

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 E. Siler, Jr.

PRE-HEARING BRIEF OF STATE OF MISSISSIPPI

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I. INTRODUCTION

This dispute between states under the United States Constitution involves the nation’s most valuable natural resource in a setting not previously addressed by the Supreme Court: Defendants’ intentional large-scale commercial groundwater pumping of high-quality groundwater out of natural storage in the pore spaces of materials in the earth within Mississippi’s sovereign territory. Mississippi pursues this original action in its sovereign capacity, and as *parens patriae* to fulfill its duty to its citizens to regulate, protect, and preserve the development and use of this natural resource held in trust for the benefit of its citizens. No federal interest has been or can be asserted under the facts of this case, and Mississippi looks to the Court to enforce all appropriate remedies for this clear violation of its territorial sovereignty by its sister state.

This is not a case about interstate surface waters naturally traveling across multiple state borders on a path to the sea. It is a case about water naturally residing and stored in an essentially constant volume in the tiny pore spaces of the earth within Mississippi’s borders before and after Mississippi became a state—until Defendants constructed large commercial well fields intended to pump it out of Mississippi storage. The fact that this Mississippi groundwater “existed,” naturally “occurred,” and was stored at an essentially constant volume within the land making up the State of Mississippi and would have remained in Mississippi natural

groundwater storage but for Defendants' pumping, makes it "intrastate" by definition.

II. THE LIMITED ISSUE FOR THE HEARING

The issue presented for the January 2019 hearing is "[w]hether the water that is at issue in this case is interstate in nature."^{1 2} The Supreme Court's seminal case, *Kansas v. Colorado*, addressed two important issues. First, it affirmed the separate States' "full jurisdiction [and authority] over the lands within its borders, including the beds of streams *and other waters*." *Kansas v. Colorado*, 206 U.S. 46, 93-97 (1907) (emphasis added). Then, the Court addressed the specific problem of surface water flowing "under the agency of natural laws" in the Arkansas River, which was "a stream running through the territory which now composes Kansas and Colorado." 206 U.S. 46 at 97-98. Nothing in that case, or any subsequent Court decision has diminished individual State sovereign authority over water naturally residing only within its borders under the "agency of natural laws,"³ or purports to recognize any

¹ The Special Master stated the same question slightly differently in the Memorandum Decision (Dkt No. 55) at page 36: "[W]hether the Aquifer and the water constitutes an interstate resource."

² The phrase "interstate in nature" is sometimes used in cases decided under the interstate commerce clause and is best understood in terms of intrastate residence and interstate travel.

³ All of the Court's equitable apportionment cases begin by tracing the interstate path of the water. *E.g.*, *Kansas v. Colorado*, 206 U.S. 46, 50 (1907) (Arkansas River from Colorado through Kansas, Oklahoma, Indian Territory, Arkansas, and to the sea); *Wyoming v. Colorado*, 259 U.S. 419, 456 (1922) (Laramie River from Colorado through Wyoming to North Platte River); *New Jersey v. New York*, 283 U.S. 336 (1931) (Delaware River from

authority in the Court to authorize cross-border cross-border pumping of groundwater out of its natural storage in another state.⁴

III. SUMMARY OF FACTS

Unlike surface water, groundwater natural collection in useable quantities and movement beneath the earth's surface is infinitely more complex than it is for surface waters and the differences cannot be reasonably articulated in this brief, but the high-level explanation of some of the material facts should be helpful to the Court at this juncture in preparation for the hearing evaluation of the legal issues presented.

The groundwater at issue in this case is part of the soil and earth, and it came to be stored in the earth at an essentially constant volume under natural conditions within the land making up the sovereign state territory of Mississippi over thousands of years. The evidence presented at the hearing will explain the natural forces which created the Mississippi Embayment sometime between 299 and 199 million years

New York to Pennsylvania, New Jersey, and Atlantic Ocean); *Nebraska v. Wyoming*, 325 U.S. 589, 592 (1945) (North Platte River from Colorado through Wyoming, Nebraska, and into Missouri River near Iowa); *Colorado v. New Mexico*, 459 U.S. 176, 178 (1982) (Vermejo River from Colorado into New Mexico and the Canadian River); *Idaho v. Oregon*, 462 U.S. 1017 (1983) (tracing path of anadromous fish from Pacific Ocean up Columbia-Snake River through Wyoming, Idaho, Washington, Oregon, British Columbia); *South Carolina v. North Carolina*, 558 U.S. 256 (2010) (Catawba River flowing from North Carolina into South Carolina).

