained sovereignty of each State within its borders as against its neighboring states is one of the foundations of the Union. *Rhode Island v. Massachusetts*, 37 U.S. at 733-34 (1838). In *Rhode Island* the Court emphasized the absolute prohibition against one State’s violation of another State’s territorial sovereignty and its rights within that territory in the discussion of the Court’s jurisdiction to resolve disputes between states over the location of their common border. “Controversies about boundary, are more serious in their consequences upon the contending states, and their relations to the Union and governments, than compacts and agreements.” *Id.* at 726. The Court went on to explain this statement as follows:

The locality of that line is matter of fact, and, when ascertained separates the territory of one from the other; *for neither state can have any right beyond its territorial boundary. It follows, that when a place is within the boundary, it is a part of the territory of a state; title, jurisdiction, and sovereignty, are inseparable incidents, and remain so till the state makes some cession.*

Id. at 733 (emphasis added).

Consistent with *Rhode Island*, as between sovereigns, the Court has consistently held that the territorial boundary is the beginning and end of each State’s sovereign rights. *See United States v. Louisiana*, 363 U.S. 1 (1960) (dispute

between the United States and five states on Gulf of Mexico over lands, minerals and other natural resources); *Louisiana v. United States*, 656 F. Supp. 1310, 1312 (W.D. La. 1986), *aff'd sub nom. Louisiana ex rel. Guste v. United States*, 832 F. 2d 935 (5th Cir. 1987) (Louisiana suit for drainage dismissed because United States had already paid for drainage beneath Louisiana sovereign lands).

Tarrant Regional Water District v. Herrmann, 133 S. Ct. 2120 (2013) is directly applicable to Mississippi's sovereignty claims regarding its authority over the transboundary taking of Mississippi groundwater. In *Tarrant* the petitioner contended that an interstate compact allocating the water from the Red River created a borderless common in which the signatories had a right to cross each other's borders to access water that was subject to the compact. *Id.* at 2129. The compact was silent as to the effect of state water laws regulating out-of-state sales of water, so petitioner argued the sharing agreement waived the restrictions imposed by state water law as to the compact's members. The Supreme Court rejected this argument, stating that a State's exclusive authority to create and enforce the water policies within its borders is a fundamental part of state sovereignty which cannot be lost by implication. *Id.* at 2133.

The Supreme Court cases are clear. Under the Constitution no State has any claim of right to any water while it is naturally residing within another State, even if the parties have agreed by compact to share the water, unless they expressly

agree that such cross-border rights are granted. There is no agreement between Mississippi and Defendants of any kind, and nothing in the equitable apportionment cases changes this attribute of state sovereignty which remains absolute under the Constitution. Defendants' intentional taking of groundwater located within Mississippi through pumping as alleged in the Complaint is a direct violation of Mississippi's territorial sovereignty and its sovereign authority to establish and enforce its water policy within Mississippi. Compl. ¶¶ 28-37.

4. Mississippi Has Petitioned for, and the Court Has Authority Under Existing Case Law to Grant to Mississippi, All Relief Supported by the Evidence for Defendants' Violation of Its Sovereignty

Mississippi seeks relief under the equitable jurisdiction of the Court for intentional violations of Mississippi's sovereignty under the United States Constitution. These violations were not driven by necessity, but to obtain Mississippi's groundwater for Defendants' economic benefit. In *Kansas v. Colorado*, 533 U.S. 1 (2001), the Court held that "[i]n proper original actions" money damages are available. *Id.* at 6. The Court possesses all the authority necessary to grant any relief it determines appropriate in the exercise of its original and exclusive jurisdiction. *See South Dakota v. North Carolina*, 192 U.S. 286, 320-21 (1904) (explaining the Court's original jurisdiction over the states and power to order the payment of money in an action of one State seeking payment of bonds

issued by the other). This is precisely the type of action the Court's original and exclusive jurisdiction was created to address. *Rhode Island v. Massachusetts*, 37 U.S. at 731; *Kansas v. Nebraska*, 135 S. Ct. at 1052 (2015).

The Defendants' intentional violation of Mississippi's territorial sovereignty goes to the foundations of the Constitution and its Amendments on which our federal system is built. In this context, the Court possesses the authority to both grant such relief and enforce such remedies as are necessary to prevent such abuses and best promote the purposes of justice. *Kansas v. Nebraska*, 135 S. Ct. at 1052.

B. Defendants Are Not Entitled to Assert Any Rights Under the Court's Equitable Apportionment Cases

Defendants' argue that under the Supreme Court's equitable apportionment decisions (1) all disputes between states over "interstate water resources" must be resolved by an apportionment of the interstate water resource; (2) that Tennessee and its municipalities have a constitutionally protected equitable interest in groundwater residing within Mississippi's sovereign territory which would not be available in Tennessee absent pumping; and (3) that Mississippi has no protectable interest in groundwater naturally stored and residing within its state borders under local geological and hydrological conditions if that groundwater can be drawn into Tennessee by pumping. Tenn. Motion at 15-17; Mem. Motion at 15-19, 42-47. The primary impediments to Defendants' argument are the Supreme Court case law and the United States Constitution.

