

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 Motion for Leave to File Bill
of Complaint in Original Action*

**REPLY BRIEF OF THE STATE OF MISSISSIPPI ON
ITS MOTION FOR LEAVE TO FILE BILL OF
COMPLAINT IN ORIGINAL ACTION**

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INTRODUCTION

The State of Mississippi's Motion for Leave to File Bill of Complaint in Original Action ("Motion") seeks the Court's resolution of foundational issues in a dispute between Mississippi—acting in its sovereign and representative capacities—and Tennessee, Memphis and MLGW ("Tennessee Parties"): Whether the Tennessee Parties' knowing, intentional, and forcible pumping of groundwater stored and exclusively residing within Mississippi's territorial borders violates Mississippi's retained sovereignty; constitutes a wrongful taking of Mississippi's most valuable natural resource; and, supports monetary and equitable relief. These issues were raised in the previous action against Memphis and MLGW, but never decided in a plenary proceeding because the district court held that Tennessee was a necessary and indispensable party, stripping the trial court of any jurisdiction.¹

In this action Mississippi adds Tennessee as a party, and its proposed Complaint is supported by legal authority and evidence regarding (1) Mississippi's retained sovereign authority over all waters within its territory under the United States Constitution and

¹ This Court's denial of certiorari affirmed the necessity of Tennessee's joinder and dismissal of the district court action, but not its reasoning. The district court never took evidence, or made any decision regarding Mississippi's claim that the groundwater at issue, as distinguished from the sandstone formation, was an interstate resource, rather than an intrastate natural resource under natural conditions. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981).

state law;² (2) the natural conditions under which the groundwater in dispute was collected and stored within Mississippi's territory, with only very limited natural movement from east to west/southwest entirely within Mississippi;³ (3) and the intentional and forcible pumping beginning no later than 1985 of over 400 billion gallons of intrastate groundwater out of Mississippi into Tennessee for recovery, sale and distribution in Tennessee, without permission from or compensation to Mississippi. This case does not involve a threatened invasion of Mississippi's rights; it involves a long, continuing, intentional invasion of Mississippi's sovereignty in violation of the United States Constitution. Under these facts, Mississippi's proposed Complaint is of sufficient serious magnitude to invoke the Court's original and exclusive jurisdiction.

The only arguments made by the Tennessee Parties for denying Mississippi's Motion are fairly summarized as follows: (1) this Court's equitable apportionment decisions automatically convert all intrastate groundwater naturally stored and residing solely within the territory of one state into an interstate natural resource *if* such groundwater becomes "technologically available" to the neighboring state, which only directly employs the technology within its own state borders; and (2) that the prior proceedings in this dispute have conclusively determined that the Tennessee Parties' pumping of groundwater out of Mississippi is a legitimate exercise of Tennessee sovereignty, leaving Mississippi without any remedy

² Complaint, ¶¶ 8-13.

³ Complaint, ¶¶ 15-17.

except equitable apportionment of Mississippi intrastate groundwater. Both arguments are fundamentally flawed.

I. MISSISSIPPI'S CLAIMS DO NOT FALL UNDER THE COURT'S EQUITABLE APPORTIONMENT JURISPRUDENCE; RATHER, THEY FALL UNDER THE COURT'S JURISDICTION TO PROTECT EACH STATE AGAINST ANOTHER'S ENCROACHMENT ON ITS RETAINED TERRITORIAL SOVEREIGNTY

A. Equitable Apportionment Does Not Apply to Groundwater Which, Under Natural Conditions, Is An Intrastate Natural Resource

The Tennessee Parties' arguments simply assume the groundwater they are admittedly pumping out of Mississippi is "interstate water" subject to equitable apportionment. This position, however, is not supported by the facts pleaded by Mississippi, or the Court's equitable apportionment decisions. A review of the Court's cases reveals that it has never addressed the issue of a state's claim of sovereign rights over groundwater which is trapped within its territorial borders in a deep confined aquifer under natural conditions.

Virginia v. Maryland, 540 U.S. 56, 74 n.9 (2003) does not support the proposition asserted by Tennessee that "equitable apportionment governs disputes over interstate groundwater resources, including the Aquifer." (Tenn. Reply Br. at 2). *Virginia* determined the riparian rights of Virginia to construct a water-

intake structure extending into the Potomac River. The cited footnote merely states that application of “equitable apportionment is the doctrine of federal common law governing disputes between States concerning their rights to use the water of an interstate stream.” *Id.* (emphasis added). In fact, none of the cases cited by the Tennessee Parties provide authority for applying the doctrine of equitable apportionment to intrastate groundwater which is not hydrologically connected to interstate surface water already apportioned by the Court or an interstate compact.⁴ The groundwater at issue here is even further removed from these cases in that it is trapped within Mississippi in a deep confined sandstone formation under natural conditions.

