

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.

DEFENDANTS' PROPOSED CONCLUSIONS OF LAW

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I. Burden And Quantum Of Proof

1. As Plaintiff, Mississippi bears the burden to prove its right to recover the relief it is seeking. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005).
2. A State requesting that the Supreme Court intervene to “control the conduct” of another State must establish an invasion of rights “by clear and convincing evidence.” *E.g., New York v. New Jersey*, 256 U.S. 296, 309 (1921); *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1027 (1983); *Florida v. Georgia*, 138 S. Ct. 2502, 2514 (2018).
3. Under any standard, the evidence shows that Mississippi’s claims concern an interstate water resource and that dismissal is therefore appropriate.

II. Equitable Apportionment Is The Exclusive Remedy For Interstate Water Resources, Including Groundwater Resources

A. Equitable Apportionment Applies To Interstate Groundwater

4. Groundwater pumping from an interstate aquifer is like pumping from an interstate surface water resource: “both could have an effect on water in another state through the operation of natural laws.” 2016 Op. 20.
5. The doctrine of equitable apportionment governs disputes between States over their respective rights to use an interstate groundwater resource, just as it governs such disputes over interstate surface waters. *See* 2016 Op. 20.

6. The Supreme Court has applied the equitable-apportionment doctrine broadly to all interstate “disputes over the allocation of water.” *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 619 (2013). The doctrine applies “whenever . . . the action of one state reaches, through the agency of natural laws, into the territory of another state.” *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907).
7. The Supreme Court has applied the equitable-apportionment doctrine to an array of interstate water resources, including rivers, *see Nebraska v. Wyoming*, 325 U.S. 589, 617-19 (1945); groundwater tributaries, *see Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995); groundwater hydrologically connected to interstate surface water, *see Washington v. Oregon*, 297 U.S. 517, 524-25 (1936); *Texas v. New Mexico*, 462 U.S. 554, 556-58 & n.2 (1983); and migratory fish, *see Idaho ex rel. Evans*, 462 U.S. at 1024-25.
8. As applied to interstate groundwater resources and interstate surface water resources, equitable apportionment promotes the principle that “a State may not preserve solely for its own inhabitants natural resources located within its borders.” *Idaho ex rel. Evans*, 462 U.S. at 1025.
9. The hallmark of the equitable-apportionment doctrine is “flexibility”: that doctrine supplies a framework under which the Court “weigh[s] the harms and benefits to competing states” and tailors a remedy in light of *both* the

“benefits” and the possible “harms” of a proposed use of an interstate resource. *Colorado v. New Mexico*, 459 U.S. 176, 186-88 (1982).

10. Strict adherence to a rigid “rule” of allocation – such as Mississippi’s proposed legal theories based solely on state borders – would hamper the Supreme Court’s ability to deliver “just and equitable” results in interstate water cases, *Nebraska v. Wyoming*, 325 U.S. at 618, and directly conflict with the Court’s equitable-apportionment decisions holding that the origin of the interstate resource at issue is “essentially irrelevant to the adjudication of the[] sovereigns’ competing claims,” *Colorado v. New Mexico*, 467 U.S. 310, 323 (1984).

B. Sovereign Ownership Does Not Apply

11. Mississippi has no viable claim against another State for the alleged wrongful taking of water from an interstate resource that has not been apportioned by either an equitable-apportionment action in the Supreme Court or an interstate compact. *See* 2016 Op. 19 (citing *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015)).

Equal footing

12. The equal-footing doctrine does not support Mississippi’s claims because it merely gives Mississippi sovereign rights equal to the rights of all other States. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1871 (2016).

This doctrine does not confer upon Mississippi a sovereign right to a portion of unapportioned interstate water resources. *See* 2016 Op. 21-22 (citing *Kansas v. Colorado*, 206 U.S. at 93; *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726, 733-34 (1838); and *United States v. Louisiana*, 363 U.S. 1, 5 (1960)).