1. Equitable Apportionment Case Law Does Not Support Defendants' Arguments In This Case

Under the allegations of Mississippi's Complaint none of the groundwater Mississippi claims would ever be naturally available in Tennessee. Compl. ¶¶ 17, 22, 41, 50. As such, the territorial sovereignty of each State within its borders under the Constitution, specifically recognized in *Kansas v. Colorado*, 206 U.S. 46 (1907), controls: "It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters." *Id.* at 93. Within this context, all of the groundwater at issue was located in Mississippi at the time of its taking by Defendants, and no Constitutional basis exists for the Court to allow Tennessee to extract water residing in Mississippi at the time of its taking because Defendants have no rights to the water, equitable or otherwise, providing a foundation for any equitable remedy.¹¹

Kansas v. Colorado illustrates this point. Each State held an equitable claim to the surface water of the Arkansas River flowing down its natural course to the sea because "[b]efore either Kansas or Colorado was settled the Arkansas River

¹¹ Defendants strenuously argue that Mississippi's acknowledgement that the larger Sparta Sand formation crosses State borders, *see e.g.*, Compl. ¶ 41, establishes an equitable interest in groundwater naturally residing in Mississippi sovereign territory. But this case is not about the interstate presence of subsurface sand. It is about the natural location and hydrological characters of groundwater which was naturally collected, stored and residing within Mississippi and which was never available within Tennessee under natural conditions. Defendants have no equitable interest in such groundwater.

was a stream running through the territory which now composes these two States.” *Id.* at 98. This pre-existing equitable interest in the river water naturally flowing through the territory of these states supported the application of the equitable apportionment remedy. However, equity follows the law, and no equitable right can exist which is in direct conflict with an established legal (or Constitutional sovereign) right. Mississippi’s Complaint only addresses water naturally residing within Mississippi which would never under natural conditions, reside in Tennessee. Compl. ¶¶ 14-17, 20-24, 26. The groundwater claimed by Mississippi is “intrastate” groundwater under natural conditions.¹² There is no basis whatever

¹² Likewise, the fact that some groundwater collected and stored at a short stretch of the States’ common border would eventually naturally seep into Tennessee does not change the analysis. Mississippi is not divested of the authority to regulate its taking, and such other water does not convert all Mississippi groundwater which would never be available in Tennessee into a shared natural resource. This case involves only Mississippi intrastate groundwater. *See American Trucking Ass’ns, Inc. v. Michigan Public Service Comm’n*, 545 U.S. 429, 433 (2005) (“intrastate” transactions are “activities taking place exclusively within the State’s borders”); *David Cabrera, Inc. v. Union*, 256 F. Supp. 839, 843 (D.P.R. 1966) (“intrastate” means “within a state”); *AT&T Communications v. Mountain States, Inc.*, 778 P. 2d 677, 683 (Colo. 1989) (“plain and ordinary meaning” of “intrastate” is “existing within a state” (*quoting Webster’s Third New International Dictionary* 1186 (1986))); *Florida Dept. of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 961 (Fla. 2005) (“the term ‘intrastate’ is commonly construed as meaning ‘existing or occurring within a state.’”) (*citing Merriam-Webster’s Collegiate Dictionary* 614 (10th ed. 1999)). That the water at issue is neither interstate water nor a naturally shared resource, is evidenced and confirmed by the fact that Defendants must mechanically pump the water from underneath Mississippi’s borders in order to produce and use it. In the absence of such pumping, the water would have remained in Mississippi. Compl. at ¶ 24.

under these facts to support the existence of any equitable interest in Tennessee in this dispute, and equitable apportionment cannot apply as a matter of law.

Defendants' argument that their ability to pump groundwater out of Mississippi into Tennessee applying the laws of physics creates an equitable interest in Mississippi groundwater under the "agency of natural laws" defies common sense and finds no support in case law. Tenn. Motion at 21-23; U.S. Br. at 20. *Kansas v. Colorado* cited *Missouri v. Illinois*, 180 U.S. 208 (1901), as an example of its exercise of jurisdiction in disputes between states arising from the natural interstate water flow of rivers. 206 U.S. at 97-98, In *Missouri v. Illinois*, Illinois was dumping sewage into the Chicago River, which would naturally flow through the Des Plaines River into the Mississippi River and be deposited in Missouri. *Missouri v. Illinois*, 180 U.S. 208 (1901). Pumping groundwater out of Mississippi is not the "agency of natural laws" under any case decided by the Court or the plain meaning of the words. Nor is the "agency of natural laws" discussed by the Court in any case remotely similar to the mechanical application of the law of physics (i.e., the use of scores of turbine pumps).

2. Federal Common Law Cannot Be Used To Create The Extraterritorial Rights Claimed by Defendants

What Defendants are really arguing is because they can capture groundwater naturally residing beyond their borders with modern pumping, the Court should radically extend the federal common law remedy of equitable apportionment to

groundwater outside Tennessee in which they have no Constitutional claim or equitable interest. Regulation of Mississippi, if possible under the Constitution, would be a matter for Congress, not federal common law. As the Court has recognized, this is not within the power or Constitutional authority of the Court. *See e.g., Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535-37 (2011). Under *Kansas v. Colorado*, and the consistent decisions of the Court to date, state law—not federal common law—controls all water naturally residing within a State’s sovereign boundaries.

