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IN THE
Supreme Court of the United States

STATE OF MISSISSIPPI,
Plaintiff,
v.

CITY OF MEMPHIS, TENNESSEE,
MEMPHIS LIGHT, GAS & WATER DIVISION,
AND STATE OF TENNESSEE,
Defendants.

On Motion for Leave To File Complaint

**BRIEF OF DEFENDANT STATE OF TENNESSEE
IN OPPOSITION TO STATE OF MISSISSIPPI'S
MOTION FOR LEAVE TO FILE
BILL OF COMPLAINT IN ORIGINAL ACTION**

DAVID C. FREDERICK
DEREK T. HO
MARC A. WALLENSTEIN
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

*Special Counsel to the
State of Tennessee*

ROBERT E. COOPER, JR.
Attorney General
MICHAEL E. MOORE
Solicitor General
BARRY TURNER
Deputy Attorney General
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-3491

*Counsel for the
State of Tennessee*

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QUESTION PRESENTED

Whether Mississippi should be granted leave to file its bill of complaint given that (1) Mississippi's claim for damages against the City of Memphis and its utility division, Memphis Light, Gas & Water, for wrongful conversion of groundwater supposedly owned by Mississippi is facially defective because Mississippi's and Tennessee's respective rights to use of the Memphis Sand aquifer have never been determined by equitable apportionment or interstate compact; and (2) Mississippi cannot state a claim for equitable apportionment against Tennessee because it has disclaimed any allegation—and, in all events, has no factual basis to allege—that it has suffered any injury to its use of the aquifer.

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INTRODUCTION

Mississippi's proposed bill of complaint ("Compl.") alleges that the City of Memphis's and Memphis Light, Gas & Water's ("MLGW") extraction of groundwater from the Memphis Sand aquifer, a large interstate water source flowing beneath multiple states, including Mississippi and Tennessee, has caused groundwater to flow from Mississippi into Tennessee. Mississippi claims that this alleged diversion of groundwater constitutes wrongful conversion of water owned by Mississippi, and it seeks more than \$1 billion in damages from Memphis and MLGW. In a single paragraph of its proposed complaint, Mississippi also requests, in the alternative, that the Court equitably apportion the aquifer between Mississippi and Tennessee, and award damages to Mississippi "for any past diversions and takings of ground water by Memphis and MLGW that are inconsistent with the Court's apportionment." Compl. ¶ 5(c)(iii).

Under 28 U.S.C. § 1251(a), this Court has "substantial discretion" to decline to exercise its original jurisdiction, *Texas v. New Mexico*, 462 U.S. 554, 570 (1983) (citing *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981)), and will do so "in any but the most serious of circumstances," *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995). "A state asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor." *Alabama v. Arizona*, 291 U.S. 286, 291-92 (1934). A complaint that fails to meet that basic standard lacks the requisite "seriousness and dignity" to warrant this Court's expenditure of its limited resources. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); see *id.* at

94 (this Court's equitable and prudential limitations on the exercise of its original jurisdiction are designed to ensure that its "duties with the appellate docket will not suffer").

Under this Court's cases, leave is properly denied in several well-recognized circumstances. One is when, in view of the facts alleged in the complaint and those subject to judicial notice, *see Arizona v. California*, 298 U.S. 558, 560 (1936), a claim is clearly premature or lacks merit as a matter of law. *See Alabama v. Texas*, 347 U.S. 272 (1954) (per curiam) (denying leave to file complaint that was clearly without merit and barred as a matter of law); *see also id.* at 278 (Black, J., dissenting); *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973) (denying leave to file amended complaint for same reason). Even if the complaining state has alleged a cognizable legal cause of action, denial of leave to file a complaint also is appropriate when the complaint fails to allege an injury that is "clearly shown to be of serious magnitude and imminent." *Alabama v. Arizona*, 291 U.S. at 292 (denying motion for leave because the "facts alleged [we]re not sufficient to warrant a finding that [defendants' conduct] would cause Alabama to suffer great loss or any serious injury"). In both circumstances, denial of leave is warranted because further proceedings "would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." *Ohio v. Kentucky*, 410 U.S. at 644 (noting that "the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable [the Court] to dispose of matters at a preliminary stage").

Mississippi's motion for leave should be denied because the proposed complaint fails to satisfy both

of these well-established prerequisites. Mississippi's principal cause of action is nothing more than a re-hash of its claim in prior district court litigation, *see infra* pp. 4-7, that Memphis and MLGW converted groundwater supposedly owned by Mississippi. As the district court and the Fifth Circuit correctly concluded, Mississippi's claim is foreclosed by this Court's longstanding water-rights precedents, which have squarely rejected Mississippi's premise that states own the portion of interstate waters within their borders. Instead, a state's legal entitlement to a shared water resource must be determined by equitable apportionment or interstate compact before a claim against another state can be sustained.

Mississippi's fall-back claim for equitable apportionment also should not be permitted to proceed, because Mississippi's proposed complaint does not allege that it has suffered *any* injury—much less injury of a serious magnitude—to its present or reasonably anticipated uses of the aquifer. Indeed, in the district court proceedings, Mississippi expressly disclaimed any such injury. Because such injury is a necessary prerequisite to any equitable apportionment claim, Mississippi's disclaimer conclusively forecloses its claim and warrants denial of leave to file its complaint.

If the Court nonetheless grants Mississippi's motion and permits further development of the case, it should, at the very least, entertain full briefing and argument on motions to dismiss at an early stage of the litigation to address serious doubts about the sufficiency of Mississippi's complaint. Such briefing and argument on dispositive legal questions might obviate the expense and need for a special master to supervise discovery and to make recommendations.

Should the Court perceive benefit in referring the case to a special master, Tennessee reserves the right to file a motion to dismiss so that the dispositive legal questions raised by Mississippi's complaint may be adjudicated promptly.

STATEMENT OF THE CASE

For nearly 125 years, since 1886, Memphis has relied on water from the Memphis Sand aquifer—a large underground water source lying beneath at least seven states, including Mississippi and Tennessee—for residential and commercial uses associated with a large metropolitan area. MLGW, a division of Memphis, operates one of the world's largest artesian water systems, using multiple well fields within Tennessee to pump water from the aquifer for delivery to customers in Memphis. DeSoto County, Mississippi, which is located across the Mississippi border from Memphis, also pumps water from the Memphis Sand aquifer, but it is far less populated than Memphis and thus uses far less water.¹

On February 1, 2005, Mississippi filed a lawsuit against Memphis and MLGW in the United States District Court for the Northern District of Mississippi. See App., *infra*, 1a-30a. Mississippi alleged in its complaint that Memphis's and MLGW's extraction of groundwater from the Memphis Sand aquifer had caused a "cone of depression" centered around Memphis and extending into DeSoto County. Mississippi alleged that this cone of depression caused

¹ As of July 2008, the Census Bureau estimated that DeSoto County has approximately 155,000 residents, compared to nearly 1 million residents in Shelby County, Tennessee, which includes Memphis. See <http://www.census.gov/popest/counties/CO-EST2008-01.html>.

water in the aquifer that would otherwise lie beneath Mississippi to flow over the border into Tennessee.

In its initial complaint, Mississippi alleged that Memphis's and MLGW's pumping of groundwater had harmed its ability to use the aquifer. Specifically, Mississippi alleged that Memphis and MLGW had caused a "lowering of the Aquifer groundwater table or artesian pressure" that would "prevent or inhibit the water level from returning to normal levels even if MLGW's excessive pumping ceases." *Id.* at 8a-9a (¶¶ 19, 20(b)). Mississippi also alleged that Memphis and MLGW were "injuring the Aquifer's ability to recharge, or replenish itself naturally," causing "serious and irreparable contamination of the high quality groundwater contained in the Aquifer" and causing "fear of current and future injury and damage and uncertainty regarding the quality and availability of sufficient quantities of water supplies." *Id.* at 8a (¶ 19). Mississippi alleged "irreparable injury and harm, or . . . financially devastating damage to, . . . residential and commercial development of Northwest Mississippi" and a "chilling effect" on such development. *Id.* at 8a, 11a-12a (¶¶ 19, 22). On the basis of these allegations, Mississippi asserted various common-law torts against Memphis and MLGW, including unjust enrichment, violation of the Restatement (Second) of Torts § 858 (1979), trespass, conversion, nuisance, and unlawful taking or inverse condemnation. *See id.* at 12a-22a (¶¶ 23-52).

In March 2005, Memphis filed a motion to dismiss Mississippi's complaint for lack of jurisdiction, contending that Tennessee was a necessary and indispensable party under Federal Rule of Civil Procedure 19 and that joinder of Tennessee would defeat the district court's subject-matter jurisdiction because

this Court has exclusive jurisdiction over controversies between states. *See* 28 U.S.C. § 1251(a). The district court denied that motion in August 2005 and denied Memphis's motions for reconsideration and certification of interlocutory appeal in September 2005.

Mississippi filed an amended complaint on October 5, 2006. *See* App., *infra*, 31a-51a. Mississippi's amended complaint withdrew all of the initial complaint's allegations of harm to the aquifer and injury to Mississippi's use thereof, and it abandoned all of the causes of action that were premised on those allegations of harm. The only allegation of harm preserved in Mississippi's amended complaint was the loss of its alleged property right in the groundwater that Memphis and MLGW had supposedly caused to flow from Mississippi into Tennessee. Mississippi claimed that this diversion constituted unlawful conversion, trespass, nuisance, and unjust enrichment, and it sought injunctive and declaratory relief, damages, and imposition of a constructive, implied, or resulting trust. *See id.* at 40a-49a (¶¶ 23-52).

Subsequently, as the litigation progressed, Mississippi repeatedly disclaimed any loss of use of the aquifer, stating that it was pursuing only conversion and trespass based on its supposed ownership of groundwater within its borders. *See, e.g.,* Memphis Cert. Opp. App. 21b ("this is simply an action for damages by Mississippi against these defendants for the trespass and conversion and unjust enrichment resulting from taking of water from DeSoto County"); Pl.'s Reply Mem. of Authorities in Supp. of Its Resp. in Opp. to Defs.' Mot. for J. on the Pleadings at 21 (July 16, 2007) (5th Cir. Rec. p. 1547) ("The right to 'use' Aquifer ground water is not what is at stake in

Mississippi's lawsuit. . . . [Mississippi's claims are] based upon ownership issues and claims squarely premised upon protection of possessory rights."); Pl.'s Reply Mem. of Authorities in Supp. of Pl.'s Resp. in Opp. to Defs.' Mot. for Partial Summ. J. at 17-18 (Sept. 7, 2007) (5th Cir. Rec. pp. 2507-08) ("In this action, the State of Mississippi has pursued claims based on its ownership of the ground water resources of the State, not claims based on *usufructory* water rights or the right to use the public waters owned by the State."); Pl.'s Reply Mem. of Authorities in Supp. of Resp. in Opp. to Defs.' Mot. To Exclude Testimony of Dr. William W. Wade at 13 (Sept. 14, 2007) (5th Cir. Rec. p. 2875) ("The claims in this case do not include claims for any compensation or restoration or injury to the aquifer. Mississippi has not lost ground water services but the water itself.") (citation omitted).

On June 12, 2007, Memphis and MLGW filed motions for judgment on the pleadings, again asserting that Mississippi's amended complaint should be dismissed for failure to join Tennessee (as well as Arkansas) as a necessary and indispensable party. On September 25, 2007, the district court denied that motion, on the ground that the "stringent standard" for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) had not been satisfied. Miss. Mot. App. 32a-33a. The court also denied two motions for partial summary judgment on certain of Mississippi's claims. *See id.*

On January 28, 2008, approximately two weeks prior to the scheduled bench trial, the district court announced it was reconsidering, *sua sponte*, whether Tennessee was a necessary and indispensable party under Rule 19. After further briefing and argument,

on February 6, 2008, the court dismissed Mississippi's claims without prejudice for failure to join Tennessee. Applying settled principles under Rule 19, the court concluded that Mississippi's claim for conversion necessarily implicated Tennessee's sovereign interests in the shared use of the aquifer. The court noted that the Memphis Sand aquifer "has not been apportioned, neither by agreement of the involved States nor by the U.S. Supreme Court." Miss. Mot. App. 23a. Thus, the court could not adjudicate Mississippi's claim for conversion without effectively adjudicating the rights of the two states to use of the aquifer. *Id.* at 24a ("[i]t is simply not possible for this court to grant the relief the Plaintiff seeks without engaging in a *de facto* apportionment of the subject aquifer"). Because any such apportionment would necessarily implicate Tennessee's sovereign interests, the court concluded that Tennessee was a necessary party under Rule 19(a).