13. Mississippi does not have the right to prevent another State from using an interstate water resource within that State's own territorial boundaries, even if the other State's use affects a part of that resource within Mississippi. *See* 2016 Op. 22-23; *Tarrant Reg'l Water Dist.*, 569 U.S. at 631-32.
14. A rule enabling Mississippi to prevent Tennessee (or any other State) from pumping groundwater within Tennessee's own territorial boundaries because the actions within Tennessee affect groundwater within Mississippi would impinge on the sovereign right of Tennessee (or any other State) to control the use of interstate natural resources within its own borders. *See Tarrant Reg'l Water Dist.*, 569 U.S. at 631-33. "Neither State can . . . impose its own policy upon the other," and equitable apportionment is therefore the only available remedy. *Kansas v. Colorado*, 206 U.S. at 95.

15. Defendants have not violated any of Mississippi's sovereign rights. *See* 2016 Op. 20-24.
16. Accepting Mississippi's "equal footing" claim in the context of this dispute over an interstate water resource would undermine the Supreme Court's equitable-apportionment jurisprudence. *See* 2016 Op. 23-24 (citing *Colorado v. New Mexico*, 467 U.S. at 323).

Public trust

17. The public-trust doctrine defines the rights and obligations of a State only vis-à-vis its own citizens with respect to intrastate water and submerged lands. *See Cinque Bambini P'ship v. State*, 491 So. 2d 508, 516-17 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). The public-trust doctrine does not grant Mississippi rights to a portion of an unapportioned interstate water resource, such as the Aquifer, as against other States. *See Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625, 630 (5th Cir. 2009), *cert. denied*, 559 U.S. 904 (2010).
18. The public-trust doctrine is inapplicable to disputes between States over the use of interstate water resources, because such disputes necessarily implicate the co-equal rights of neighboring States and, therefore, are resolved only by interstate compact or equitable apportionment. *See Kansas v. Colorado*, 206 U.S. at 97-98.

Proprietary ownership

19. States do not have sovereign ownership over natural resources within their borders, including groundwater. *See Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 950-52 (1982).
20. A State's claim to "own" a natural resource is a legal fiction expressive of a State's right to preserve and regulate the use of natural resources within its borders. *See Toomer v. Witsell*, 334 U.S. 385, 402 (1948); *Sporhase*, 458 U.S. at 951.

C. Tort Claims Do Not Apply

21. The federal common-law doctrine of equitable apportionment preempts Mississippi's state-law claims for trespass, conversion, restitution, and unjust enrichment. *See Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003).
22. "Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate [resource]." *Colorado v. New Mexico*, 459 U.S. at 183. Accordingly, for such disputes, the doctrine of equitable apportionment displaces all other theories of recovery asserted under federal common law. *See Virginia v. Maryland*, 540 U.S. at 74 n.9.
23. Mississippi statutory law supports the view that Mississippi's state-law claims do not apply to the taking of water from an interstate aquifer.

Mississippi’s statutory water-regulation regime expressly contemplates Mississippi negotiating and entering into interstate compacts with other States to determine Mississippi’s “share of ground water” in an aquifer within Mississippi “where a portion of those waters are contained within the territorial limits of a neighboring state.” Miss. Code Ann. § 51-3-41.

24. Because a State does not have an enforceable property right against another State to an unapportioned interstate water resource, *see Kansas v. Nebraska*, 135 S. Ct. at 1052, it cannot bring a federal common-law or state-law tort claim for the taking of water from that resource by another State within that State’s own borders. Mississippi’s tort claims therefore fail on the merits.

III. The Middle Claiborne Aquifer Is An Interstate Water Resource, Mississippi Has Disclaimed Its Sole Remedy, And, Therefore, Dismissal Of Mississippi’s Complaint Is Required

A. The Aquifer Is An Interstate Resource For Multiple Independent Reasons

Nature of determination

25. Whether an aquifer is interstate is a mixed question of fact and law. Whether an aquifer is geographically and hydrologically interstate is a question of fact. Whether an aquifer is interstate such that equitable apportionment is the only available judicial remedy is a question of law.

Geographic extent

26. The Middle Claiborne Aquifer (or “Aquifer”), the single aquifer at issue in this case, is interstate because it is a continuous hydrogeological unit that underlies Mississippi, Tennessee, and six other States.
27. The geographic extent of a water resource, as recognized by a consensus of scientists and experts, is relevant to determining whether it is an interstate resource. *See Kansas v. Colorado*, 206 U.S. at 115.