3. Defendants’ Primary Reliance on the Published Decisions in *Hood v. City of Memphis*, Only Demonstrates the Lack of Merit in Their Equitable Apportionment Argument

Lacking any supporting Supreme Court cases, Defendants have latched onto the unfortunately conflated language taken in the appellate court opinion affirming dismissal of the Mississippi district court action against Memphis and MLGW solely for lack of subject matter jurisdiction. This dismissal was granted before any evidence was taken or any decisions made on the merits. *Hood v. City of Memphis*, 533 F. Supp. 2d 646 (N.D. Miss. 2008), *aff’d*, 570 F.3d 625 (5th Cir. 2009). Nevertheless, the *Hood* appellate court opinion adopted language argued by Defendants which appears to create equitable rights in interstate water sources (i.e., “the Aquifer”) and to apply equitable apportionment to all state disputes over “interstate water resources.” This phrase and its expansive association with the

Court's equitable apportionment remedy by the appellate court is not supported in word or substance in any Supreme Court decision.¹³ Accordingly, it is no surprise that Defendants rely on *Hood* as the law of the land, with Tennessee citing *Hood* as authority for this sweeping proposition on 25 pages of its Motion, and Memphis relying on *Hood* even more heavily. As discussed in the response to Defendants' issue preclusion argument below, *Hood* is not authority for any proposition except the requirement to file this case as an original action joining Tennessee in this Court. *Hood* provides no support for Defendants' pending Motions.

4. Mississippi's Sovereign Authority to Protect Its Waters from Cross-Border Extractions is Not Nullified by the Equitable Apportionment Doctrine

Defendants' other arguments reveal their real position that subsurface water resources residing within the boundaries of a specific State are free for the taking by groundwater pumping without recourse for the State from which they are taken. Tennessee asserts that under the equitable apportionment doctrine, a "State may not preserve solely for its own inhabitants natural resources located within its

¹³ The phrase "interstate water resources" used in the following sentence from *Hood* is not used in any other reported federal court case: "The Aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests, and whose allotment is subject to interstate compact or equitable allocation." *Hood*, 570 F.3d at 631. LEXIS searches for the phrases "interstate water resource" in the Supreme Court Cases databases yielded zero results; and this search in the Federal Court Cases, Combined database yielded only *Hood*.

borders.” Tenn. Motion at 16 (*citing Idaho v. Oregon*, 462 U.S. 1017, 1025 (1983); *Hinderland v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938)). Memphis makes essentially the same argument. Mem. Motion at 17. Neither of these cases supports Defendants’ arguments. Mississippi’s case does not implicate rights to anadromous fish migrating interstate or an interstate river, and neither case purports to grant cross-border groundwater extraction rights to Defendants, or nullify Mississippi’s sovereign territorial right over groundwater residing within its borders. *See Tarrant Reg’l Water Dist.*, 133 S. Ct. at 2132-34.

The equitable apportionment cases do not create substantive rights of general application. The equitable apportionment *remedy* was applied by the Court in *Kansas v. Colorado* (1907) to address disputes over flowing surface water in which each State held an equitable interest under the conditions established by nature, absent only human intervention. Under these circumstances, the Court balances the rights of the affected States and makes equitable allocations that affect how much water (or salmon, in *Idaho v. Oregon*) a State may take as the water naturally traverses the State. It is only in the context that the Court has stated that a State “may not preserve solely for its own inhabitants natural resources located within its borders.” *Idaho v. Oregon*, 462 U.S. at 1025.

This case is not about “equitable allocation.” It is about “location” and sovereign rights. *No case* stands for the principle that one State such as Tennessee

has the authority to *reach into* another State and forcibly take water that is physically located in the other State, nor for the principle that a State such as Mississippi may not obtain judicial relief to prevent another State from engaging in forced, unnatural cross-border extractions of water that is physically located within its borders.

The notion that a State has inherent “cross-border” rights to water located within another State was rejected by this Court in *Tarrant Regional Water District v. Hermann*, 133 S. Ct. 2120 (2013). *Tarrant* involved an interstate compact entered between the states of Texas, Oklahoma, Arkansas and Louisiana relating to the Red River and its tributaries. In *Tarrant*, the Court made it clear that, in the absence of an interstate compact provision to the contrary, a State has no right to access water physically located within another State, and rejected Tarrant’s assertion that the compact at issue contained a relinquishment of the States’ sovereign powers so as to “grant each other cross-border rights under the Compact.” *Id.* at 2133.¹⁴

¹⁴The Court noted that other interstate compacts between other states “feature language that unambiguously permits signatory States to cross each other’s borders to fulfill obligations under the compacts,” but found no such language in the Red River Compact. *Id.* (“Adopting Tarrant’s reading would necessarily entail assuming that Oklahoma and three other States silently surrendered substantial control over the water within their borders when they agreed to the Compact. Given the background principles we have described above, we find this unlikely to have been the intent of the Compact’s signatories.”). *See also, id.* at 2131

There is no interstate compact at issue in this case. Mississippi retains and possesses sovereign control over the water within its borders, and the Defendants have no right or authority to engage in cross-border extractions of water that is located in Mississippi.

C. Relief is Warranted Under Alternative Causes of Action

Whether analyzed under state law or federal common law,¹⁵ the Defendants' intentional pumping of Mississippi groundwater from within Mississippi into Tennessee constitutes, *inter alia*, trespass,¹⁶ conversion,¹⁷ and intentional tortious

(“Obviously, none of the upstream states can redirect water that lies outside of their borders Applying Tarrant’s understanding of silence regarding state borders to this section would imply that Arkansas could enter into Texas without having to wait for the water that will inevitably reach it. This counter-intuitive outcome would thwart the self-evident purposes of the Compact.”) (emphasis added).

¹⁵Defendants assert that Mississippi seeks to apply Mississippi tort law, Mem. Motion at 32 n.12; Tenn. Motion at 15 n.4, but Mississippi has also cited to Tennessee case authority, and it acknowledges that the formulation and application of federal common law may be appropriate in this unique case. *See Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981). Regardless, the Court is vested with the power to “regulate and mould the process it uses in such a manner as in its judgment will best promote the purpose of justice.” *Kansas v. Nebraska*, 135 S. Ct. at 1052 (citation omitted).