⁴ A few cases in which river water has been allocated between States involve questions of whether pumping from shallow aquifers in one State has denied the allocated river water to another, but these cases do not address groundwater independently, or water in a deep confined aquifer system like the one in the present dispute.

ago, and how this geological structure, a large trough running north to south with its axis near the location of the current Mississippi River, was ultimately filled with a “complex sedimentary assemblage” throughout the approximately 100,000 square miles in which the embayment is found. Cushing, Boswell, and Hosman, *General Geology of the Mississippi Embayment*, USGS Professional Paper 448-B (1964), (“*Cushing General Geology*”) at B1, B21-23.

Generally, the Mississippi Embayment inclines beginning at a point near southeast Missouri and continues south to the Gulf of Mexico. The sedimentary geological materials deposited in this geological structure over the millions of years since its formation outcrop or subcrop near the east and west edges of the embayment. These outcrop or subcrop areas naturally supply the surface water that gradually descends through the pore spaces of the earth materials to significant depths under the Mississippi River. Over millions of years, large volumes of high-quality groundwater filtered through the earth and were stored under pressure in the confined sedimentary formations. Some of this water can be produced for human use. This case involves the natural collection, storage, and movement of groundwater in the complex geological formations found in Mississippi within the Claiborne Group of formations.

The Claiborne Group is one geologically distinct group of formations within the Mississippi Embayment. It is divided into three subgroups, the Lower, Middle,

and Upper Claiborne. In Mississippi the Middle Claiborne contains multiple separate geological formations. The top formation in the Middle Claiborne in Mississippi is a distinct geological formation named the Sparta Sand, which is found in most of Mississippi and it is naturally supplied with water from its outcrop to the east. It is one of the most important sources of groundwater for the citizens of Mississippi in locations where it is found to be capable of producing sufficient quantities of useable water. It is the uppermost confined aquifer formation in the Claiborne Group in Mississippi, and it effectively disappears as a separate geological formation when its lower confining clay layer goes through a series of facies changes near the Mississippi/Tennessee border. The Sparta Sand in Mississippi correlates with the top layer of the Memphis Sand in Tennessee, which also appears to be present a short distance south of the border. Groundwater naturally stored in the confined aquifer system within Mississippi originated from the outcrop area in Mississippi.

The Memphis Sand in the Claiborne Group is a much thicker formation than the Sparta Sand that appears to occupy the entire thickness of the Middle Claiborne component of the Claiborne Group in all of west Tennessee and parts of Missouri and northeastern Arkansas. Locally in Tennessee it has historically been referred to as the “500-foot” sand. In 1965 the Memphis Sand in western Tennessee was described as follows:

The “500-foot” sand is present over 7,200 square miles in western Tennessee and averages about 450 feet in thickness. The volume of this

aquifer is about 600 cubic miles. If the average porosity is 25% of its volume, the “500-foot” sand contains 150 cubic miles, or 170 trillion gallons, of water in storage.

Moore, *Geology and Hydrology of the Claiborne Group in Western Tennessee*, USGS Water-Supply Paper 1809-F (1965) at F17. This confined aquifer in western Tennessee exists along the entire west Tennessee border and is naturally supplied by the large outcrop area to the east in Tennessee. *Id.* at F9.

Because all groundwater seeps through and into the pore spaces of the earth and can only be produced for use where it has fully saturated those pore spaces, it is the subject of a multidisciplinary scientific specialty called groundwater hydrogeology or groundwater hydrology covering both geology and hydrology. The United States Geological Survey (USGS) employs such experts for the study of the natural availability and use of groundwater and publishes papers with their findings. Pumping by Defendants in Shelby County in extreme southwest Tennessee has been a local area of study by the USGS and other groups since the 1920s.