Because joinder of Tennessee as a defendant would give this Court exclusive jurisdiction over the case, *see* 28 U.S.C. § 1251(a), the district court proceeded to determine whether, "in equity and good conscience," Mississippi's complaint should be permitted to proceed without Tennessee or whether it should be dismissed. Miss. Mot. App. 26a (citing Fed. R. Civ. P. 19(b)). Applying the well-settled four-factor test in Rule 19(b), the court concluded that the complaint should be dismissed without prejudice, because proceeding without Tennessee would "caus[e] great prejudice to Tennessee" and because Mississippi could petition this Court for leave to file a bill of complaint that includes Tennessee as a necessary party. *Id.* at 27a.

The Fifth Circuit affirmed. The court of appeals concluded that the district court “made no error of law” in determining that Mississippi’s claim for conversion could not proceed without a *de facto* apportionment of the aquifer. *Id.* at 8a. Citing this Court’s longstanding precedents, the Fifth Circuit held 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.” *Id.* (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-05 (1938)).

The Fifth Circuit then squarely rejected two arguments made by Mississippi in its motion for leave. First, it rejected Mississippi’s contention that the equitable apportionment doctrine does not apply to groundwater. Finding as a matter of fact that the aquifer “flows, if slowly, under several states,” the Fifth Circuit held that an aquifer “is indistinguishable from a lake bordered by multiple states or from a river bordering several states depending upon it for water.” *Id.* at 9a. Second, relying on longstanding precedents of this Court, the Fifth Circuit rejected Mississippi’s argument “that state boundaries determine the amount of water to which each state is entitled from an interstate water source.” *Id.* at 10a. Because there was no merit to Mississippi’s claim that it owned a “fixed portion of the Aquifer . . . within its state boundaries,” the Fifth Circuit found “no error in the district court’s conclusion that Tennessee’s presence in the lawsuit was necessary to accord complete relief to Mississippi and Memphis.” *Id.* at 10a, 11a.

The Fifth Circuit also agreed with the district court that joinder of Tennessee would destroy the district court's subject-matter jurisdiction. Interstate water disputes, the court of appeals held, are controversies between states that are subject to this Court's exclusive original jurisdiction. *See* Miss. Mot. App. 11a-12a; 28 U.S.C. § 1251(a). Finally, the Fifth Circuit found no abuse of discretion in the district court's determination that Mississippi's complaint should, "in equity and good conscience," be dismissed for failure to join Tennessee as a necessary and indispensable party because a "judgment rendered in Tennessee's absence would be enormously prejudicial to Tennessee's sovereign interest in its water rights." Miss. Mot. App. 15a.

Mississippi filed a petition for a writ of certiorari, which is pending. *See* Miss. Cert. Pet., No. 09-289. Mississippi's petition seeks review of three holdings of the Fifth Circuit: (1) whether the Fifth Circuit erred in rejecting Mississippi's claim that it owns the groundwater under its territory, notwithstanding the doctrine of equitable apportionment; (2) whether this Court has exclusive original jurisdiction over Mississippi's lawsuit even though it named only Memphis and MLGW as defendants; and (3) whether the Fifth Circuit erred in affirming the district court's conclusion that Mississippi's lawsuit should not be permitted to proceed without Tennessee as a necessary and indispensable party. *See id.* at i.

Contemporaneously with its certiorari petition, Mississippi filed a provisional motion for leave to file a complaint against Memphis, MLGW, and Tennessee, "only in the event this Court denies" the petition for a writ of certiorari. Miss. Mot. Br. i (emphasis omitted). Mississippi's proposed complaint contains

two causes of action. First, Mississippi reprises its conversion claim against Memphis and MLGW, alleging, as it did in *Hood*, that Memphis's and MLGW's pumping of water constitutes a "wrongful diversion, taking and conversion of state-owned natural resources." Compl. ¶ 24. Mississippi seeks more than \$1 billion in damages from Memphis and MLGW, as well as injunctive relief. *Id.* ¶ 5(a)-(b). As with the amended complaint in *Hood*, Mississippi's proposed complaint alleges no harm to the aquifer or its use. Rather, the sole injury alleged by Mississippi is the taking of groundwater supposedly owned by Mississippi. *See id.* ¶ 12 ("Only ground water originally residing, or now residing, within Mississippi's sovereign borders is at issue in this dispute."); *id.* ¶¶ 22-23 (alleging that "quantities of Mississippi's ground water" have crossed the border and been "lost by Mississippi").

Second, in a single paragraph of the proposed complaint, Mississippi alleges that, "*if and only if* this Court determines that Mississippi does not own and control the ground water resources within its borders," the Court should equitably apportion the water in the aquifer between Tennessee and Mississippi, and enjoin Memphis and MLGW from using the aquifer inconsistent with that apportionment. *Id.* ¶ 5(c). As part of that provisional equitable apportionment cause of action, Mississippi again seeks damages against Memphis and MLGW "for any past diversions and takings of ground water" that "are inconsistent with the Court's apportionment." *Id.* Apart from that one paragraph seeking alternative relief, the proposed complaint contains no further factual allegations to support the claim for equitable apportionment.

REASONS FOR DENYING MOTION FOR LEAVE TO FILE COMPLAINT

Mississippi's motion for leave should be denied for two reasons. First, Mississippi's principal claim that Memphis and MLGW converted groundwater owned by Mississippi is foreclosed by this Court's longstanding water-rights precedents. Both the district court and the Fifth Circuit in *Hood* correctly recognized that Mississippi's claim is contrary to this Court's equitable apportionment jurisprudence, and the parties and this Court should not be required to expend substantial resources litigating a claim clearly barred as a matter of law. Second, Mississippi's provisional claim for equitable apportionment also should not be permitted to proceed because Mississippi has expressly disclaimed—and has no basis to allege—that it has suffered any injury to its use of the aquifer. Under this Court's longstanding equitable apportionment cases, absent any such injury, Mississippi's proposed complaint fails to state a claim for relief, and the exercise of original jurisdiction is therefore unwarranted.

I. MISSISSIPPI'S CLAIM FOR UNLAWFUL CONVERSION OF GROUNDWATER RESTS ON A PROPERTY-RIGHTS THEORY THAT IS FORECLOSED BY MORE THAN A CEN- TURY OF THIS COURT'S PRECEDENTS

Mississippi's conversion claim against Memphis and MLGW is, by its own admission, "premised . . . on the State's assertion of ownership of all water resources within its borders, including the subject ground water, as one of the fundamental, self-evident attributes of statehood." Miss. Mot. Br. 12. Mississippi's claim does not warrant this Court's exercise of its original jurisdiction because that central premise

is inconsistent with more than a century of this Court's water-rights jurisprudence, which provides that interstate waters must be apportioned, either by interstate compact or by this Court, before a state has an enforceable right to prevent another state's use of the water.

A. This Court Has Long Rejected Mississippi's Argument That States Own Interstate Waters To The Extent Located Within Their Borders

This Court has squarely rejected Mississippi's theory that each state owns the portion of an interstate water source located within its boundaries. For more than a century, since its seminal decision in *Kansas v. Colorado*, 206 U.S. 46 (1907), this Court has held that the federal common-law doctrine of equitable apportionment governs disputes over interstate waters. *See, e.g., Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003) ("Federal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other's interest in the river."); *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) ("Equitable apportionment is the doctrine of federal common law that governs disputes between States concerning their rights to use the water of an interstate stream.") (citing *Kansas v. Colorado*, 206 U.S. at 98).

Under the equitable apportionment doctrine, states bordering on an interstate body of water do not own any of the water in the shared resource. Instead, when a plaintiff state alleges that the defendant state is impairing its rights to use the shared resource, the doctrine of equitable apportionment calls for "the exercise of an informed judgment on a consideration

of many factors”—including “physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former”—to secure a “just and equitable” allocation of the bordering states’ right to use the water. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

Indeed, this Court has specifically rejected the theory—critical to Mississippi’s conversion claim—that states simply own the part of an interstate body of water that lies within their borders. In *Colorado v. New Mexico*, the Court “reject[ed]” the proposition “that the mere fact that the Vermejo River originates in Colorado automatically entitles Colorado to a share of the water.” 459 U.S. at 182 n.8; see *Colorado v. New Mexico*, 467 U.S. 310, 323 (1984) (concluding that a state’s border is “essentially irrelevant to the adjudication of these sovereigns’ competing claims”); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982) (rejecting “New Hampshire’s purported ‘ownership’ of the Connecticut River”); *Hinderlider*, 304 U.S. at 102-03 (rejecting contention that state “rightfully may divert and use, as she may choose, the waters [in an interstate stream] flowing within her boundaries”) (internal quotation marks omitted). In the context of a dispute over an interstate water resource, where the rights of states are co-equal, traditional property-rights concepts simply do not apply. See *Kansas v. Colorado*, 206 U.S. at 97-98 (equitable apportionment doctrine requires the Court to settle interstate water disputes).

“in such a way as will recognize the equal rights of both [states] and at the same time establish justice between them”); *Wyoming v. Colorado*, 259 U.S. 419, 465 (1922) (describing the “equal level or plane on which all the states stand” in interstate water disputes).²

This Court’s rejection of property-rights claims to shared water resources has deep roots in American law. Since the early 1800s, it has been well settled that the owner of land next to a river has “no property in the water itself; but a simple use of it, while it passes along.” *Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (D.R.I. 1827) (No. 14,312) (Story, J.); see *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702 (1899) (“He has no property in the water itself, but a simple usufruct while it passes along.”) (quoting 3 James Kent, *Commentaries on American Law* § 439 (1826)); see also *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 953 (1982). Mississippi’s own highest court has likewise held that public water is not “susceptible of absolute ownership” because “[i]t is a movable wandering thing and admits only of a transient, usufructary property.” *Dycus v. Sillers*, 557 So. 2d 486, 501-02 (Miss. 1990) (internal quotation marks omitted); see also *State v. Superior Ct. of Riverside County*, 93 Cal. Rptr. 2d 276, 1024-34 (Cal.

² See also Frank J. Trelease, *Government Ownership and Trusteeship of Water*, 45 Cal. L. Rev. 638, 651 (1957) (noting that “the Supreme Court has never used property concepts in deciding water cases,” instead apportioning water among states as representatives of individual users, “not as owners” of the water); 4 *Waters & Water Rights* § 36.02, at 36-8 to 36-9 & nn.16-17 (Robert E. Beck, ed., 2004 repl. vol.) (“the Supreme Court has made it abundantly clear that it has little patience with claims of absolute ‘ownership’ by either [state or federal] government”).

Ct. App. 2000) (concluding based on Miss. Code Ann. § 51-3-1—the very statute upon which Mississippi relies here—that under California law “[t]he State ‘owns’ the groundwater in a regulatory, supervisory sense, but it does not own it in a possessory, proprietary sense”). Mississippi’s “assertion of ownership” of the portion of interstate waters located within its borders, therefore, is flatly contrary to nearly two centuries of American water-rights jurisprudence.