Cross-border effects

28. The Middle Claiborne Aquifer is interstate because the effects of pumping from the Aquifer cross state borders, including the Mississippi-Tennessee border. *See* 2018 Op. 14, 17-18; *see also Kansas v. Colorado*, 206 U.S. at 97-98.
29. Mississippi’s claims in this case require and assume that groundwater pumping from the Aquifer within the borders of Tennessee has affected the groundwater in the same Aquifer beneath Mississippi. *See* 2018 Op. 14 (citing Compl. ¶¶ 14, 16-17, 19, 22-24).
30. A cone of depression caused by pumping in one State that crosses over a border into another State is an example of an “‘action of one State reach[ing] through the agency of natural laws into the territory of another

State.’” *Idaho ex rel. Evans*, 462 U.S. at 1024 & n.8 (quoting *Kansas v. Colorado*, 206 U.S. at 97-98).

Natural flow

31. The natural (i.e., before the influence of pumping) flow of groundwater within the Middle Claiborne Aquifer across state borders, including from Mississippi into Tennessee, confirms the interstate nature of the Aquifer.
32. The existence of natural cross-border groundwater flow is not *necessary* to make an aquifer interstate. An aquifer is interstate if it extends beneath two or more States such that withdrawing groundwater from the aquifer entirely within the borders of one State can affect the groundwater in the aquifer in another State. *Cf. Kansas v. Colorado*, 206 U.S. at 97-98.
33. The fact that groundwater naturally flowed across multiple state borders within the Middle Claiborne Aquifer confirms both that the Aquifer extends across multiple States and that there can be interstate effects from one State’s use of the resource.

Hydrological connections

34. The connections between the Middle Claiborne Aquifer and interstate surface waters further demonstrate that it is an interstate water resource. *See Texas v. New Mexico*, 462 U.S. at 556-58 & n.2; *Washington v. Oregon*, 297 U.S. at 523-26.

B. Mississippi's Claims Fail Because Mississippi Has Expressly Disclaimed Its Only Judicial Remedy, Equitable Apportionment

35. A State has no legal right to any portion of an interstate water resource unless it has entered into an interstate compact or obtained an equitable apportionment from the Supreme Court. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-05 (1938).
36. Because the Aquifer is an interstate resource, Mississippi has no legal right against another State to a given portion of the water in the Aquifer without an interstate compact or an equitable apportionment. *See Kansas v. Nebraska*, 135 S. Ct. at 1052.
37. Mississippi has expressly disclaimed any request for the Supreme Court to equitably apportion the Aquifer. *See* Compl. ¶ 38 (“This case does not fall within the Court’s equitable apportionment jurisprudence.”).
38. There is no interstate compact between Mississippi and Tennessee, or any other States, apportioning the Middle Claiborne Aquifer.
39. The Middle Claiborne Aquifer is an interstate water resource. Equitable apportionment is the exclusive judicial remedy that governs disputes between States over rights to use interstate aquifers. Mississippi has expressly disclaimed relief under equitable apportionment. Accordingly, Mississippi’s Complaint fails to state a viable claim for relief and should be dismissed with prejudice.

IV. Mississippi's Arguments That The Aquifer Is Intrastate Fail

A. Issue Preclusion*

40. Issue preclusion “foreclos[es] successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.” *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001).
41. Issue-preclusion principles bar Mississippi from re-litigating the question whether the Aquifer is an interstate water resource subject exclusively to equitable apportionment.
42. The interstate character of the Aquifer was a litigated issue in the *Hood* proceedings. The district court held and the Fifth Circuit affirmed that the Aquifer is an interstate resource and that equitable apportionment or an interstate compact are Mississippi's only avenues for relief. *See Hood ex rel. Mississippi v. City of Memphis*, 533 F. Supp. 2d 646 (N.D. Miss. 2008), *aff'd*, 570 F.3d 625 (5th Cir. 2009), *cert. denied*, 559 U.S. 904 (2010). The courts' holding that the Aquifer is an interstate resource was necessary to the dismissal of Mississippi's complaint because Tennessee

* Although Defendants recognize that the Special Master disagreed with the argument that issue preclusion prevents Mississippi from re-litigating whether the Aquifer is an interstate resource, Defendants respectfully raise the point here again to preserve it for further review.

was an indispensable party to any equitable-apportionment action, which fell within the exclusive and original jurisdiction of the Supreme Court.