Testimony and documentary evidence at the hearing, including USGS reports, will show that in the early 1960s MLGW was planning to expand its groundwater pumping from the Memphis Sand by constructing new well fields, and the USGS conducted several groundwater resource investigations in cooperation with Defendants. As a result of these investigations Defendants knew, no later than 1965, that the existing pumping in southwest Tennessee was creating an expanding cone

of depression that was crossing the border into Mississippi and withdrawing groundwater out of Mississippi's natural groundwater storage.

Instead of taking actions to mitigate Tennessee pumping of groundwater out of Mississippi's natural groundwater storage, Defendants chose to intentionally increase groundwater pumping from Mississippi. To this end, MLGW proceeded to build three new Well Fields (Lichterman, Davis, Palmer) a few miles from the Mississippi border knowing the new Well Fields would be pumping naturally occurring groundwater out of Mississippi groundwater storage, with the attendant negative consequences for Mississippi and its citizens in the area. The cone of depression created by the MLGW pumping now covers most of DeSoto County, Mississippi.

Defendants' argument that their withdrawal of groundwater out of Mississippi storage by pumping is unavoidable is not scientifically supportable. The same amount of groundwater, or water from other available sources in Tennessee has always been available within Tennessee's borders for the use of its citizens without taking any of the groundwater at issue out of Mississippi; and the Special Master should recommend imposition of all available remedies against Defendants for committing the equivalent of an act of war against Mississippi and its citizens.⁵

⁵ Mississippi also incorporates by reference the "Summary of Material Facts" previously submitted in Section I(C) of *Plaintiff's Response to Defendants' Motion for Summary*

IV. ARGUMENT

Defendants' position can be condensed to the assertion that Tennessee and its citizens are free to intentionally locate large-scale commercial groundwater pumping fields close to Mississippi and pump as much groundwater out of the natural groundwater storage of that state because they can. Defendants' arguments attempting to conflate the common presence of underlying earth with all the groundwater naturally stored anywhere in a multistate area; and asserting that the mere existence of groundwater pumping in one state unavoidably appropriates a neighboring states' natural groundwater storage are diversions that attempt to confuse the issues. The issue presented is a conflict between two states over the violation of Mississippi's territorial sovereignty under the United States Constitution by intentional actions taken by Defendants in violation of that sovereignty.

To be clear, Mississippi's complaint is not that Defendants are taking too much of Mississippi's natural groundwater storage. It is that they are intentionally pumping that groundwater out of its natural storage within Mississippi sovereign territory. The groundwater science as applied and used by the USGS shows that Defendants' intentional taking of Mississippi groundwater was neither necessary nor unavoidable, and Defendants' intentional actions constitute a clear invasion of

Judgment (Dkt. 71, pp. 5-10). For brevity, those facts are incorporated for reference but not wholly repeated here.

Mississippi's sovereign territory that would constitute an act of war between nations. *See* The Federalist No. 6 (Alexander Hamilton) (Discussing wars between nations founded upon commercial motives).

The hollowness of Defendants' arguments to the contrary will become apparent upon development of the geological and hydrogeological facts during the hearing addressing the groundwater science applicable to the specific groundwater systems at issue. In summary, the location and amount of groundwater removed from natural groundwater storage by pumping is limited by the size of the cone of depression created by the wellfield location, well spacing, volume and length of pumping, and the specific local geology of the groundwater formation being pumped. All of this said, even MLGW cannot pump any volume of local natural groundwater storage out of the entire Mississippi Embayment, the entire area covered by the Middle Claiborne aquifer system, or even the entire disposition of the Memphis Sand in Tennessee, Missouri, and Arkansas.

Accordingly, this case only involves the taking of naturally stored groundwater and other impacts on the groundwater system in northwest Mississippi by the well documented massive commercial pumping in the Memphis Tennessee area. For the same reasons, the existence of hydrological connections which make Defendants' pumping of naturally occurring groundwater out of Mississippi possible have nothing to do with the classification of the Mississippi groundwater as an

interstate or intrastate natural resource. Aside from the fact that Defendants are arguing that their groundwater pumping actually makes Mississippi's groundwater an interstate resource, they have constructed all of these arguments by completely ignoring the time that the Mississippi groundwater naturally resides in storage within the Mississippi confined groundwater system absent pumping. The answer is thousands of years.

A. The Question Posed for the Hearing Must Be Decided As a Question of Sovereign Rights Between Coequal Sovereigns Under the United States Constitution.