B. Mississippi’s Argument That Equitable Apportionment Does Not Apply To Groundwater Is Also At Odds With This Court’s Cases

Mississippi suggests in its brief and in its petition for a writ of certiorari in *Hood* that the equitable apportionment doctrine does not apply to groundwater, as opposed to surface water. Miss. Mot. Br. 19; Miss. Cert. Pet. 18. This Court’s equitable apportionment cases, however, have recognized that groundwater and surface water are part of a single hydrological unit and have included groundwater in their equitable apportionment determinations. In *Washington v. Oregon*, 297 U.S. 517 (1936), for example, this Court addressed a claim—similar to Mississippi’s—that Oregonian farmers should be enjoined from pumping subsurface water. *Id.* at 523-26. The Court employed the doctrine of equitable apportionment and concluded that no injunction was warranted because the water pumped from wells in Oregon did not “materially lessen[.]” water available in Washington. *See id.* (internal quotation marks omitted); *see also Kansas v. Colorado*, 533 U.S. 1, 5-6 (2001) (finding that groundwater pumping can deplete the surface water in an apportioned river in violation of an inter-

state compact).³ As the Fifth Circuit recognized in *Hood*, while these cases did not deal with a claim for equitable apportionment relating solely to groundwater, “the fact that the aquifers were not treated differently from any other part of the interstate water supply subject to litigation supports the conclusion that the Aquifer must be apportioned.” Miss. Mot. App. 10a n.5.⁴

³ See also *Texas v. New Mexico*, 462 U.S. at 556-57 & nn.1-2 (discussing effects of aquifer pumping on nearby Pecos River); *Wisconsin v. Illinois*, 449 U.S. 48, 50 (1980) (requiring that “allocations to new users of Lake Michigan water shall be made with the goal of reducing withdrawals from the Cambrian-Ordovician aquifer”); *Kansas v. Colorado*, 185 U.S. 125, 146-47 (1902) (discussing “subterranean flow”).

⁴ Notably, Mississippi’s premise that a state owns the groundwater underneath its territory is inconsistent with all five of the common-law regimes that govern groundwater in the various states. See Joseph L. Sax et al., *Legal Control of Water Resources* 362-85 (3d ed. 2000); 1 *Waters & Water Rights* § 4.05(c) (2007 repl. vol.); 3 *Waters & Water Rights* §§ 19.05(b), 20.01-23.07 (2003 repl. vol.); *Colorado v. New Mexico*, 459 U.S. at 183-84 (stating that state law is an “important consideration” but “not controlling” in equitable apportionment cases). Two of those regimes—the English rule of “capture” and its American “reasonable use” variant—treat groundwater as a migratory resource, like wildlife, that is not owned until after it has been “reduced to possession” or “captured” through pumping. *City of San Marcos v. Texas Comm’n on Envtl. Quality*, 128 S.W.3d 264, 270-71, 274 (Tex. App. 2004); see also *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1327-28 (Ariz. 1981). The three remaining common-law doctrines treat groundwater as a shared resource, to which competing claimants have no right of ownership, but merely a right of use based on principles of allocation.

Tennessee follows a “correlative rights” regime for adjudicating intrastate disputes over percolating groundwater, which, like this Court’s equitable apportionment doctrine, calls for equitable sharing of groundwater by adjacent landowners. See

Moreover, this Court's precedents have applied the equitable apportionment doctrine broadly to all disputes over interstate resources that are susceptible of depletion by one state to the exclusion of another:

[W]henever . . . the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

Kansas v. Colorado, 206 U.S. at 97-98.

Mississippi's attempt to distinguish groundwater and surface water is also inconsistent with this Court's decision in *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1983). In that case, this Court applied the doctrine of equitable apportionment to anadromous (migratory) fish, reasoning that "the natural resource of anadromous fish is sufficiently similar" to water in a flowing stream, because "a State that overfishes a run downstream deprives an upstream State of the fish it otherwise would receive." *Id.* at 1024. If the doctrine of equitable apportionment applies to migratory fish, it surely applies to an interstate groundwater resource such as the Memphis Sand aquifer.

Nashville, C. & St. L. Ry. v. Rickert, 89 S.W.2d 889, 896-97 (Tenn. Ct. App. 1935); 6 Waters & Water Rights at 1040-43 (2005 repl. vol.). Mississippi follows a "regulated riparianism" regime for both surface and groundwater, pursuant to which a state administrative body issues permits for the use of intra-state groundwater and resolves permit disputes. See Miss. Code Ann. §§ 49-17-28, 51-3-1, 51-3-3(e), 51-3-13; 6 Waters & Water Rights at 708-09.

Finally, as the Fifth Circuit likewise recognized, there is no coherent reason to treat an interstate aquifer differently than interstate surface waters. The Memphis Sand aquifer “flows, if slowly, under several states, and it is indistinguishable from a lake bordered by multiple states or from a river bordering several states depending upon it for water.” Miss. Mot. App. 9a. Just as with a lake or river, the entire aquifer is interconnected.⁵ There is thus no sound reason why this Court’s longstanding equitable apportionment principles would not apply to the aquifer.

C. The Public Trust Doctrine Does Not Recognize Mississippi’s Claim Of Ownership Over Interstate Waters

Mississippi also contends that, under the “public trust” doctrine, it owns the groundwater in the portion of the shared aquifer that lies beneath its territory as a product of its “inalienable sovereignty.” Miss. Mot. Br. 12-15. That doctrine, however, relates only to a state’s control over purely intrastate waters and submerged lands vis-à-vis private parties. It has no bearing on interstate water disputes, which implicate the co-equal rights of neighboring states and are therefore governed not by any principle of absolute ownership, but rather by this Court’s well-developed principles of equitable apportionment.

⁵ Mississippi’s allegation that there is a geologically “*separate* reserve of groundwater” under Tennessee, Compl. ¶ 13 (emphasis added), not only is inconsistent with the district court’s and the Fifth Circuit’s findings in *Hood* that the aquifer is an interstate water source, see Miss. Mot. App. 8a, 23a, but also is contradicted by its own complaint, see Compl. ¶ 2 (“[t]he formation comprising the aquifer spans a subterranean area between Mississippi and Tennessee”).

The public trust doctrine recognizes that navigable waters and submerged lands lying wholly within a state are held by the state government in trust for its citizens and are not susceptible of ownership by private parties. As this Court has explained, at English common law, the sovereign, not private parties, owned all navigable waters and the lands beneath them. See *Shively v. Bowlby*, 152 U.S. 1, 11-13 (1894); 4 Waters & Water Rights § 30.01(a) & n.1. Upon American independence from England, the original 13 colonies “became themselves sovereign” and thus assumed sovereign ownership of “all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the [federal] government.” *Martin v. Waddell’s Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842).⁶

However, the state’s ownership of navigable waters and lands under the public trust doctrine is not equivalent to private ownership. Rather, the state holds those waters and lands in trust for the benefit of the public. As this Court explained more than a century ago:

[T]itle [to land underneath navigable waters] necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. . . . It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and

⁶ The principle of sovereign ownership of submerged lands was extended to later-admitted states to ensure that all states were on an “equal footing.” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997).

have liberty of fishing therein, freed from the obstruction or interference of private parties.

Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892). The public trust doctrine limits private ownership of navigable waters and submerged lands within the state, and it defines a state's fiduciary obligations under its own state law to preserve and protect its natural resources for the benefit of the public. See 4 Waters & Water Rights § 30.02(a)-(c). It does not amount to Mississippi's claimed "ownership" of interstate groundwater vis-à-vis a neighboring state.⁷

Mississippi's heavy reliance on *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 516-17 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988), is misplaced. In *Cinque Bambini*, private parties holding record title to certain lands underlying non-navigable but tidally influenced waters on the Gulf Coast of Mississippi sought to confirm their ownership by suing the state to quiet title. The sole issue in the case was whether the private parties' title—derived from pre-Spanish land grants dating back to 1813—was valid, or whether the State owned the land by virtue of state sovereignty. Both the Mississippi Supreme Court and this Court ruled against the private title holders,

⁷ In its Fifth Circuit *amicus* brief, Tennessee did not "essentially agree[]" with Mississippi's theory of water ownership, contrary to Mississippi's claim (at 16). Tennessee argued that the doctrine of equitable apportionment, not any concept of property rights, applies to interstate waters. Moreover, Tennessee argued, and the Fifth Circuit agreed, that Tennessee has a sovereign interest in any equitable apportionment of the aquifer, not because it owns the groundwater within its borders, but because equitable apportionment would "implicate Tennessee's sovereign interest in regulating" the use of the aquifer. *Tennessee Amicus Br.* at 6.

holding that Mississippi “acquired at the time of statehood and held in public trust all land lying under any waters influenced by the tide, whether navigable or not.” 484 U.S. at 472.⁸ Like *Cinque Bambini*, all of the public trust cases on which Mississippi relies involve disputes between the state and other claimants over wholly intrastate lands or waters.⁹ None of them has any bearing on a dispute *between states* over interstate waters.

The only case cited by Mississippi (at 14) that did involve an interstate dispute is *Kansas v. Colorado*, 206 U.S. 46 (1907)—this Court’s seminal equitable apportionment decision—and it fatally undermines Mississippi’s claims. Although Mississippi cites the part of the decision that recognized each state’s “full jurisdiction over the lands within its borders,

⁸ After *Cinque Bambini*, Mississippi codified the public trust doctrine and promulgated regulations regarding its citizens’ use of intrastate surface water and groundwater. That statute, however, has no application to interstate water disputes, because no state “can impose its own legislation” on the others. *Kansas v. Colorado*, 206 U.S. at 97; see also *Massachusetts v. Missouri*, 308 U.S. 1, 19-20 (1939).

⁹ See *Coeur d’Alene Tribe of Idaho*, 521 U.S. at 286-87 (title dispute between state and Indian tribe over lakebed entirely in Idaho); *Montana v. United States*, 450 U.S. 544, 550-51 (1980) (title dispute between state and Indian tribe over “the bed of the Big Horn River” in Montana); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 365, 370-71 (1977) (title dispute over lands underlying the Willamette River, located entirely within Oregon); *Illinois Cent. R.R.*, 146 U.S. at 452 (title dispute over lands near Chicago that were reclaimed from and submerged under Lake Michigan); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 220, 230 (1845) (ejectment action relating to land in Mobile, Alabama); *Waddell’s Lessee*, 41 U.S. at 407 (title dispute over “land, covered with water, situated in the township of Perth Amboy, in the state of New Jersey”).

including the beds of streams and other waters,” this Court ultimately held that “interstate common law,” not state sovereignty, governs controversies among states. *Id.* at 93, 97-98. Under federal common law, the “cardinal rule, underlying all the relations of the states to each other, is that of equality of right.” *Id.* at 97. A state “can impose its own legislation on no one of the others, and is bound to yield its own views to none.” *Id.* As a result, whenever “the action of one state reaches . . . into the territory of another state,” such as in a dispute between states over a shared interstate water resource, a state’s rights are determined not according to any principle of absolute property rights, but rather by the principle of equitable apportionment. *Id.* at 97-98; *see supra* Point I.A.

In sum, Mississippi’s principal claim against Memphis and MLGW should not be allowed to proceed because its core premise—that Mississippi has “ownership of all water resources within its borders as one of the fundamental, self-evident attributes of statehood”—cannot be squared with this Court’s settled precedents.

II. THIS COURT SHOULD DENY MISSISSIPPI LEAVE TO FILE AN EQUITABLE APPOR- TIONMENT CLAIM AGAINST TENNESSEE BECAUSE MISSISSIPPI HAS DISCLAIMED ANY ALLEGATION OF HARM TO ITS USE OF THE AQUIFER

This Court has long held that a state may not invoke this Court’s original jurisdiction without evidence—or, at the pleading stage, a serious allegation—that it is suffering present or imminent injury due to the other state’s diversion of water. Mississippi’s claim falters at the threshold. Not only did Mississippi fail to allege such injury in the one para-

graph of its proposed complaint devoted to equitable apportionment, but it expressly disclaimed any such injury in *Hood*. Because Mississippi concededly cannot satisfy a necessary element of an equitable apportionment claim, any further proceedings would be a waste of the resources of this Court and the parties, and should not be permitted.