¹⁶*Great Northern Nekoosa Corp. v. Aetna Cas. & Sur. Co.*, 921 F. Supp. 401, 415 (N.D. Miss. 1996) (discussing trespass law in Mississippi); *Morrison v. Smith*, 757 S.W. 2d 678, 681 (Tenn. Ct. App. 1988) (*quoting Daughtery v. Stepp*, 19 N.C. 371 (N.C. 1835) (“[E]very unauthorized, and therefore unlawful, entry into the close of another, is a trespass.”)). *See also* RESTATEMENT (SECOND) OF TORTS § 158 (stating one subject to liability for trespass if he intentionally enters land in the possession of another or causes a thing to do so); *id.* § 159 (stating trespass may be

conduct.¹⁸ Mississippi seeks damages in an amount equal to the value of the water wrongfully taken. In addition, Defendants' actions present a classic claim for restitution based on their violation of Mississippi's territorial sovereignty and taking of Mississippi's natural resources held by Mississippi in trust for its citizens, without consent or compensation.¹⁹ Mississippi is entitled to recover the value of

committed beneath the surface of the earth); *id.* § 161(1) (stating trespass may be committed by the continued presence on the land of a thing the actor has tortiously placed there, whether or not the actor has the ability to remove it); *Gregg v. Delhi-Taylor Oil Corp.*, 344 S.W. 2d 411, 416 (Tex. 1961) (*quoting Glade v. Dietert*, 295 S.W. 2d 642, 645 (Tex. 1956) (“[E]ntry upon another’s land need not be in person, but may be made by causing or permitting a thing to cross the boundary of the premises.”)); *Forbell v. City of New York*, 164 N.Y. 522, 526 (N.Y. 1900) (finding trespass when city constructed pumping stations that caused water underlying plaintiff’s land to flow into its own wells).

¹⁷*Mississippi Motor Fin., Inc. v. Thomas*, 149 So. 2d 20 (1963) (stating conversion is the exercise of dominion or control over property inconsistent with the true owner’s rights). *See also Barger v. Webb*, 391 S.W.2d 664, 665 (Tenn. 1965) (stating conversion is the appropriation of property to defendant’s “own use and benefit, by the exercise of dominion over it, in defiance of plaintiff’s right”).

¹⁸*Capital Elec. Power Ass’n v. Hinson*, 92 So. 2d 867, 871 (Miss. 1957) (“A tortious act has also been defined as the commission or omission of an act by one, without right, whereby another receives some injury, directly or indirectly, in person, property, or reputation.”) (citation omitted); *Stokes v. Newell*, 165 So. 542, 545 (Miss. 1936) (“It is a general principal of law that the breach of a legal duty owed by one person to another when damages have resulted therefrom gives the right to a cause of action.”). *See also* RESTATEMENT (SECOND) OF TORTS § 927 (providing a remedy for “destruction or impairment of any legally protected interest in the land or other thing”).

¹⁹*Magnolia Fed. Sav. & Loan Ass’n v. Randal Craft Realty Co.*, 342 So. 2d 1308, 1311 (Miss. 1977) (stating unjust enrichment and restitution recognize that a person should not be allowed to enrich himself unjustly through his retention or use of property or money which belongs to another); *Freeman Indus., LLC v.*

the benefits conferred, an accounting and disgorgement of all proceeds and consequential gains realized by the Tennessee Parties as “conscious wrongdoers.”²⁰

Memphis makes the remarkable argument that “Mississippi has not asserted real or substantial injury.” Mem. Motion at 30. Such an argument is manifestly incorrect in light of the allegations of, *inter alia*, paragraph 54 of Mississippi’s Complaint.

Memphis and MLGW also present specific challenges to Mississippi’s conversion and trespass claims. Those challenges also fail.

As to trespass, Memphis argues that Mississippi’s trespass claim should be dismissed “because there has been no physical invasion of Mississippi’s property.” Mem. Motion at 41-42. The asserted factual basis of Memphis’ argument is

Eastman Chem. Co., 172 S.W. 3d 512, 524-25 (Tenn. 2005) (containing elements of unjust enrichment claim); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 (2011) (“A person who obtains a benefit by an act of trespass or conversion, by comparable interference with other protected interests in tangible property, or in consequence of such an act by another, is liable in restitution to the victim of the wrong.”); *id.* § 1 (“A person who is unjustly enriched at the expense of another is subject to liability and restitution.”); *id.* § 3 (“A person is not permitted to profit by his own wrong.”).

²⁰RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 49 & 51; *see also id.* § 51(3)(b) (providing a “conscious wrongdoer” is a defendant who is enriched by misconduct and acts “despite a known risk that the conduct in question violates the rights of the claimant”). Such consequential gains include, *inter alia*, saved expenditures, such as where a defendant’s unauthorized taking or use of the claimant’s property has saved the defendant the “greater cost of making alternative arrangements.” *Id.* § 1, cmt. d.

simply wrong. There has, in fact, been a physical invasion of Mississippi's property. Mississippi's Complaint alleges:

Defendants' wrongful taking is evidenced by a substantial drop in pressure and corresponding drawdown of stored groundwater in the Sparta Sand in Mississippi in a pattern covering substantially all of DeSoto County in northwest Mississippi across the state border from Memphis. This drawdown is illustrated by a potentiometric surface map showing a hydrologic feature called a "cone of depression," which was discovered by the USGS. This cone of depression extends miles into north Mississippi and was formed by, and continues to expand, as a direct result of Defendants' water well development and pumping operations.