The fact that Defendants have been pumping groundwater naturally stored within Mississippi's sovereign territory is not an issue. The critically important question is whether Defendants have any right to take it under the United States Constitution as applied in the equitable apportionment cases. The answer is no.

While this is a dispute between States Under the United States Constitutional authority of the Court like *Kansas v. Colorado*, 206 U.S. 46 (1907) and other equitable apportionment cases involving water, the respective state's rights do not arise in federal common law of equity, but they arise directly under the Constitution and the 10th Amendment. The Court has long held that each state holds all sovereign authority of a nation within their respective boundaries, save the portion of that sovereignty they granted to the federal government. As succinctly stated in *Rhode Island v. Massachusetts*, 37 U.S. 657, 719 (1838), in this context the states are

foreign to each other for all but federal purposes. Accordingly, this is a dispute between coequal sovereigns on a matter outside the realm of the federal government to be decided under the Constitution absent the type of Constitutional conundrum faced in *Kansas v. Colorado*. U.S. Const. amend. X; *PPL Montana, LLC v. Montana*, 565 U.S. 574, 590-91, 132 S.Ct. 1215, 182 L.Ed.2d 77, (2012); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977); *Pollard v. Hagan*, 44 U.S. 212 (1845); *Martin v. Lessee of Waddell*, 16 Pet. 367, 410, 413, 10 L.Ed. 997 (1842). No such conundrum is present in this case.

B. Mississippi's Sovereign Rights and Authority Arise From The Core Territorial Sovereignty Retained Under the Federal System Established Under the Constitution.

State territorial sovereignty at the foundation of the federal system in the United States. As the Court explained in *Rhode Island v. Massachusetts* as between two states neither state has any right beyond its territorial boundary, which represents the true line of right and power between them. *Rhode Island v. Massachusetts*, 37 U.S. 657, 733, 735 (1838). This core attribute of retained State sovereignty in our federal system was not only affirmed in *Kansas v. Colorado*, 206 U.S. 46 (1907), gave rise to the specific problem created by an interstate river relied upon by all of the citizens in a large geographic territory that was cut up into territorially sovereign states with absolute authority over local control of

groundwater residing, even temporarily within its borders. As the Court stated, no “State can legislate for *or impose its own policy* upon another.” *Id.* at 95.

This attribute of retained state sovereignty has not changed with regard to surface water, and certainly not with regard to groundwater. In *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 133 S.Ct. 2120, 186 L.Ed.2d 153 (2013) the Court rejected the argument that Texas could reach into Oklahoma to access surface water being held under an interstate compact that gave Texas equal rights to the surface water of the Red River impounded in Oklahoma, in subject to a 25% cap. *Id.* at 627. While the compact clearly granted Texas an ownership interest in this body of water being held in Oklahoma, it was silent regarding any right to force Oklahoma to release the water under Oklahoma state law, which prohibited its release. In rejecting Texas’ argument that it could force the release of this surface water, the Court affirmed Oklahoma’s territorial sovereignty in a way directly applicable to this case:

The background notion that a State does not easily cede its sovereignty has informed our interpretation of interstate compacts. We have long understood that as sovereign entities in our federal system, the States possess an “absolute right to all their navigable waters and the soils under them for their own common use.” *Martin v. Lessee of Waddell*, 16 Pet. 367, 410, 10 L.Ed. 997 (1842). Drawing on this principle, we have held that ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water, “is an essential attribute of sovereignty,” *United States v. Alaska*, 521 U.S. 1, 5, 117 S.Ct. 1888, 138 L.Ed.2d 231 (1997). Consequently, “[a] court deciding a question of title to [a] bed of navigable water [within a State’s boundaries] must ... begin with a strong presumption’ against

defeat of a State's title." *Id.*, at 34, 117 S.Ct. 1888 (quoting *Montana v. United States*, 450 U.S. 544, 552, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)). See also *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195, 107 S.Ct. 2318, 96 L.Ed.2d 162 (1987).

Id. at 663-662. Unlike the State of Texas in *Tarrant*, the State of Tennessee has absolutely no claim of right in law or equity to groundwater while it is residing in natural groundwater storage within the territorial boundaries of Mississippi, which in the absence of massive heavy pumping in Tennessee near Mississippi's border would remain in Mississippi groundwater storage at an essentially constant volume.