A. Injury Of A “Serious Magnitude” Resulting From The Defendant State’s Use Of The Shared Water Resource Is A Necessary Element Of An Equitable Apportionment Claim

This Court has consistently held that, to state a viable original action for equitable apportionment, a state must show that it is currently suffering an injury of serious magnitude, or is in imminent jeopardy of suffering such injury, because of the defendant state’s actions. In deciding whether a case is “appropriate[.]” for the exercise of original jurisdiction, an “important” factor is whether the complaining state has “suffered any direct harm as of the time that it moved for leave to file a complaint.” *Maryland v. Louisiana*, 451 U.S. at 743. “[This Court’s] cases establish that a state seeking to prevent or enjoin a diversion by another state bears the burden of proving that the diversion will cause it real or substantial injury or damage.” *Colorado v. New Mexico*, 459 U.S. at 187 n.13 (internal quotation marks omitted). Because this Court’s original jurisdiction is to be exercised only in the “most serious of circumstances,” *Nebraska v. Wyoming*, 515 U.S. at 8, the burden to show serious injury “is much greater than that imposed upon a complainant in an ordinary suit between private parties,” *New York v. New Jersey*, 256 U.S. 296, 309 (1921) (dismissing complaint).

Under that exacting standard, this Court has dismissed numerous equitable apportionment cases where the complaining state has failed to make a showing of substantial injury. In *Washington v. Oregon*, for example, Washington argued that Oregon, the upstream state, was wrongfully diverting the waters of the Walla Walla River, and it sought an equitable apportionment of those waters. The Court dismissed the complaint because of the lack of any evidence of injury to Washington. Because Washington had not shown that Oregon's diversion of the water was preventing any countervailing use by Washington, the Court characterized Washington's claim as a "barren right," which would needlessly "bring distress and even ruin" to Oregon's "long-established settlement of tillers of the soil." 297 U.S. at 523. Moreover, the Court concluded that groundwater pumping by Oregon farmers also did not inflict any injury on Washington, because it did not "materially lessen[] the quantity of water available for use within the State of Washington." *Id.* at 526 (internal quotation marks omitted).

In *Kansas v. Colorado*, the Court concluded that, although Colorado had made heavy use of the waters of the Arkansas River by irrigating a great deal of land and diminishing its flow into the Arkansas valley, Kansas had not shown sufficient injury to warrant an injunction because Colorado "ha[d] worked little, if any, detriment" "to the great body of the valley." 206 U.S. at 117. In a subsequent opinion, the Court highlighted that, to support relief, Kansas must show "additional takings working serious injuries to her substantial interests." *Colorado v. Kansas*, 320 U.S. 383, 391-92 (1943) (dismissing complaint). The Court dismissed the complaint in

both cases because the actions of the defendant state did not meaningfully interfere with water uses in the complaining state.

Likewise, in *Arizona v. California*, 283 U.S. 423 (1931), Arizona sought to void the Colorado River Compact, an agreement among seven states apportioning the waters of the Colorado River, which Arizona had not ratified. Arizona also sought an injunction prohibiting construction of a dam on the Colorado River that would divert water away from Arizona. *Id.* at 449-50. The Court dismissed the complaint because Arizona was not currently appropriating any of the water to be diverted, and thus any harm was “based, not on any actual or threatened impairment of Arizona’s rights, but upon assumed potential invasions.” *Id.* at 462.

Finally, in *Connecticut v. Massachusetts*, 282 U.S. 660 (1931), the Court declined to enjoin Massachusetts’ proposed diversion of the Ware and Swift Rivers for Boston’s municipal water needs, in light of the absence of “real or substantial injury or damage” to Connecticut downstream from the proposed diversions. *Id.* at 672. The Court rejected the suit because Connecticut did not allege any substantial present injury; instead, the alleged harm from the diversions was “merely feared as liable to occur at some indefinite time in the future.” *Id.* at 674 (dismissing complaint); *see also Idaho ex rel. Evans*, 462 U.S. at 1028 (dismissing complaint because Idaho did “not demonstrate that Oregon and Washington are now injuring Idaho by overfishing the Columbia or that they will do so in the future”); *Alabama v. Arizona*, 291 U.S. at 292 (denying motion for leave where state failed to allege that it would suffer “great loss or any serious injury”).

Conversely, in each case where this Court has equitably apportioned an interstate body of water, it has done so upon a showing that the challenged uses could not continue without serious injury to the interests of the complaining state. In *Nebraska v. Wyoming*, for example, the Court found that “the clash of interests [was] of that character and dignity which makes the controversy a justiciable one under our original jurisdiction” because “the claims to the water of [the] river exceed the supply.” 325 U.S. at 610; *see also Wyoming v. Colorado*, 259 U.S. at 457 (apportioning the Laramie River upon showing that Colorado’s upstream diversions “will not leave in the stream sufficient water to satisfy [Wyoming’s] prior and superior appropriations”); *New Jersey v. New York*, 283 U.S. 336, 345-46 (1931) (limiting New York’s diversion of the Delaware River because of harm to New Jersey’s uses of the river).

This Court’s precedents uniformly provide that a “serious injury” to the complaining state’s “substantial interests” is an essential element of a cognizable equitable apportionment action. The Court “will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude.” *Connecticut v. Massachusetts*, 282 U.S. at 669.

B. Mississippi’s Failure To Plead Injury In Its Complaint And Its Disclaimer Of Any Injury In The Hood Litigation Warrant Denial Of Mississippi’s Motion For Leave To File The Bill Of Complaint

Despite this Court’s clear pronouncements that an allegation of serious harm is a prerequisite to this Court’s exercise of its original jurisdiction in an equitable apportionment action, the single paragraph

in the proposed complaint seeking equitable apportionment contains no allegation of any harm to Mississippi's use of the aquifer.¹⁰ Mississippi's proposed complaint does not allege that it suffers from any shortage of groundwater in the aquifer; that any current or contemplated use is being foreclosed by Memphis's uses; or that any Mississippi water user sustains any harm from Memphis's activities. Mississippi's bald assertion that it is entitled to equitable apportionment, without any supporting allegation of harm, fails basic pleading standards,¹¹ as well as this Court's more exacting standards for the invocation of its original jurisdiction.

Not only does Mississippi's proposed complaint fail to allege any substantial harm, but Mississippi previously *disclaimed* any such allegation. When Mississippi amended its complaint in federal district court in *Hood*, it withdrew all of its allegations of harm to Mississippi's use of the aquifer or to the aquifer itself, and it abandoned all of its claims except for those based on its property-rights theory. Mississippi reiterated that disclaimer throughout the *Hood* litigation. *See supra* pp. 6-7.

That disclaimer was not inadvertent but instead reflected Mississippi's lack of a good-faith basis to allege any harm to its use of the aquifer. Indeed, during discovery in *Hood*, Mississippi's own wit-

¹⁰ The alleged loss of groundwater supposedly owned by Mississippi does not constitute legally cognizable harm. *See supra* Point I.

¹¹ *See* Sup. Ct. R. 17.2 (Federal Rules serve as "guides" in original cases); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347-48 (2005) (holding that complaint was legally insufficient because it failed to allege loss causation, a necessary element of a securities-fraud claim).

nesses testified that the alleged pumping by Memphis did not meaningfully reduce the availability of groundwater in DeSoto County. For example, David Wiley, Mississippi's expert hydrogeologist, testified that the "storage" or total volume of groundwater beneath DeSoto County has decreased by only 0.02 million (20,000) gallons per day since pumping began in the late 1800s, an amount Wiley agreed was "insignificant." Memphis Mot. Opp. App. 5b. According to the evidence in the *Hood* litigation, the portion of the aquifer underlying DeSoto County holds an estimated 33 trillion gallons of water. See Memphis Mot. Opp. 25, App. 12b. The water in the aquifer underneath DeSoto County is only a small portion of the total water in the aquifer underneath all of Mississippi. A reduction of 20,000 gallons per day, since 1886, amounts to only 897.9 million gallons total, or 0.0027% of the volume of the water in the aquifer underneath DeSoto County, and an even smaller percentage of the water in the aquifer underneath Mississippi. Moreover, Mississippi's Rule 30(b)(6) witness agreed that the Mississippi Department of Environmental Quality "has never issued a water use warning" and "has never declared or delineated a water use caution area." Memphis Mot. Opp. App. 17b-18b. Such warnings are required by state statute upon a finding that "[e]xisting water resources, including surface water, groundwater, or both, are inadequate to meet present or reasonably foreseeable needs." Miss. Code Ann. § 51-3-11(1)(a). Mississippi's own witnesses thus confirm that Mississippi has suffered no harm because plenty of water remains to support Mississippi's uses.

This Court has relied on substantially similar concessions to dismiss an equitable apportionment claim.

See *Colorado v. Kansas*, 320 U.S. at 396 (“Kansas’s expert witness himself testified that the diversion records show no material change”). Those concessions would likewise doom Mississippi’s equitable apportionment claim in this case. Accordingly, allowing the proposed complaint to be filed “would only serve to delay” the inevitable dismissal of the complaint for failure to state a claim. *Ohio v. Kentucky*, 410 U.S. at 644. Mississippi’s motion for leave therefore should be denied in its entirety.¹²

C. Mississippi Cannot Recover Damages For Tennessee’s Use Of Unapportioned Waters

As part of its equitable apportionment claim, Mississippi seeks to recover damages for “past diversions and takings of ground water.” Compl. ¶ 5(c). That relief, too, is inconsistent with this Court’s well-settled case law. As this Court has held, an equitable apportionment decree “is not intended to compensate for prior legal wrongs. Rather, a decree prospectively ensures that a State obtains its equitable share of a resource.” *Idaho ex rel. Evans*, 462 U.S. at 1025; see Miss. Mot. App. 8a (Fifth Circuit noting that “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”).

Consistent with that principle, this Court has permitted recovery of damages only after the Court has

¹² This Court can deny Mississippi’s motion for leave to file without prejudice to its re-filing a new complaint if, in the future, it suffers an injury of serious magnitude and can state a claim for equitable apportionment. See, e.g., *United States v. Nevada*, 412 U.S. 534 (1973) (per curiam) (denying motion for leave to file complaint without prejudice); *Texas v. New York*, 300 U.S. 642 (1937) (same).

entered an equitable apportionment decree or after the adverse states have entered into an interstate compact ratified by Congress. *See Kansas v. Colorado*, 514 U.S. 673, 679-80 (1995) (adjudicating dispute over “post-Compact” pumping); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (permitting damages for violation of compact).

Thus, Mississippi’s motion for leave should be denied for the additional reason that its request for damages as part of its equitable apportionment action runs contrary to this Court’s settled precedents.

III. IF THIS COURT GRANTS MISSISSIPPI LEAVE TO FILE ITS PROPOSED COMPLAINT, IT SHOULD ENTERTAIN FULL MERITS REVIEW OF DEFENDANTS’ MOTIONS TO DISMISS

Because it is “feasible” to “dispose of [the] issues” presented by Mississippi’s proposed complaint, the Court should resolve those issues now and deny the motion for leave. *Ohio v. Kentucky*, 410 U.S. at 644. Should the Court decide to grant Mississippi’s motion for leave, however, Tennessee respectfully requests that the Court entertain full briefing and argument on substantive motions to dismiss at the earliest stage possible. *See Idaho ex rel. Andrus v. Oregon*, 429 U.S. 163, 164 (1976) (per curiam) (grant of leave to file is “not a judgment that the bill of complaint, to the extent that permission to file is granted, states a claim upon which relief may be granted”). For the reasons set forth above, there is, at the very least, substantial doubt whether the proposed complaint states claims upon which relief can be granted. Given that this Court’s “object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented,” *Ohio*

v. Kentucky, 410 U.S. at 644, the appropriate course, if the Court grants Mississippi's motion for leave, is to permit defendants to file motions to dismiss, and entertain briefing and oral argument on those motions at an early stage.

That course is especially appropriate given that the proposed complaint raises pure questions of law that could dispose of all or part of the case. This Court can resolve whether Mississippi's conversion claim against Memphis and MLGW is legally cognizable based on the pleadings alone, without any factual development. Likewise, the question whether Mississippi can obtain equitable apportionment without alleging any harm to its use of the aquifer is a clean issue of law susceptible to resolution on a motion to dismiss. Should either of those legal issues be decided against Mississippi, all parties and the Court will be spared the significant expense associated with fact discovery, expert discovery, motions practice, and other pretrial proceedings.