43. Mississippi was a party to the *Hood* decisions and had a full and fair opportunity to litigate the issues.

44. Mississippi is bound by the *Hood* decisions, which preclude it from asserting that the Aquifer is not interstate.

45. Issue preclusion applies in original actions in the Supreme Court. Mississippi is barred from asserting that the Aquifer is not interstate by the *Hood* decisions, even though the merits of an equitable apportionment is within the exclusive jurisdiction of the Supreme Court. *See Arizona v. California*, 530 U.S. 392, 413-18 (2000); *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985).

B. Mississippi's Factual Arguments That The Aquifer Is Not Interstate Fail

46. Mississippi's evidence that the groundwater in the Aquifer flows at a slow velocity, and that much of it will remain beneath Mississippi for thousands of years, is irrelevant to whether the Aquifer is interstate.

47. No Supreme Court case supports Mississippi's position that one State can sue another over a *portion* of an interstate water resource. *See* 2016 Op. 31-32 (citing *Kansas v. Colorado*, 206 U.S. at 115).

48. Mississippi's contention that the Aquifer should be considered two separate intrastate resources is analogous to the argument raised and rejected in *Kansas v. Colorado* that the Arkansas River was actually two rivers because it "periodically ran dry between two points in different States." 2016 Op. 31 (citing *Kansas v. Colorado*, 206 U.S. at 115).

49. Whether a natural resource is interstate must be decided based on the entirety of the resource and not merely a portion of the resource. *See Kansas v. Colorado*, 206 U.S. at 115; *Hinderlider*, 304 U.S. at 102.

50. Mississippi's contention that the portion of the interstate Aquifer beneath Mississippi is an intrastate resource is tantamount to a unilateral apportionment. Only the Supreme Court has jurisdiction to equitably apportion an interstate water resource. The Aquifer at issue here has not been apportioned by the Supreme Court or by interstate compact.

V. Mississippi's Evidence That Was Outside The Scope Of The Limited Issue At The Evidentiary Hearing Or Was Not Disclosed During Discovery Should Be Stricken

51. The Special Master ordered a hearing on the limited question whether this case involves an interstate resource. 2016 Op. 36.

52. There is no Supreme Court precedent that supports Mississippi's contention that groundwater management practices, pumping volumes,

volumes allegedly diverted, or velocity of water flow are relevant to determining whether a water resource is interstate.

53. Mississippi's evidence concerning MLGW's groundwater management practices, volumes of water pumped from the Aquifer, volumes allegedly diverted, and velocity is irrelevant to the interstate character of the Aquifer at issue and prejudicial to Defendants, which limited their discovery to the scope of the issue identified by the Special Master. *See* Fed. R. Evid. 402, 403.
54. The irrelevant evidence – including evidence concerning Memphis's and MLGW's groundwater management practices, pumping volumes, volumes allegedly diverted, and velocity – should be stricken from the record. *See* Fed. R. Evid. 402, 403.
55. A number of the opinions Dr. Spruill offered at the hearing were not disclosed during discovery. *See, e.g.*, Tr. 192:8-24. They should be stricken from the record for this independent reason. *See* Case Management Plan ¶ 4(b) (Dkt. No. 57); Fed. R. Civ. P. 26, 37.
56. Even if considered, the evidence and testimony Defendants seek to exclude do not change the conclusions set out herein, namely, that the Aquifer is an interstate resource, that equitable apportionment is Mississippi's sole recourse, and that, because Mississippi has disclaimed

relief under equitable apportionment, its Complaint should be dismissed with prejudice.

Respectfully submitted,

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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 19th day of September 2019.

/s/ David C. Frederick

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