C. Supreme Court Decisions Provide No Support For Equitable Apportionment of Groundwater Between States.

1. The Equitable Apportionment Cases Are Easily Distinguishable.

Defendants' pumping is also easily distinguished from the surface water equitable apportionment river cases. Before addressing a remedy in *Kansas v. Colorado*, 206 U.S. 46 (1907) (equitable apportionment) the Court had to find an overriding equitable interest in the competing states, because within their borders "each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters." *Id.* at 93. This equitable interest was found in the conditions pre-existing the creation of the two states: "Before either Kansas or Colorado was settled the Arkansas River was a stream running through the territory which composes these two States." This fact along with the scarcity of any water in

the two states at the time was the basis for that equitable interest supporting the equitable remedy. *See Id.* at 98-99. Under the Constitution the groundwater that has been and continues to be taken by Defendants out of Mississippi groundwater storage is intrastate because the groundwater was located in Mississippi at the time of its taking.

2. **History and Mississippi and Tennessee Laws Support State Groundwater Sovereignty.**

State authority to regulate, protect, preserve, and control the water residing within its territorial borders has been recognized since the founding of the union and long standing Constitutional precedent is not lightly disregarded. Exercising this authority, Mississippi law declares that all water including groundwater within Mississippi is “among the basic resources of this state [and belongs] to the people of this state,” and further that “the control and development and use of [this] 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.” *See* Miss. Code Ann. § 51-3-1 (2003).⁶ Pursuant to this law, Mississippi has promulgated statutes and regulations controlling groundwater withdrawal and use in Mississippi. *See, e.g.*, Miss. Code

⁶ Tennessee has similarly declared, as a sovereign state, “[t]hat the waters of the state are the property of the state and are held in public trust for the benefit of its citizens.” Tenn. Code Ann. § 68-221-702 (2013).

Ann. § 51-3-5 (stating that “[n]o person who is not specifically exempted by this chapter shall use water without having first obtained a permit as provided herein”). Mississippi will offer evidence that it has actively policed and enforced these statutes and regulations.

D. Some Practical Considerations.

Beyond these foundational issues, practical considerations demonstrate that equitable apportionment simply has no place in interstate groundwater disputes, and the sovereign authority of states within their borders continues to provide the best mechanism for the preservation and protection of this country’s natural groundwater resources. The evidence at the hearing will show that because of the complexity of naturally created groundwater systems, the nature and extent to which groundwater is sustainably produced to assure the continued viability of these critical natural resources is an inherently local undertaking best handled by the individual states.

In addition, the alternative a finding that this or any of the United States groundwater constitutes an interstate resource simply because it can be pumped across state lines only puts the valuable resource at risk of damage or loss. Equitable apportionment cases are long, expensive, and so fraught with risk that the Supreme Court has stated that they provide an incentive for interstate compacts. But interstate compacts carry risks of their own as demonstrated by the reported cases on compact disputes. Declaring groundwater within a state a shared interstate resource free for

the taking by cross-border pumping absent an original action seeking equitable apportionment as Defendants content portends the worst of outcomes. Why should the state preserving its on groundwater while pumping its needs from its neighboring state ever stop. The economic analysis to continue until that state is forced to stop by court action may determine the outcome, or the neighboring states may just commence what the Court has sanctioned as a water war, both pumping away from the common border, or pumping and selling the groundwater until it is gone and the aquifer system is forever damaged.

CONCLUSION

For the reasons discussed herein as more fully developed during the hearing, the Special Master should find the water at issue in this case is “intrastate” in nature and, therefore, recommend to the Supreme Court a finding that Defendants violated the State of Mississippi’s territorial sovereignty and that Mississippi is entitled to such relief as the Court may grant in further proceedings.

Dated: December 20, 2018.

Respectfully submitted,

THE STATE OF MISSISSIPPI

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CERTIFICATE OF SERVICE

Pursuant to Paragraph 3 of the Special Master's Case Management Plan (Dkt. No. 57), I hereby certify that all parties on the Special Master's approved service list (Dkt. No. 26) have been served by electronic mail, this the 20th day of December, 2018.

/s/ C. Michael Ellingburg
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