In situations where dispositive legal questions would obviate the need to refer a case to a special master, this Court has entertained briefing and argument without making such a referral. See *New Hampshire v. Maine*, 532 U.S. 742 (2001) (dismissing complaint after hearing oral argument without appointing a special master); see also *United States v. Nevada*, 410 U.S. 901 (1973) (setting oral argument on motion for leave to file complaint); *United States v. Nevada*, 412 U.S. at 537 (denying motion for leave after hearing oral argument); *Massachusetts v. Missouri*, 308 U.S. at 20 (same). If the claim for damages against Memphis fails because Mississippi has no pre-determined legal entitlement to a certain amount of water from the aquifer, such a ruling

would focus the remaining parties' litigation efforts solely on the question of equitable apportionment. Further, if a claim for equitable apportionment cannot go forward because Mississippi has failed to plead harm, or if Mississippi's prior concession against interest is given legally binding effect here, such a ruling would have a significant bearing on the future contours of the litigation.

If the Court concludes that the recommendation of a special master nonetheless would inform its disposition of the case, it should make such a referral without foreclosing defendants' right to bring dispositive motions to dismiss prior to discovery. *See Idaho ex rel. Andrus*, 429 U.S. at 163.

CONCLUSION

The State of Mississippi's motion for leave to file a complaint should be denied, in light of Mississippi's failure to plead a legally cognizable claim for damages and Mississippi's failure to plead harm sufficient to support an equitable apportionment. Alternatively, if the Court grants Mississippi's motion, it should clarify that, in doing so, it is not foreclosing defendants' right to bring dispositive motions prior to discovery.

Respectfully submitted,

DAVID C. FREDERICK
DEREK T. HO
MARC A. WALLENSTEIN
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

*Special Counsel to the
State of Tennessee*

December 2, 2009

ROBERT E. COOPER, JR.
Attorney General
MICHAEL E. MOORE
Solicitor General
BARRY TURNER
Deputy Attorney General
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-3491

*Counsel for the
State of Tennessee*

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

Civil Action No. 2:05CV32-D-B

JIM HOOD, Attorney General, *ex rel.*,
THE STATE OF MISSISSIPPI, Acting for
Itself and *Parens Patriae* for and on behalf of the
People of the State of Mississippi,
Plaintiff,

v.

THE CITY OF MEMPHIS, TENNESSEE, AND
MEMPHIS LIGHT, GAS & WATER DIVISION,
Defendants.

[Filed Feb. 1, 2005]

COMPLAINT
PARTIES

PLAINTIFF

1. Jim Hood, the duly elected and present Attorney General of the State of Mississippi, according to law and equity, brings this action on behalf of Plaintiff, the State of Mississippi, acting for itself and *parens patriae* for and on behalf of the People of the State of Mississippi ("the State").

2. The State is a sovereign body politic governed by the Constitution and laws of Mississippi and, as such, is authorized, entitled and required to bring this action pursuant to law. This interstate suit con-

cerns, *inter alia*, matters of state-wide interest and is brought by the State on behalf of itself and certain of its agencies, boards and commissions, including the Mississippi Department of Environmental Quality ("MDEQ").

3. Under the Mississippi Constitution of 1890 and other laws of the State of Mississippi, including Mississippi's common law or decisional law, and including, among other applicable laws, Mississippi Code Annotated Title 51, Chapter 3, Article 1, Sections 51-3-1, *et seq.*, the State has certain rights and duties and is responsible, in the exercise of its police powers, for management, supervision, control, regulation, enforcement and use of the water resources of Mississippi for purposes of, *inter alia*, the following:

- (a) Promotion, expansion and protection of the rights, interests and general welfare of the State and the People of Mississippi;
- (b) Enforcement of requirements that the water resources owned by, and subject to the right of use of, the State and Mississippi landowners and riparians be put to reasonable and beneficial use to the fullest extent for the State and the People of Mississippi;
- (c) Prevention and prohibition of, and prosecution of claims and issues relative to, the unlawful and unreasonable diversion, taking and use, or unlawful and unreasonable methods of diversion, taking and use, of such water resources;
- (d) Protection and conservation of the quantity and quality of such water resources to ensure reasonable and beneficial use thereof in the interest of the People of Mississippi and for

advancement and safe-guarding of the State's correlative rights in such water resources;

- (e) Supervision, administration, regulation and advancement of the policies and public laws of Mississippi, and resort to judicial remedies available under common law and such other measures as necessary to effectively and efficiently preserve, conserve, manage, protect, control, develop and use Mississippi's water resources for reasonable, beneficial purposes.

4. The State owns and exercises rights, interests, entitlements, privileges and/or duties which authorize and empower the State to act for itself and *parens patriae* herein.

DEFENDANTS

5. Defendant, Memphis Light, Gas & Water Division is a division of Defendant, the City of Memphis, Tennessee, both of whom are often collectively referred to herein as "MLGW." MLGW is a non-resident foreign municipal utility company, organized and existing by virtue of an amendment to the Memphis City Charter, Chapter 381 of the Private Acts of the General Assembly of Tennessee, adopted March 9, 1939, as amended, whose address is 220 South Main Street, Memphis, Tennessee 38103, and who is now, and at all times pertinent hereto has been, doing business in Mississippi and, as a result of the acts complained of herein, has committed, and continues to commit, torts in whole or in part in Mississippi for purposes of, *inter alia*, MISS. CODE ANN. Section 13-3-57 (1972 & Supp. 2003).

6. Pursuant to Rule 4(j)(2), FED. R. CIV. P., MLGW may be served with process by delivery of a copy of a summons and this Complaint to, and

service of same upon, its President and Chief Executive Officer, Joseph Lee, III, or as prescribed by applicable law.

7. MLGW, the nation's largest three-service municipal utility, provides electricity, gas and water to its customers in Shelby County, Tennessee, including the City of Memphis, and also engages in direct business or commerce in Mississippi through its electric and gas interconnections and gas distribution activities, as well as through sales of water to customers located in Mississippi, such as the City of Olive Branch, Mississippi.

8. Additionally, MLGW owns and operates one of the largest artesian water systems in the world and, as a result, the City of Memphis is the largest city in the world that relies solely on artesian water wells for its water supply, despite the close proximity and availability of an adequate alternative source of supply from the nearby Mississippi River. In fact, approximately one-third (1/3) of the City of Memphis' artesian water supply, or about 60,000,000 gallons per day (60 MGD), comes from high-quality aquifer groundwater unreasonably and unlawfully diverted and withdrawn by MLGW from underneath lands situated exclusively within the State of Mississippi, and belonging to the State and the overlying residential, commercial, agricultural and municipal owners of these groundwater resources as set forth in Paragraph Nos. 15 through 22 (and subparts) hereof.

JURISDICTION AND VENUE

9. Jurisdiction in this interstate groundwater dispute is proper in this Court under 28 U.S.C.A. Sections 1331 & 1332 inasmuch as, *inter alia*, there are presented herein certain federal questions calling for application of federal and/or interstate common

law, in addition to state law, and because there exists complete diversity of citizenship between the parties. The amount in controversy exceeds the sum or value of seventy-five thousand dollars (\$75,000.00) exclusive of interests and costs.

10. Venue in this cause is proper in this Court under 28 U.S.C.A. Sections 1391(a)(2) & (b)(2).

INTRODUCTION

NATURE OF DISPUTE

11. This is an interstate groundwater action in which the State, for itself and for the People of Mississippi, seeks damages and/or just compensation, declaratory judgment(s) and/or injunctive relief for MLGW's unlawful diversion and excessive and unreasonable withdrawal of high quality groundwater from the portion of the Memphis Sand Aquifer underlying Mississippi lands in direction violation, destruction or diminution of the rights and interests of the State, including, *inter alia*, the correlative rights and rights of reasonable and beneficial use of groundwater belonging to the State and its citizens.

NATURE OF RELIEF SOUGHT

12. Damages. The State seeks past, present and future damages in an aggregated amount, sum or value estimated to be in a range of several hundreds of millions of dollars for MLGW's unlawful diversion and withdrawal of the State's groundwater. The State reserves the right to supplement its allegations regarding the total amount of and/or bases for such damages.

13. Declaratory Judgment(s). The State seeks certain declaration(s), including those set forth in Paragraph Nos. 56(a)-(j) hereof, establishing, among other things, that (a) MLGW is, and has been, taking

the State's groundwater and violating Mississippi's water rights by virtue of its continuous and repeated wrongful diversion and excessive, unreasonable withdrawal or misappropriation of the State's groundwater and that (b) MLGW is liable for and must pay the State monetary damages for the unjust benefits derived by MLGW based upon or measured by, *inter alia*, the fair market value or monetary equivalent of the billions of gallons of groundwater taken by MLGW from the State and/or any values obtained, amounts received and/or profits recovered or realized by MLGW, along with all other damages and forms of relief and declarations claimed herein.

14. Injunctive Relief. The State seeks an order(s) enjoining MLGW to, *inter alia*, (a) stop immediately, or as soon as practicable, its wrongful diversion and excessive, unreasonable withdrawal of the State's groundwater from the Memphis Sand Aquifer and/or to (b) plan, fund, construct, implement and operate an alternate water treatment plant to access and use water from other nearby abundant and available sources, such as the Mississippi River, as a substitute for the water MLGW is withdrawing and taking from Mississippi.

STATEMENT OF FACTS COMMON TO ALL CLAIMS

15. The Memphis Sand Aquifer, or "Sparta Aquifer" as it is known in Mississippi ("the Aquifer"), is an underground reservoir that underlies hundreds of square miles in West Tennessee and Northern Mississippi, along with other lands.

16. The Aquifer, consisting of a 400-900 foot thick layer of very fine to very coarse sand interlaced with beds of clay and silt, is an optimum source of high-quality water supply for Mississippi riparian owners

and the State. It constitutes a unique and extremely valuable natural resource of the State. In fact, the groundwater from the Aquifer is considered to be among the best water sources in the United States.

17. MLGW, the largest user of the Aquifer, is currently, and has been for many years, taking massive quantities of Mississippi's portion of the groundwater, thus exceeding and/or overdrafting its rightful share of the Aquifer and is withdrawing, without permit, right or authority, thirty percent (30%), or about 60 MGD, of the City of Memphis' water supply from portions of the Aquifer underlying property owned by the State and Mississippi citizens.

18. Three (3) of the well fields serving MLGW's ten (10) water-pumping stations extend within two and one-half (2.5) miles of the Mississippi border. Heavy pumping of these municipal wells has been so excessive as to divert and change the natural flow path of the Aquifer, causing the State's groundwater to be siphoned and drained away from Mississippi into the City of Memphis. In West Tennessee and North Mississippi, the natural flow of groundwater in the Aquifer is to the west and southwest. However, due to MLGW's excessive pumping, the Aquifer water flow path has been diverted "uphill," northward from Mississippi across the State line into MLGW's wells.

19. As a result of MLGW's overdrafting, diversion and excessive and unreasonable taking and use of the State's groundwater from the Aquifer, MLGW has damaged and diminished the Aquifer, and the State's rights and interests therein, by various acts including, *inter alia*, (a) unlawfully taking, without payment or compensation, groundwater that belongs to the State for use by the People of Mississippi;

(b) improperly exceeding MLGW's share of the Aquifer for which it must compensate or reimburse the State; (c) lowering of the Aquifer groundwater table or artesian pressure; (d) injuring the Aquifer's ability to recharge, or replenish itself naturally; (e) the creation of "cones of depression" which have caused, contributed to or resulted in diversion of the State's water into the Memphis area; (f) the withdrawals of an excessive, unreasonable and disproportionate share of the Aquifer by MLGW in a manner which has violated and continues to violate the State's water rights; (g) causing, or contributing to, serious and irreparable contamination of the high quality groundwater contained in the Aquifer; and (h) causing fear of current and future injury and damage and uncertainty regarding the quality and availability of sufficient quantities of water supplies, which has caused, and will increasingly cause or contribute to, existing and/or potential prospective irreparable injury and harm, or, at a minimum, financially devastating damage to, destruction of or detrimental impact upon residential and commercial development of Northwest Mississippi.