The Tennessee Parties’ efforts to apply the logic of *Kansas v. Colorado*, 206 U.S. 46 (1907) to the present dispute simply ignore the logical progression of that decision. *Kansas* first presented the question of the

⁴ *Kansas v. Colorado*, 533 U.S. 1, 5 (2001) (pumping of groundwater hydrologically connected to, and reducing water apportioned in, the Arkansas River, which had been apportioned by Compact); *Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995) (allowing Nebraska to amend its pleading to include allegations that Wyoming was engaged in unlimited pumping of groundwater hydrologically connected to, and depleting previously apportioned water in, the North Platte River); *Texas v. New Mexico*, 462 U.S. 554, 556 (1983) (ruling on Special Master’s recommendations concerning technical aspects of Pecos River Compact enforcement and commenting on the impact of hydrologically connected groundwater on the previously apportioned river water); *Washington v. Oregon*, 297 U.S. 517 (1936) (affirming Special Master’s findings that groundwater pumping did not impair surface water rights in Walla Walla River being apportioned).

Court's authority to resolve a conflict between two states over the water in a river which naturally ran between and among several states, but was not navigable. The United States argued that state water law was subordinate to federal common law, giving a superior right to the national government over the whole Arkansas River system flowing through the states. *Id.* at 89-93. The Court rejected this argument concluding "[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) (citations omitted).

As the downstream state fearing dispossession of the water, Kansas also argued that federal common law controlled the river, asserting that "Congress had expressly imposed the common law on all this territory prior to its formation into States." *Id.* at 95. The Court also rejected this argument stating: "But when the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other States . . ." *Id.* (citations omitted). The Court expressly recognized that each state possesses the right to determine its own law and policy controlling all water residing within its borders, and that "[n]either State can legislate for or impose its own policy upon the other." *Id.* To solve the obvious dilemma resulting from a river flowing through multiple states—each possessing complete sovereignty over the water while in its territory—the Court applied the cardinal rule of equality of right among the states

to authorize the equitable apportionment of the *naturally* shared water. *Id.* at 97.⁵

Mississippi's case challenges the utilization of one of the largest commercial groundwater pumping operations in the world to intentionally impose Tennessee's groundwater policy on Mississippi in violation of Mississippi's retained sovereignty expressly affirmed in *Kansas v. Colorado* and subsequent decisions of the Court. In response the Tennessee Parties argue that Mississippi possesses no protected interest in its intrastate groundwater, and cannot recover for its taking in violation of Mississippi sovereignty; and, that the physical location of MLGW's approximately 170 commercial water wells within Tennessee defeats Mississippi's argument of a violation of its sovereignty. Neither argument supports denial of Mississippi's Motion.

⁵ Tennessee argues that acquisition by pumping is the equivalent of the agency of natural laws referred to by the Court at this point in the decision; however, the Court's citation to *Missouri v. Illinois*, 180 U.S. 208 (1901) as the source of this statement demonstrates the fallacy of this contention. In *Missouri* the Court allowed Missouri to seek an injunction against Illinois to enjoin the construction and use of an artificial channel for the delivery of sewage into the harbor of Chicago, which subsequently "by the agency of natural laws" flowed into the Illinois River, poisoning the water supply of Illinois citizens. The flow of the river was the agency of natural laws.

B. Mississippi Has a Protectable Interest in Its Intrastate Groundwater, and the Court's Precedent Authorizes All Relief Requested by Mississippi

In the absence of Congressional action, or 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). While the Court found the state's claim to ownership of minnows to be "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource" in *Hughes v. Oklahoma*, 441 U.S. 322, 334 (1979), it has subsequently recognized water as a state's most important natural resource because it is vital to life. *Sporhase v. Nebraska*, 458 U.S. 941, 952 (1982). Accordingly, in *Sporhase* the Court acknowledged that the state's claim of a "greater ownership interest" in groundwater was not irrelevant to the Court's Commerce Clause inquiry, *id.*; nor was the state's "claim of public ownership" "without significance" in its analysis. *Id.* at 953. Considering these facts, and Congressional deference to state water laws, the Court upheld all Nebraska law except a reciprocity requirement for shipping water to another state. 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. v. Herrmann*, 133 S. Ct. 2120, 2132 (2013) (quoting *United States v. Alaska*, 621 U.S. 1, 34 (1997)). However characterized, the Court's decisions recognize Mississippi's sovereign interest in groundwater naturally residing within its

territory, and that a violation of this interest presents a serious Constitutional issue for resolution by the Court.