Compl. ¶ 25.

The fact that MLGW's wells are physically located within Tennessee's borders does not negate Mississippi's trespass claims, because trespass may be premised on a defendant causing something to invade the plaintiff's premises, regardless of whether the defendant, himself, has physically invaded the plaintiff's premises. *See* pg. 24 n.16, *supra*.²¹

²¹Trespass is a long-recognized cause of action for groundwater pumpage diversions, as evidenced by the *Forbell* case cited in footnote 16, above. In *Forbell*, the Court ruled that an actionable trespass occurred when a city constructed pumping stations that caused water underlying plaintiff's land to flow into the city's wells, whereupon the water was sold by the city to its customers. The Court reasoned:

The learned judge found that the acts of the defendant were a trespass. No doubt trespass may be committed by the projection of force beyond the boundary of the lot where the proprietary instrument is located Force . . . may be produced by the employment of such

The two Mississippi cases cited by Memphis for the contrary proposition are clearly distinguishable. Mem. Motion at 41. The requirement of *Prescott v. Leaf River Forest Products, Inc.*, 740 So. 2d 301, 310 (Miss. 1999), for “an actual physical invasion of the plaintiff’s property” is met by the invasion of Mississippi’s sovereign territory as discussed above. In *California Company v. Britt*, 154 So. 2d 144 (Miss. 1963), the court held that the defendant’s drilling of a gas well pursuant to Mississippi’s oil and gas statutes and regulations and a voluntary unitization agreement to which plaintiff was not a party was not tortious to plaintiff. *Id.* at 148-49. In contrast, Defendants have never had any lawful authority or permission to withdraw groundwater from Mississippi’s sovereign territory.

As to Mississippi’s conversion claims, Memphis argues that Mississippi has no ownership interest in groundwater underlying its border and therefore Mississippi’s claim fails as a matter of law. Mem. Motion at 32-39. For the reasons addressed hereinabove, Mississippi possesses sovereign powers and attributes of

material agencies or instruments as become effective by the co-operation of the forces of nature, and such is the case before us.

Forbell, 164 N.Y. at 646. This Court cited *Forbell* in *Washington v. Oregon*, 297 U.S. 517 (1936), as one of the authorities recognizing that it is “unlawful” to extract groundwater to the injury of a neighboring landowner if the extracted water is sold or is used on distant lands. *Id.* at 524.

ownership under the public trust doctrine that are more than sufficient to sustain a conversion claim.

Mississippi's sovereign rights and authority over the groundwater residing within its territorial borders is provided in the Constitution and is sufficient to support its claims. *See Tennessee Copper Co.*, 206 U.S. at 237. This is not a Commerce Clause case, and Defendants' "no ownership" argument under those cases miss the mark. Nevertheless, even those cases, *Hughes v. Oklahoma*, 441 U.S. at 334, and *Sporhase v. Nebraska*, 458 U.S. at 952, acknowledge the State's interests in its natural resources protected under the Constitution. *Id.* at 952-53. Consistent with this fundamental attribute of State sovereignty, the Court recently recognized that the right to control and regulate the use of natural resources within the State's territory "is an essential attribute of sovereignty." *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2132 (*quoting United States v. Alaska*, 621 U.S. 1, 34 (1997)). Memphis acknowledges, as it must, that states have the "power to preserve and regulate" their natural resources. Mem. Motion at 34. Logically, a State has incidents of ownership or control sufficient to recover damages should another State or other actor wrongfully appropriate, harm or otherwise deprive the State or its citizens of those natural resources. *See Hudson Co. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (recognizing that "[t]he State, as *quasi*-sovereign and representative of the interests of the public, has standing in court to protect . . . the

water . . . within its territory”); *Selma Pressure Treating Co. v. Osmose Wood Preserving*, 221 Cal. App. 3d 1601, 1617-18 (Cal. Ct. App. 1990) (collecting cases where states have been awarded damages where its interests in air, land, or water were violated). *Cf. Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (“It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State, but it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them.”).

Mississippi clearly has attributes of ownership and protectable property interests in the subject water pursuant to the public trust doctrine. *See* Section III(A)(1), *supra*. Defendants argue the public trust doctrine is not applicable to the facts of this case, but their arguments are premised on inaccurate descriptions of either the scope of the doctrine or the manner in which the doctrine applies to the facts pled by Mississippi. Mem. Motion at 42-47; Tenn. Motion at 29-30.

Memphis argues the public trust doctrine only applies to land, but Tennessee correctly acknowledges that under the public trust doctrine, “a State holds in trust the waters and submerged lands confined within its own borders, subject to fiduciary duties to preserve those resources for the benefit of the public.” Mem. Motion at 42; Tenn. Motion at 29.

Tennessee asserts that the public trust doctrine only defines “the rights and obligations of a State vis-à-vis its own citizens,” but Tennessee cites no authority for such an argument. Tenn. Motion at 29. Further, it is simply illogical to suggest that Mississippi’s rights and duties of protection rise and fall depending upon the citizenship of the actor invading the corpus of the trust.