20. During the periods involved in this action, MLGW's acts that have damaged, and continue to damage, the State include the following:

**MLGW's Improper Withdrawals Have
Exceeded Its Share of the Aquifer**

(a) MLGW has improperly taken, and continues to improperly take, quantities of groundwater exceeding its reasonable or beneficial share of the Aquifer in violation of Mississippi's correlative rights and the rights for reasonable and beneficial use of the People of the State. Extensive technical studies or reports prepared and disseminated by scientists

and legal experts for, or on behalf of, MLGW, and/or under the auspices of Memphis and/or Tennessee governmental and regulatory authorities or agencies, as well as by independent federal agencies, confirm conclusively that MLGW has taken, and continues to take, quantities of groundwater in excess of its share of the Aquifer to the direct ultimate detriment of the State. Such expert analyses and conclusions have been prepared for and reported to MLGW, the City of Memphis and various other governmental departments, agencies and branches of Tennessee in published material confirming the nature and extent of MLGW's improper, unlawful withdrawals of groundwater from the Aquifer and MLGW's liability to Mississippi, and its citizens, for the damages and other forms of remedies or relief requested herein.

Lowering the Aquifer Groundwater Table

(b) There is undisputed scientific and technical evidence of serious declines in the Aquifer groundwater table levels caused by MLGW's excessive pumping. The largest and most damaging declines have been in the Memphis area, where a major, expanding cone of depression has developed due to long-term heavy pumping at MLGW's well fields. Overdrafting or excessive taking of the State's groundwater by MLGW will prevent or inhibit the water level from returning to normal levels even if MLGW's excessive pumping ceases, thus causing substantial economic and environmental damages to the State.

Damage to Aquifer Recharge

(c) Aquifer recharge, or replenishment, occurs along a broad outcrop belt that stretches across West Tennessee. Excessive overdrafting or improper, illegal mining of the Aquifer by MLGW are diminish-

ing and adversely impacting Aquifer recharge, thus causing long-term and permanent damage to the Aquifer and the State's rights and interests therein.

Creation of a Cone of Depression

(d) MLGW's excessive pumping of the Aquifer has created a tremendous, expanding cone of depression in the Memphis area; in fact, the cone of depression centered at Memphis now extends over ten (10) miles into Desoto County, Mississippi. Undisputed estimates of competent, objective and independent federal agency studies, confirmed and adopted by MLGW and/or the Tennessee state authorities or agencies referenced hereinabove, show that thirty percent (30%) of MLGW's water, some 60 MGD, is now coming from under Desoto County by virtue of MLGW's siphoning of Mississippi's groundwater, causing it to flow across the State line into the City of Memphis.

Causing and Increasing Danger of Aquifer Contamination

(e) MLGW's withdrawals have caused or contributed to current and ongoing contamination and increased the risk of serious future contamination of the Aquifer by artificially increasing the rates of recharge into the Aquifer from polluted surficial water sources, such as creeks, waste disposal and abandoned dumpsites in the Memphis area. Arsenic, barium, cadmium, chromium, copper, lead, mercury, strontium, zinc and other dangerous contaminants have been found in the Aquifer, thus demonstrating the accumulation of concentrations of such pollutants in the drinking water supplies of the State's groundwater.

21. As a direct result of MLGW's unreasonable and excessive taking and use of Mississippi's groundwater from the Aquifer, the City of Memphis boasts water rates well below other large cities located on the Mississippi River and using primarily river water, such as St. Louis, Missouri and New Orleans, Louisiana, and is, therefore, benefitting substantially at the expense of Mississippi's riparian owners and to the ultimate detriment and damage of the State. The City of Memphis has expanded beyond and outgrown its ability to rely on groundwater and is better suited and obligated to access and use water available from the Mississippi [sic] River to supply its customers' requirements without improperly usurping and relying on the valuable, high-quality groundwater MLGW has taken, and continues to take, unlawfully from the State.

22. According to reliable data, MLGW is the largest municipal user of Mississippi's groundwater. MLGW's excessive, grossly disproportionate use will invariably increase proportionate to its growth and further expansion of residential, commercial and industrial water needs. The State's existing and prospective values of groundwater uses, land and real estate, investments, business development and commercial enterprises are being, and will in the future be, diminished, damaged or destroyed due to uncertainty regarding the quality, availability and reliability of present and future water supplies caused by MLGW's past and continuing actions. These circumstances give rise to a cloud over the security of the State's current and future water supply that have an immediate and prospectively worsening detrimental chilling effect on residential, commercial,

industrial and economic development of Northwest Mississippi.

CLAIMS FOR RELIEF

**COUNT I: UNJUST ENRICHMENT/
RESTITUTION**

23. The State adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 through 22 of this Complaint to the extent such allegations, statements or averments support or are consistent with the claims or causes of action of the State herein.

24. MLGW has exercised illegal control and dominion over, and taken wrongful and improper possession, without right, authority or permission, of Mississippi's valuable groundwater in direct contravention of the State's groundwater rights. As a result, MLGW has been unjustly enriched and has improperly and inequitably obtained, and continues to reap, substantial economic benefits in relation to, and because of its misappropriation and unreasonable use of, the State's property, which in good conscience and justice MLGW should not retain.

25. By virtue of MLGW's unjust enrichment, to the ultimate detriment and injury of the State and the People of Mississippi, MLGW is liable for, and must pay over and return to the State, the use value and value of benefits derived by MLGW attributable to the Aquifer groundwater taken from the State and Mississippi riparian owners represented by the State herein.

26. In accordance with the foregoing, the State is entitled to, and claims herein, restitution, equitable disgorgement and/or recovery of actual, compensa-

tory, incidental or consequential damages in an amount, sum or value currently estimated as several hundred million dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein. Alternatively, or in addition to such damages, the State seeks an injunction to prevent, prohibit and stop future, continued wrongs and injuries as specified herein. The State further requests such declarations as may be necessary or appropriate to support and effectuate any damages and/or injunction ordered in this cause.

COUNT II: RESTATEMENT (SECOND) OF TORTS, SECTION 858(1)(a) & (b)

27. The State adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 through 26 of this Complaint to the extent such allegations, statements or averments support or are consistent with the claims or causes of action of the State herein.

28. Restatement (Second) of Torts, Section 858(1)(a) & (b) provide:

(1) A proprietor of land or his grantee who withdraws groundwater from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless

(a) the withdrawal of groundwater unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure, [or]

- (b) the withdrawal of groundwater exceeds the proprietor's reasonable share of the annual supply or total store of groundwater.

29. MLGW's unlawful diversion and withdrawal of the State's groundwater have lowered the Aquifer's water table and/or pressure and have exceeded MLGW's reasonable share of the Aquifer, thus violating the State's correlative rights and rights of reasonable or beneficial use of its share of groundwater from the Aquifer.

30. Because of the past, current and continuing actions of MLGW, the State is entitled to, and claims alternatively or in addition to the other claims or causes of action set forth herein, recovery of actual, compensatory, incidental or consequential damages or compensation in an amount, sum or value currently estimated as several hundred million dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein. The State is also entitled to, and claims herein, declaratory judgment(s) and injunctive relief in order to protect its existing and future rights and interests from being damaged, diminished or destroyed by MLGW's misconduct.

COUNT III: TRESPASS

31. The State adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 through 30 of this Complaint to the extent such allegations, statements or averments support or are consistent with the claims or causes of action of the State herein.

32. MLGW's actions constitute an unlawful present and continuing physical invasion of the State's rights and interests in the Aquifer made and committed without authority, permission, permit, license, consent, approval or acquiescence of the State. MLGW's overdrafting, diversion, withdrawal, and excessive taking and improper use of the State's groundwater has been, and continues to be, intentional, willful, wanton and reckless in direct infringement upon or usurpation of the groundwater resources of the State and Mississippi riparian owners represented by the State herein. Alternatively, the actions of MLGW constitute negligence on the part of MLGW for, *inter alia*, failing to fairly, equitably and reasonably take and use its proper share of the Aquifer and further failing to establish, develop and utilize existing available sources for supplying its customers' water requirements other than the groundwater unlawfully taken from Mississippi.

33. Accordingly, MLGW has committed, and continues to commit, a willful, intentional and/or negligent trespass for which MLGW is liable to the State for, *inter alia*, damages and/or injunctive relief as requested herein.

34. In accordance with the foregoing, the State is entitled to, and claims alternatively or in addition to the other claims or causes of action set forth herein, recovery of actual, compensatory, incidental or consequential damages in an amount, sum or value currently estimated as several hundred million dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein. Alternatively, or in addition to such damages, the State seeks an injunction to

prevent, prohibit and stop future, continued wrongs and injuries as specified herein. The State further requests such declarations as may be necessary or appropriate to support and effectuate any damages and/or injunction ordered in this cause.

COUNT IV: CONVERSION

35. The State adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 through 34 of this Complaint to the extent such allegations, statements or averments support or are consistent with the claims or causes of action of the State herein.

36. MLGW is now, and has been, taking and using Aquifer groundwater owned by the State for the benefit and use of the People of Mississippi for the wrongful purpose and intent of misappropriating and selling Mississippi's water to MLGW customers. As a result of the positive and tortious acts of MLGW, MLGW and/or the City of Memphis have unjustly and improperly benefitted, and have enjoyed substantial gains and profits, to the ultimate detriment of the State and its citizens.

37. MLGW has assumed and exercised, and continues to assume and exercise, unlawful control and dominion over Mississippi's groundwater in a manner which interferes and is inconsistent with and detrimental to the rights and interests of the State and the People of Mississippi. MLGW has knowingly and intentionally taken and used, and continues to unlawfully take and use, the State's groundwater and has, as a result, enjoyed illegally and inequitably, tremendous profits and benefits in relation to its business operations conducted for, or as part of, its utility service to, the City of Memphis.

38. MLGW's conduct constitutes conversion of the property of the State and the riparian owners owning lands overlying the Aquifer within the State of Mississippi. MLGW's misappropriation or conversion of the State's property is unlawful and inequitable, and, alternatively, its actions are and have been willful, malicious and fraudulent, such that the State, for itself and its citizens, is entitled to receive, and MLGW is liable for and must unconditionally pay to the State, the fair market value of the State's converted property and/or any and all amounts received by MLGW as a result of its misappropriation or conversion of the State's property, together with values of any profits or other benefits derived by MLGW, or the City of Memphis, by virtue of MLGW's conduct complained of herein.

39. In accordance with the foregoing, the State is entitled to, and claims alternatively or in addition to the other claims or causes of action set forth herein, restitution, equitable disgorgement, and/or the recovery of actual, compensatory, incidental or consequential damages in an amount, sum or value currently estimated as several hundred million dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein. Alternatively, or in addition to such damages or forms of compensation, the State seeks an injunction to prevent, prohibit and stop future, continued wrongs and injuries as specified herein. The State further requests such declarations as may be necessary or appropriate to support and effectuate any damages and/or injunction ordered in this cause.

**COUNT V: IMPOSITION OF CONSTRUCTIVE,
IMPLIED OR RESULTING TRUST**

40. The State adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 - 39 of this Complaint to the extent such allegations, statements or averments support or are consistent with the claims or causes of action of the State herein.

41. MLGW's excessive pumping of Aquifer groundwater and its improper taking and use of, and exercise of illegal control and dominion over, the State's property, in violation of the correlative rights and/or rights of reasonable and beneficial use of the State and its citizens, have unjustly enriched, and continue to improperly and inequitably inure to the benefit of, MLGW and the City of Memphis.