The Tennessee Parties also argue that the monetary damages and equitable relief sought by Mississippi against them are not available because the groundwater at issue has never been equitably apportioned between the states. (Memphis/MLGW Reply Br., at 19; Tenn. Reply Br., at 21). The cases cited do not support this contention. 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).

C. The Fact That the Commercial Wells Pumping Water Out of Mississippi are Physically Located in Tennessee is Irrelevant to Mississippi’s Claims for Violations of its Retained Sovereignty

In determining whether Tennessee is unconstitutionally imposing its groundwater policies on Mississippi, the test is not the location of the Tennessee Parties’ wells; rather, it is the effect of Tennessee’s policies outside Tennessee, and how Tennessee’s policies interact with Mississippi’s legitimate regulatory regimes. See *Healy v. Beer Institute*, 491 U.S. 324, 335-337 (1989). Both

Mississippi and Tennessee have enacted legislation and put into place regulatory regimes for the control and conservation of groundwater within their respective sovereign territories. The effect of the Tennessee Parties' development of their well fields and intentional pumping of groundwater out of Mississippi into Tennessee, without permission or compensation, is the nullification of Mississippi's territorial sovereignty over the groundwater taken. This is a serious and appropriate matter requiring the Court's resolution, and Mississippi's Motion should be granted.

II. THE LOWER COURT DECISIONS DID NOT AND CANNOT ESTABLISH EQUITABLE APPORTIONMENT AS MISSISSIPPI'S ONLY REMEDY

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 this Court's exclusive constitutional authority to determine matters between states to courts without jurisdiction.

In *Mississippi*, private plaintiffs, who were residents 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 held that portions of the disputed land were in Mississippi, but the Fifth Circuit rejected the district court's findings and rendered judgment in favor of Louisiana against Mississippi. *Id.* at 75. This Court granted certiorari, identifying the following question as central to the appeal: "Did the District Court properly assert jurisdiction over respondents' third-party complaint against petitioner State of Mississippi." *Id.* at 75. The Court answered "no," 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 relied on the "uncompromising" language of 28 U.S.C. § 1251(a), which vested original and "exclusive" jurisdiction over the controversy in this Court. *Id.* at 77-78.

In this case, 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. Those courts have jurisdiction and a duty to determine their own jurisdiction, *Okoro v. Bohman*, 164 F.3d 1059, 1063 (7th Cir. 1999), and determining whether Tennessee was a necessary and indispensable party was well within the prerogative of those courts; but their comments on the ultimate remedies which may or may not be available in this Court exceeded their jurisdiction and are a nullity.

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 was that Mississippi’s claims of groundwater ownership implicated Tennessee’s sovereign interests. Identifying the full range of claims Mississippi could assert against Tennessee was neither necessary nor essential to the lower courts’ decisions under Federal Rule of Civil Procedure 19; therefore, any statements the district court and court of appeals made concerning equitable apportionment have no preclusive effect, even under ordinary issue preclusion principles.

The Tennessee Parties suggest in their briefs that the Court’s previous denial of leave to Mississippi to file an original action which accompanied its petition for certiorari, or the Court’s denial of certiorari in the first action, bolsters their issue preclusion argument. Ironically, Mississippi made a similar argument in *Mississippi*, 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.

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. Denial of certiorari, while a decision on the merits, is a summary action which does not have the same authority as the Court's decisions rendered after plenary consideration. "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of a previous summary action." *Metromedia*, 453 U.S. at 499-500. The Court should grant Mississippi's Motion for Leave to file an original complaint, at the very least, to dispel this confusion and speak finally to whether Mississippi has asserted valid claims against Tennessee, Memphis, and MLGW.

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.

Mississippi has pleaded facts which support its position that the groundwater which has been and continues to be taken through forcible pumping is an intrastate natural resource over which Mississippi

retained exclusive authority under the United States Constitution absent action by Congress. No Congressional action has been taken, and the actions of the Tennessee Parties constitute a violation of Mississippi's retained sovereignty and wrongful taking of Mississippi's most valuable natural resource. This Court is the only forum in which Mississippi can obtain relief. Mississippi's Motion should be granted.

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