Tennessee also acknowledges the applicability of the public trust doctrine to “purely intrastate water,” but Defendants argue that interstate water is at issue and, therefore, the public trust doctrine does not apply. Tenn. Motion at 30; Mem. Motion at 43-46. The public trust doctrine covers the water at issue, however, simply because the water was located within Mississippi when Defendants took it. Further, the groundwater at issue originated in Mississippi, was stored in the Sparta Sand formation in north Mississippi, and would have, under natural conditions, never been available in Tennessee. Compl. at ¶¶ 15-17. It is “intrastate” water under the common, generally understood meaning of the term.²²

²² See cases cited in footnote 12, above. Mississippi has admitted that there is some groundwater in the Sparta Sand in Mississippi that gradually seeps into Tennessee under natural conditions, and Mississippi has made it clear that such groundwater is not part of its claims. The hydrologic characteristics of such other groundwater does not convert all groundwater into “interstate” groundwater as the United States suggests. U.S. Br. at 17. While Defendants and the United States may prefer to analyze this case by reference to water that is not at issue, the viability of Mississippi’s claims must be assessed based on the source, location and hydrologic characteristics of the water actually at issue.

Defendants also argue that § 51-3-41 of Mississippi's Omnibus Water Act, § 51-3-1, *et seq.*, Miss. Code Ann. (2003), somehow establishes that Mississippi has no protectable property interests in the water at issue and that it must be equitably apportioned. Tenn. Motion at 27-29; Mem. Motion at 35-38. The statute, however, does nothing more than empower the Mississippi Commission on Environmental Quality to negotiate compacts or agreements with adjoining states.

As interpreted by Defendants, § 51-3-41 waives Mississippi's sovereign powers and nullifies the public trust which is established in § 51-3-1 and attaches to *all* water in the State. This Court recognized in *Tarrant* that "states do not easily cede their sovereign powers, including their control over waters within their own territories," *Id.*, 133 S. Ct. at 2132, and held that any ceding of such powers must be stated expressly and cannot be premised on ambiguity or silence. *Tarrant*, 133 S. Ct. at 2133. There is nothing in § 51-3-41 which purports to waive or limit Mississippi's sovereign powers as Defendants assert.

Memphis also argues that "the public trust of every State 'overlying the Aquifer' are implicated," but there are no "competing" public trusts at issue here. Mem. Motion at 44). Mississippi's rights and obligations under the public trust doctrine extend to groundwater located within Mississippi (the groundwater at issue), while Tennessee's rights and obligations under its own public trust doctrine extend to waters located within Tennessee. *See* Tenn. Code Ann. § 68-221-702

(“Recognizing that the waters of the state [of Tennessee] are the property of the state and are held in public trust for the benefit of its citizens, it is declared that the people of the State are beneficiaries of this trust and have a right to both an adequate quantity and quality of drinking water.”).

Mississippi’s sovereign and quasi-sovereign interests and attributes of ownership under the public trust doctrine enable it to pursue a conversion claim, and Memphis’s challenges to Mississippi’s claim should be denied.

D. Defendants’ Water Policy Argument is Not a Basis for Dismissal

Defendants assert speculative, unfounded arguments about the potential effects Mississippi’s claims may allegedly have on “water policy” in the United States. Tennessee asserts, for example, that “Mississippi’s claims risk undermining [the] well-settled framework for managing interstate water resources.” Tenn. Motion at 32. Similar assertions are contained in the Memphis Motion. Mem. Motion at 47-48. Once again, Defendants’ arguments rely on equitable apportionment concepts and cases that have *no* application to this case. This case is grounded upon Mississippi’s rights as a sovereign State and the protection of water residing and stored solely within Mississippi, and there is no indication that the hydrologic characteristics of water stored in the Sparta Sand in north Mississippi, as pled by Mississippi, are present in any other locations. This is a unique case and Defendants’ arguments about the effects Mississippi’s claims might have on

“water policy across the Nation” are nothing more than rank speculation. Tenn. Motion at 31.

Tennessee claims that Mississippi’s sovereign interests are secondary and there are “broader national interest[s]” that are involved in dealing with groundwater. *Id.* Congress is free to act, of course, and might have the authority to implement a nationwide policy for groundwater as the Court intimated in *Sporhase v. Nebraska*, 458 U.S. at 952-53. But Congress has not acted, and Mississippi is entitled to have its claims resolved and its sovereignty protected in a manner that is consistent with its rights under the United States Constitution. Tennessee also asserts that Mississippi’s claims would be “disruptive,” Tenn. Motion at 32, and refers to the assertion of the United States that under Mississippi’s theory, “Tennessee cannot pump *any* water from the Aquifer because doing so would cause water to flow out of Mississippi.” U.S. Br. at 13 (emphasis in original). Such assertions are factually wrong and must be ignored. First, “disruption” is what occurs and should occur when a defendant is forced to cease engaging in unlawful conduct. Second, contrary to the United States’ assertions, MLGW can move its wells to the north and east of MLGW’s distribution system and thereby

withdraw water from the Sparta Sand without taking water from Mississippi's groundwater storage. Compl. ¶ 27.²³

Tennessee's argument is not truly about national water policy. It is about Defendants' desire to avoid the consequences of their unlawful takings. There is nothing in the Constitution or any law, anywhere, which authorizes Defendants to invade Mississippi's sovereign territory through MLGW's massive pumping operations and forcibly extract water naturally stored within Mississippi's borders.

E. The Potential Scope of Discovery Cannot Serve as a Basis for Dismissal

Tennessee spends an extensive amount of time making a somewhat puzzling and inconsistent argument about the Court dismissing Mississippi's claims simply because of the potential discovery that may be needed to resolve them. Tenn. Motion at 31-35, 40-43. Defendants' motions, however, must be resolved solely on the core legal question of whether Mississippi has stated viable claims for relief under the facts in Mississippi's Complaint, taken as true. In essence, Tennessee is rearguing its opposition to Mississippi's Motion for Leave to File Bill of Complaint in Original Action, which was granted. Mississippi has stated viable

²³ Under basic principles of tort law, all persons have a duty to act in a manner that does not cause foreseeable harm to another. The same basic concept applies here.

claims for relief, and it is entitled to a resolution of its claims on the merits—which the Court and Special Master are abundantly capable of providing.