42. The State and the People of Mississippi own unique and valuable rights and interests in relation to the Aquifer groundwater, including the groundwater unlawfully taken and used by MLGW. As a result of MLGW's unjust and inequitable conduct described herein, MLGW has obtained, held or enjoyed property rights and interests, and derived monies, profits or benefits therefrom, which rightfully belong to the State and its citizens and which MLGW, in equity or good conscience, has no right or entitlement to hold or enjoy.

43. MLGW's conduct is such that warrants, to the extent applicable herein, the imposition of a constructive, implied or resulting trust over all properties or rights and interests therein owned by the State, as well as all revenues or funds or other profits, benefits or values derived, claimed or held by MLGW, for itself or on behalf of the City of Memphis, in relation to all of the groundwater diverted, with-

drawn, taken and used by MLGW to the ultimate detriment of the State and the People of Mississippi.

44. Accordingly, to the extent applicable, the State is entitled to, and requests alternatively or in addition to the other claims or causes of action set forth herein, the imposition of an implied, constructive or resulting trust upon all property and rights and interests converted by MLGW and all monies, revenues, funds or other benefits, profits or values conferred upon or derived, claimed or illegally retained by MLGW and/or the City of Memphis, together with an order requiring MLGW to unconditionally return to the State all such converted property, rights and interests and to pay the State all monies, revenues, funds, benefits, profits or values unjustly obtained or retained by MLGW. The State also requests an award of actual, compensatory, incidental or consequential damages in an amount, sum or value currently estimated as several hundred million dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein. Alternatively, or in addition to such damages, the State seeks an injunction to prevent, prohibit and stop future, continued wrongs and injuries as specified herein. The State further requests such declarations as may be necessary or appropriate to support and effectuate any damages and/or injunction ordered in this cause.

COUNT VI: NUISANCE

45. The State adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 through 44 of this Complaint to the extent such allegations, statements or averments support or are

consistent with the claims or causes of action of the State herein.

46. MLGW's excessive pumping of its well fields bordering Mississippi for the purpose of taking and using, without legal right, permit or authority, groundwater belonging to the State and the People of Mississippi has caused present and continuing, and will cause future, injury and damage to the Aquifer and the rights and interests of the State and Mississippi riparians in the ownership and use thereof.

47. Some or all of the actions of MLGW as complained of herein, including those enumerated in Paragraphs 19, 20(a)-(e), 21 & 22 hereof, constitute a present and continuing significant and unreasonable interference with the groundwater ownership rights and interests of the State and Mississippi riparian owners represented by the State herein, which are common to the general public welfare and public trust. MLGW's past, present and continuing taking of the State's groundwater contravenes, and is proscribed by, state and, where applicable, federal common law, statutory laws and regulations and, if unabated and allowed to continue without monetary compensation to the State, along with other relief sought herein, has had, and will continue to have, a long-lasting, substantial negative effect and adverse impact upon the Aquifer and the State's rights and interests. MLGW knows, or has reason to know, or has for some time known or had reason to know, that its actions and conduct have had, and continue to have, such effect and impact.

48. In accordance with the foregoing, the State is entitled to, and claims alternatively or in addition to their other claims set forth herein, recovery of actual, compensatory, incidental or consequential damages

in an amount, sum or value currently estimated as several hundred million dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein. Alternatively, or in addition to such damages, the State seeks an injunction to prevent, prohibit and stop future, continued wrongs and injuries as specified herein. The State further requests such declarations as may be necessary or appropriate to support and effectuate any damages and/or injunction ordered in this cause.

COUNT VII: UNLAWFUL TAKING OR INVERSE CONDEMNATION

49. The State adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 through 48 of this Complaint to the extent such allegations, statements or averments support or are consistent with the claims or causes of action of the State herein.

50. Under the applicable state and federal laws, private property shall not be taken or damaged for public use except upon just compensation being first made.

51. MLGW has taken and damaged, and continues to take and damage, valuable property and property rights belonging to the People of Mississippi represented by the State herein.

52. As a result of MLGW's illegal and unconstitutional takings of Aquifer groundwater owned by the State, and subject to the right of beneficial use of the People of Mississippi, without their knowledge, approval, consent, permission or acquiescence, the

State is entitled to recover, and demands recovery of, compensation in an amount, sum or value currently estimated as several hundred million dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein.

COUNT VIII: DECLARATORY JUDGMENT

53. The State adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 through 52 of this Complaint to the extent such allegations, statements or averments support or are consistent with the claims or causes of action of the State herein.

54. Under Rule 57, FED. R. CIV. P. and 28 U.S.C.A. Sections 2201, *et seq.*, this Court has the power and authority to declare the rights, interests and other legal relations of the parties as to the matters which are the subject of this cause. This interstate groundwater dispute is a present, justiciable controversy as to which this Court may order a speedy hearing.

55. There exist in this cause questions regarding, *inter alia*, the clarification and establishment of legal relationships between the parties, including, *inter alia*, MLGW's liabilities to the State and MLGW's duties and obligations to pay damages to the State and to take actions to mitigate or eliminate diminution or destruction of the State's groundwater and rights and interests in the Aquifer.

56. Accordingly, Plaintiff, the State, requests declaratory judgment from this Court including, but not limited to, the following:

- (a) a declaration that MLGW has improperly taken, and continues to improperly take, Aquifer groundwater from the State and the People of Mississippi;
- (b) declarations(s) that MLGW's diversion, withdrawal, and/or use of such groundwater is and has been excessive, unreasonable and unlawful;
- (c) a declaration that MLGW has diverted, withdrawn or taken, and continues to divert, withdraw or take, such groundwater without permit or legal authority and/or that such takings, diversions or withdrawals constitute unlawful overdrafting or mining of the Aquifer;
- (d) a declaration that the actions of MLGW complained of herein, including, but not limited to, the acts enumerated in Paragraph Nos. 56(a)-(c) hereof, have violated, and will continue to violate Mississippi's water rights by virtue of MLGW's continuous and repeated wrongful diversion and excessive withdrawal, taking or misappropriation of the State's groundwater;
- (e) declaration(s) providing that MLGW must pay the State (i) damages and other sums, values or compensation referenced herein for MLGW's past and ongoing present unlawful and improper use of the State's groundwater for all applicable retroactive periods and (ii) all future damages or payments that may accrue due to MLGW's continued unlawful, excessive withdrawal, taking and use of the State's groundwater;
- (f) declarations that, in addition to quantifying and requiring unconditional payment of the

past, present and future damages or payments requested herein, provide that MLGW shall be required to cease taking and using the State's groundwater and/or that MLGW must obtain, at MLGW's sole cost, expense and effort, alternative sources for its water supply other than water from the State's share of the Aquifer;

- (g) declaration(s) establishing criteria to govern future or prospective withdrawals of Aquifer groundwater so that MLGW's takes (i) do not encroach upon, diminish or destroy the State's share of the Aquifer, (ii) do not cause further monetary damages to the State, (iii) do not exceed MLGW's reasonable share of the Aquifer, (iv) do not unreasonably lower Aquifer water table or pressure, (v) do not adversely affect, restrict, or impair Aquifer recharge capacity or capability, (vi) do not cause or contribute to Aquifer contamination or damage, (vii) do not alter Aquifer flow path or create additional or worse cone(s) of depression, and (viii) do not diminish, hinder, impair, damage or destroy any of the State's rights and interests, including the State's interests, and the interests of its citizenry, in the economic development and viability of Northwest Mississippi;
- (h) in addition to an award of past and future damages and/or compensation as requested herein, declaration(s) establishing future allocation, apportionment and use criteria, or implementing a physical solution, to adjust, stabilize and maintain proper and equitable withdrawals of groundwater by MGLW, and by the State, and to prevent or minimize the

occurrence of disputes and controversies over or regarding the Aquifer prospectively;

- (i) in addition to an award of past and future damages and/or compensation as requested herein, such declaration(s) as warranted under the circumstances to effectuate all actions necessary and appropriate to ensure the fair, equitable, reasonable and legal use of the Aquifer prospectively consistent with all applicable laws, rules, regulations and orders; and
- (j) such declarations as may be required to implement, mandate, support and make fully effective each and every request, claim or demand for relief and remedy set forth herein, including, but not limited to declaration(s) as may be necessary or appropriate to quantify and facilitate MLGW's payment of damages or compensation claimed by the State.

Plaintiff, the State, requests and reserves the right to expand, clarify, amend and/or supplement the declarations sought or to be sought in this cause.

COUNT IX: INJUNCTIVE RELIEF

57. The State adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 through 56 of this Complaint to the extent such allegations, statements or averments support or are consistent with the claims or causes of action of the State herein.

58. The ongoing excessive pumping by MLGW, siphoning tremendous quantities of valuable groundwater each day from Mississippi's share of the Aquifer, has caused, and will continue to cause, immediate and continuing irreparable harm and damage

to the State and the riparian owners or landowners represented by the State herein, because, among other things, MLGW's wrongful diversion and withdrawal of Mississippi's Aquifer groundwater constitutes a continuing trespass and/or nuisance for which there is no adequate remedy, in whole or in part, for past, present and/or future damages which will, absent the injunctive relief requested herein, require a multiplicity of suits.

59. MLGW's illegal and unreasonable exploitation of Mississippi's groundwater will, absent the injunctive relief requested herein, continue for an indefinite time in the future, and it is, and will be, unconscionable, harsh and inequitable to require the State to bring a multiplicity of successive future suits as MLGW continues to aggressively draw down Mississippi's reasonable, beneficial share of the Aquifer until the groundwater quantities and quality are jeopardized or damaged and the resulting monetary damages, or sums awarded for just compensation, are or become increasingly difficult to measure and quantify. Mississippi's Aquifer groundwater is a unique and valuable resource belonging to the State and, thus, to the People of Mississippi for their use, benefit and welfare. MLGW's continuous and repeated invasion upon the State's property and rights and interests therein, and its threatened future diversions and withdrawals from the Aquifer, entitle the State to the entry of an injunction in addition to all damages or compensation sought in this cause.

60. Because of the important and substantial rights and interests involved in this dispute, and because there exists no complete adequate remedy at law for a substantial portion of the injuries suffered, and to be suffered, by the State, Plaintiff seeks entry

of a permanent, mandatory injunction directing and compelling MLGW to (a) cease and desist entirely from the overdrafting, diversion, withdrawal, taking and/or use of Aquifer groundwater located under Mississippi lands and belonging to the State, including the quantities of groundwater referenced in this Complaint, and to (b) immediately and prospectively take all steps or measures, make all arrangements and agreements and obtain all approvals and authorizations necessary or appropriate to plan, fund, implement, construct and operate a river water treatment plant designed to access and make available for use water from, *inter alia*, the Mississippi River as a substitute for the amounts of groundwater being taken by MLGW currently, or to be taken by MLGW prospectively, from the share of the Aquifer owned by and attributable or allocable to the rights and interests of the State and the owners of water and water rights represented by the State herein.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff, the State, requests an award or judgment from the Court providing:

A. An award of actual, compensatory, incidental or consequential damages in an amount, sum or value currently estimated as several hundreds of millions of dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein for all injuries sustained and damages caused by MLGW's conduct as of the date of the filing of this Complaint, together with all damages, sums, values and other monetary payments or compensation as may accrue or become due and owing prospectively;

B. An award of pre-judgment interest, post judgment interest, attorney's fees, costs, expenses or other monetary payments, sums or values as may be warranted by the evidence presented at trial or other proceedings herein;

C. Alternatively, or in addition to such damages, payments or compensation, an award of an injunction to prevent, prohibit and stop future, continued wrongs and injuries as specified in this Complaint, including, but not limited to, the injunctive relief requested in Paragraph No. 60 hereof;

D. An award of such declarations as may be necessary or appropriate to support or effectuate any damages and/or injunctive relief ordered in this cause, including, but not limited to, the declaratory judgment(s) requested in Paragraph Nos. 56(a)-(j);

E. An award of such other or further relief which this Court, in equity and good conscience, finds and declares is necessary or appropriate to afford complete availability and recovery of all damages, payments, compensation, or other forms of remedies or relief sought by the State, for itself and/or the People of the State of Mississippi, for the past, current and continuing, and future, illegal misconduct of MLGW as specified herein.