Tennessee admits that “extensive discovery” was taken and “a full factual record” was developed in the prior litigation between Mississippi and Memphis and MLGW (that was dismissed on jurisdictional grounds due to Tennessee’s absence). Tenn. Motion at 34-35. Despite Tennessee’s implications to the contrary, the prior proceedings did not afford Mississippi a resolution of the merits of its claims. *Id.* at 35. Nevertheless, the extensive discovery from the prior proceeding means that Mississippi’s claims are significantly advanced and can be litigated in this Court in a relatively efficient manner. And while Tennessee alleges that burdens will be imposed by “relitigating” Mississippi’s claims, Tennessee was not even a party to the prior proceedings and will be relitigating nothing. *Id.* at 40-41.

Mississippi shares Tennessee’s interest in litigating this case efficiently. The Special Master and the parties can and should explore case management procedures (such as bifurcation or other phased litigation, and the use of depositions and other discovery from the prior proceedings) that will create substantial efficiencies for the Court and the parties. Regardless, the Court has granted Mississippi leave to file its Complaint, Mississippi has stated substantial, valid claims, and the Court should reject Tennessee’s speculation about the tasks

that lie ahead and afford Mississippi the opportunity to pursue its very serious, substantial claims to a conclusion on the merits.

F. The Lower Court Decisions Did Not and Cannot Establish Equitable Apportionment as Mississippi's Only Remedy, and Issue Preclusion Does Not Apply

The Tennessee Parties argue that the doctrine of issue preclusion bars Mississippi's claim because the district court and the Fifth Circuit have already ruled that Mississippi must seek equitable apportionment of the Sparta Sand aquifer before it can claim rights to the groundwater stored therein. Mem. Motion at 24-28; Tenn. Motion at 35-47. The United States declined to join the Tennessee plaintiffs' issue preclusion argument, finding "force" to Mississippi's argument that giving preclusive effect to the finding of the district court and court of appeals would impermissibly delegate the Supreme Court's exclusive authority over original actions. U.S. Br. at 23 n.4.

Even if the district court or Fifth Circuit, in concluding that Tennessee was a necessary party, purported to determine the parameters of Mississippi's rights vis-a-vis Tennessee, neither of those courts possessed any jurisdiction to make a determination limiting Mississippi's rights and claims. Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1251(a) vest original and exclusive jurisdiction over controversies between the states in this Court. "[T]he description of . . . jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to

any other federal court.” *Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992). To give preclusive effect to the statements of the district court and the court of appeals would delegate the Supreme Court’s exclusive constitutional authority to determine matters between states to courts without jurisdiction.

This Court rejected a district court’s attempt to resolve disputes such as these in *Mississippi v. Louisiana*, 506 U.S. 73 (U.S. 1992). There, citizens of Mississippi brought suit against citizens of Louisiana in federal district court to quiet title to riparian lands on the Mississippi River. *Id.* at 74. The State of Louisiana intervened and filed a third-party complaint against Mississippi, seeking the Court’s determination of the boundary line between the states. *Id.* The district court attempted to resolve this dispute, finding that portions of the disputed land were in Mississippi, and the Fifth Circuit followed suit, rejecting the district court’s findings and rendering judgment in favor of Louisiana. *Id.* at 75.

This Court granted certiorari to address the following question: “Did the District Court properly assert jurisdiction over respondents’ third-party complaint against petitioner, State of Mississippi.” *Id.* at 75. The Court held that a district court could not decide issues between the states and reversed any portion of the judgment purporting to grant any relief to Louisiana against Mississippi. *Id.* at 78. In reaching this conclusion, the Court pointed to the “uncompromising” language

of 28 U.S.C. § 1251(a), which vests original and “exclusive” jurisdiction over the controversy in the Supreme Court. *Id.* at 77-78.

As in *Mississippi v. Louisiana*, neither the federal district court nor the court of appeals had any authority to determine that equitable apportionment was Mississippi’s exclusive remedy against Tennessee. Determining whether Tennessee was a necessary and indispensable party for purposes of Rule 19 was within the prerogative of those courts, *see Okoro v. Bohman*, 164 F.3d 1059, 1063 (7th Cir. 1999), but their extraneous comments on the ultimate remedies which may or may not be available in this Court exceeded their jurisdiction and are a nullity. Just as “[t]he States . . . are not bound by any district court or court of appeals decision as to the boundary between them . . .,” *Mississippi v. Louisiana*, 506 U.S. at 79, states cannot be bound by any decision purporting to determine the respective rights between them.

In addition, issue preclusion only applies to a determination that is “essential to the judgment.” *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (*quoting* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980)). “A determination ranks as necessary or essential only when the final outcome hinges on it.” *Bobby*, 556 U.S. at 835. The “necessary and essential” determination at issue was that Mississippi’s claims of groundwater ownership implicated Tennessee’s sovereign interests, and the district court’s jurisdictional holding was based on the fact that Tennessee had an interest

in the proceedings but could not be joined in the suit because of the Supreme Court's original jurisdiction over competing interests between two states. *See* Fed. R. Civ. P. 19(a), (b). Identifying the full range of claims Mississippi could assert against Tennessee was neither necessary nor essential to the lower courts' decision under Rule 19 of the Federal Rules of Civil Procedure. Therefore, any statements the district court and court of appeals made concerning equitable apportionment and the relief potentially available to Mississippi were *dicta* and have no preclusive effect.

In fact, as Memphis recognizes, the district court expressly declined to determine the respective rights of the states because it found that the Supreme Court had not yet "determined which portion of the aquifer's water is the property of which State." *Hood*, 533 F. Supp. 2d at 648; Mem. Motion at 27. From its recognition that rights in the groundwater had not been determined, the district court opined that equitable apportionment was necessary under Supreme Court precedent in order to determine the states' respective property rights in the water. By virtue of its own logic, however, this statement is *dicta*; the district court did not have the authority to determine and therefore could not have attempted to determine the respective rights of the parties to the groundwater in issue. The district court's recognition that it lacked authority to make these critical factual

findings or binding legal conclusions involving a dispute between the states is why it dismissed the suit.

In its brief, Tennessee focuses on the language of the Fifth Circuit's opinion, which states that: "[T]he Aquifer is an interstate water source, and the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share." *Hood*, 570 F.3d at 629; Tenn. Motion at 37. The Fifth Circuit's holding is based, it appears, on its *sua sponte* factual finding that groundwater within aquifers flows, "if slowly," under several states. *Id.* at 630. Tennessee seizes on the Fifth Circuit's statement that hydrological differences between aquifers and lakes are "of no analytical significance" to Mississippi's claim. *Id.* at 630; Tenn. Motion at 9, 27, 39.

Unlike the Fifth Circuit, the district court never addressed the character of the groundwater within the aquifer or its hydrological properties; that factual issue still has not been decided on the merits after full consideration of all relevant evidence. Such a finding would have been beyond the district court's jurisdiction and exclusively within the prerogative of the Supreme Court. *Hood*, 533 F. Supp. 2d at 648. The Fifth Circuit's language, whether considered dicta or error, was not essential to its affirmance of the district court's holding regarding whether Tennessee was a necessary party and therefore does not preclude Mississippi's

arguments here. Only this Court has the authority to decide what rights, if any, neighboring states have to the groundwater at issue.

Tennessee argues that not applying issue preclusion would result in repetitive discovery and “relitigation.” Tenn. Motion at 40-47. Tennessee, however, was not even a party to the prior proceeding, which was dismissed on jurisdictional grounds due to Tennessee’s absence. Tennessee joined Memphis’ argument to the Fifth Circuit that Mississippi’s claims could *only* be decided by *this* Court. Having prevailed on that issue, Tennessee cannot be heard to now assert that those same proceedings (which were not decided on the merits) stand as a bar to Mississippi’s claims being decided by this Court. Tennessee cannot have it both ways.

Finally, Tennessee suggests in its briefs that the Court’s previous denial of leave to Mississippi to file an original action which accompanied its petition for certiorari bolsters its issue preclusion argument. Tenn. Motion at 37-38. Ironically, Mississippi made a similar argument in *Mississippi v. Louisiana*, contending that the Court’s “refusal to allow Louisiana to file an original Complaint to determine the boundary between the two states must, by implication, have indicated that the District Court was a proper forum for the resolution of that question.” 506 U.S. at 76. Mississippi argued that its “opposition to Louisiana’s motion to file original complaint in the Court was premised in part on the contention that the boundary

question could be determined in the then pending action between the private land owners in the District Court.” *Id.* The Court rejected this argument out of hand, stating that its denial of leave to file an original action did not amount to an adoption of the district court’s holding, explaining that it simply applied its two-factor analysis for determining whether to exercise its original jurisdiction on that motion. *Id.* at 76. *See also Teague v. Lane*, 489 U.S. 288, 296 (1989) (“[D]enial of a writ of certiorari imports no expression of opinion upon the merits of the case.”) (*quoting United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.)).

This Court is the only court with jurisdictional authority to adjudicate Mississippi’s claims against Tennessee. To date, Mississippi has not received a merits review of its claims. The Court should decline the Defendants’ invitation to preclude Mississippi from asserting claims that have not and could not be decided by the district court or court of appeals, and should speak finally to whether Mississippi has asserted valid claims against Defendants based on the unique facts of this case.

IV. CONCLUSION

This case must be decided under Article IV, Section 3, Clause 1 of the United States Constitution under which Mississippi was created and brought into the Union, and the Tenth Amendment to the Constitution, based on the unique location and hydrologic characteristics of the groundwater at issue. Defendants’

motions simply ignore Mississippi's sovereign rights under the Constitution. Mississippi has pled facts which dispute any conclusion that the groundwater at issue is naturally shared with Tennessee. The natural hydrogeological characteristics of the subject groundwater under natural conditions make it an intrastate, not interstate, natural resource. Under these conditions, it is trapped and resides in Mississippi, never naturally crossing into Tennessee. The natural intrastate character of the groundwater is not changed by Defendants' cross-border extraction from Mississippi by modern mechanical pumping. There is nothing "natural" about such forced extraction through artificial means. The groundwater in dispute has never been "interstate" water under natural conditions, and Defendants have no right under the Constitution to reach into Mississippi and pull it into Tennessee without Mississippi's permission. Defendants essentially ask this Court to strip Mississippi of a fundamental attribute of its sovereignty and empower them to, with impunity, forcibly seize groundwater from Mississippi. Such an outcome cannot be allowed under the Constitution of United States, and Defendants' motions should be denied.

APRIL 6, 2016

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CERTIFICATE OF SERVICE

Pursuant to Paragraph 3 of the Special Master's order on Initial Conference, I hereby certify that all parties on the Special Master's approved service list have been served by electronic mail.

/s/ C. Michael Ellingburg
C. Michael Ellingburg