Dated this the 1st day of February, 2005.

Respectfully submitted,

Attorneys for Jim Hood, Attorney General, *ex rel.*, The State of Mississippi, Acting for Itself and *Parens Patriae* for and on behalf of the People of the State of Mississippi

BY: /s/ Alan B. Cameron

Alan B. Cameron, MSB #4968
Larry D. Moffett, MSB #3401
Daniel Coker Horton & Bell, P.A.
Oxford Square North
265 North Lamar Boulevard, Suite R
Post Office Box 1396
Oxford, Mississippi 38655
Telephone: (662) 232-8979
Fax: (662) 232-8940
E-mail: acameron@danielcoker.com

Of Counsel:

John W. (Don) Barrett
David M. McMullan, Jr.
Barrett Law Office, P.A.
404 Court Square North
Post Office Box 987
Lexington, Mississippi 39095
Telephone: (662) 834-2376
Facsimile: (662) 834-2628
E-mail: dbarrett@barrettlawoffice.com

George B. Ready
George B. Ready Attorneys
Post Office Box 127
Hernando, Mississippi 38632
Telephone: (662) 429-7088
Facsimile: (662) 429-5474
E-mail: gbready@georgebreadyattorneys.com

Geoffrey C. Morgan
George W. Neville
Office of the Attorney General
State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205-0220
Telephone: (601) 359-3680
Facsimile: (601) 359-2009
E-mail: gmorg@ago.state.ms.us
gnevi@ago.state.ms.us

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

Civil Action No. 2:05CV32-D-B

JIM HOOD, Attorney General, *ex rel.*,
THE STATE OF MISSISSIPPI, Acting for
Itself and *Parens Patriae* for and on behalf of the
People of the State of Mississippi,
Plaintiff,

v.

THE CITY OF MEMPHIS, TENNESSEE, AND
MEMPHIS LIGHT, GAS & WATER DIVISION,
Defendants.

[Filed Oct. 5, 2006]

**FIRST AMENDED COMPLAINT
(JURY TRIAL REQUESTED)**

PARTIES

PLAINTIFF

1. Jim Hood, the duly elected and present Attorney General of the State of Mississippi, according to law and equity, brings this action on behalf of Plaintiff, the State of Mississippi, acting for itself and *parens patriae* for and on behalf of the People of the State of Mississippi ("Mississippi" or "Plaintiff").

2. Plaintiff is a sovereign body politic governed by the Constitution and laws of Mississippi and, as

such, is authorized, entitled and required to bring this action pursuant to law. Under the Mississippi Constitution of 1890 and other laws of the State of Mississippi, including Mississippi's common law or decisional law, and including, among other applicable laws, Mississippi Code Annotated Title 51, Chapter 3, Article 1, Sections 51-3-1, *et seq.*, Mississippi owns the water resources of the State and has certain rights, interests and duties and is responsible, in the exercise of its police powers, for management, supervision, control, regulation, enforcement and use of the water resources of Mississippi for purposes of, *inter alia*, prevention and prohibition of, and prosecution of claims and issues relative to, the unlawful and unreasonable diversion, taking and use, or unlawful and unreasonable methods of diversion, taking and use, of such water resources as described in Paragraph Nos. 10 & 14 - 22 hereof.

3. Plaintiff, Mississippi, owns and exercises rights, interests, entitlements, privileges and/or duties which authorize and empower Mississippi to act for itself and *parens patriae* herein.

DEFENDANTS

4. Defendant, Memphis Light, Gas & Water Division ("MLGW") is a division of Defendant, the City of Memphis, Tennessee ("Memphis"), both of whom are often collectively referred to herein as "Memphis-MLGW" or "Defendants." Memphis-MLGW is a non-resident foreign municipal utility company, organized and existing by virtue of an amendment to the Memphis City Charter, Chapter 381 of the Private Acts of the General Assembly of Tennessee, adopted March 9, 1939, as amended, whose address is 220 South Main Street, Memphis, Tennessee 38103, and who is now, and at all times pertinent hereto has

been, doing business in Mississippi and, as a result of the acts complained of herein, has committed, and continues to commit, torts in whole or in part in Mississippi for purposes of, *inter alia*, MISS. CODE ANN. Section 13-3-57 (1972 & Supp. 2006).

5. Pursuant to Rule 4(j)(2), FED. R. CIV. P., Memphis-MLGW was properly served with process by Plaintiffs' counsel on February 1, 2005, by delivery of a summons and Complaint to, and personal service of same upon, MLGW's President and Chief Executive Officer, Joseph Lee, III, and by other contemporaneous service of process properly effected in accordance with applicable law upon Memphis' Mayor, Dr. Willie W. Herenton (served February 1, 2005), Memphis' City Attorney, Sara L. Hall (served February 1, 2005) and MLGW's General Counsel, J. Maxwell Williams (served February 1, 2005).

6. MLGW, the nation's largest three-service municipal utility, provides electricity, gas and water to its customers in Shelby County, Tennessee, including the City of Memphis, and also engages in direct business or commerce in Mississippi through its electric and gas interconnections and gas distribution activities, as well as through sales of water to customers located in Mississippi, such as the City of Olive Branch, Mississippi.

7. Additionally, MLGW owns and operates one of the largest artesian water systems in the world and, as a result, Memphis is the largest city in the world that relies solely on ground water wells for its water supply. Because of the acts of Memphis-MLGW as set forth in Paragraph Nos. 14 - 22 hereof, a substantial portion of Memphis' water supply comes from high-quality aquifer ground water unlawfully diverted and withdrawn by MLGW from underneath

lands situated exclusively within and belonging to Mississippi. Memphis-MLGW is the largest pumper and user of Mississippi's ground water from wells and wellfields operated in and encompassed within the Memphis area.

JURISDICTION AND VENUE

8. Jurisdiction in this interstate or transboundary ground water dispute is proper in this Court under 28 U.S.C.A. Sections 1331 & 1332 inasmuch as, *inter alia*, there are presented herein certain federal questions calling for application of federal and/or interstate common law, in addition to Mississippi state law, and because there exists complete diversity of citizenship between the parties. The amount in controversy exceeds the sum or value of seventy-five thousand dollars (\$75,000.00) exclusive of interests and costs.

9. Venue in this cause is proper in this Court under 28 U.S.C.A. Sections 1391(a)(2) & (b)(2).

INTRODUCTION

NATURE OF DISPUTE

10. Mississippi seeks damages for MLGW's diversion and pumping and withdrawal of ground water from the Memphis Sand or Sparta Aquifer underlying Northwest Mississippi, specifically portions of Desoto County, Mississippi and Marshall County, Mississippi. For decades, Memphis-MLGW has been taking, without permission or payment, vast quantities of its water supply from Mississippi. It is currently estimated that one-third (1/3) of Defendants' water requirements, or 60,000,000 gallons per day (60 MGD), are pumped by MLGW's wells and wellfields from Mississippi's ground water resources. Memphis-MLGW in turn sells and supplies this

ground water to its customers, thus unjustly benefiting by its misappropriation of Mississippi's ground water. Absent obtaining the retroactive and prospective relief requested by Plaintiff herein, it is anticipated that Memphis-MLGW's pumpage and taking of Mississippi's ground water will continue and increase prospectively. Therefore, in addition to damages, Mississippi seeks injunctive relief and declaratory judgment(s) to, *inter alia*, require Memphis-MLGW to stop taking Mississippi's ground water and to prohibit Defendants from diverting, pumping and misappropriating Mississippi's ground water in the future.

NATURE OF RELIEF SOUGHT

11. Damages. Mississippi requests recovery of damages, plus interest, in an aggregated amount equal to the value of Mississippi's ground water unlawfully taken by Memphis-MLGW for the period 1985 to the present or such other time-frames that may apply. Additionally, and/or in the alternative, Mississippi requests recovery of damages measured by, *inter alia*, the unjust benefits derived and costs avoided by Defendants by virtue or as a result of Memphis-MLGW's failure and refusal to take advantage of other available sources and methods of obtaining its water supply instead of Defendants' unlawful taking of Mississippi's ground water. These damages and payments due are estimated to be in a range of several hundreds of millions of dollars. Mississippi reserves the right to supplement its allegations regarding the total amount of and/or bases for such damages.

12. Declaratory Judgment(s). Mississippi seeks certain declaration(s), including those set forth in Paragraph Nos. 45 - 48 hereof, establishing, among

other things, that (a) Memphis-MLGW is, and has been, pumping and taking Mississippi's ground water and violating Mississippi's water rights by virtue of its continuous and repeated wrongful diversion and withdrawal or misappropriation of Mississippi's ground water; that (b) Memphis-MLGW is liable for and must pay Mississippi monetary damages measured by, *inter alia*, (i) the unjust benefits derived and costs avoided by Defendants and/or (ii) the fair market value or other value or monetary equivalent of the billions of gallons of ground water taken by Memphis-MLGW from Mississippi and/or (iii) any values obtained, amounts received and/or profits recovered or realized by Defendants, along with all other damages and forms of relief and declarations claimed herein; and that (c) Memphis-MLGW must take such actions as necessary or appropriate to cease taking Mississippi's ground water and to eliminate or reduce the potential for future damages to Mississippi's ground water rights and interests.

13. Injunctive Relief. Mississippi requests an order(s) enjoining and requiring Memphis-MLGW to, *inter alia*, stop immediately, or as soon as practicable, its diversion and pumping and withdrawal of Mississippi's ground water from the Memphis Sand or Sparta Aquifer.

STATEMENT OF FACTS COMMON TO ALL CLAIMS

14. The Memphis Sand Aquifer, or "Sparta Aquifer" as it is known in Mississippi ("the Aquifer"), is an underground reservoir that underlies portions of West Tennessee and Northwest Mississippi.

15. The Aquifer, consisting of a 400-900 foot thick layer of very fine to very coarse sand interlaced with beds of clay and silt, is an optimum source of high-

quality water supply for Mississippi. It constitutes a unique and extremely valuable natural resource and the ground water produced from the Aquifer is considered to be among the best water sources in the United States.

16. Memphis-MLGW is currently, and has been for many years dating back to 1965 and earlier, taking billions of gallons of Mississippi's portion of the Aquifer ground water without permit, right or authority. Based on scientific and other reports prepared by or for Memphis-MLGW, it is currently estimated that a minimum of $1/3$, or about 60 MGD, of Memphis' water supply comes from portions of the Aquifer underlying, and which belong to, Mississippi.

17. Memphis-MLGW operates hundreds of wells in numerous wellfields, many of which are geographically situated close to the Mississippi border. For decades, Memphis-MLGW's heavy pumping of these municipal wells has caused or contributed to diversion and change of the pre-development or natural south-westerly flow path of the Aquifer so that ground water is now, and has for years been, flowing northward from Mississippi into Memphis. As a result of Memphis-MLGW's pumping, a cone of depression centered under and expanding outward from Memphis has formed in the Aquifer. This has for, at least, the past four decades, caused billions of gallons of Mississippi's ground water to flow northward away from Mississippi, across the border, and into Defendants' wells and wellfields for production of such ground water into MLGW's water distribution system for sale and delivery to Defendants' customers.

18. Numerous and extensive, publicly available scientific and technical studies and reports prepared by or on behalf of Memphis-MLGW demonstrate and

confirm conclusively that Defendants' pumping has (a) caused or contributed to the cone(s) of depression centered in and underlying Memphis and extending into Northwest Mississippi; (b) changed or contributed to change of the natural flow path or gradient of the Aquifer to a northwest direction away from Mississippi and into the Memphis area; and (c) resulted in diversion and taking by Defendants of Mississippi's ground water for use by and sale to Memphis-MLGW's customers.

19. Memphis-MLGW has no permit, right or authority to have taken, or to continue to take, Mississippi's Aquifer ground water. Defendants have, thus, misappropriated, and are continuing to misappropriate, and to take and use, Mississippi's ground water resources without compensation or payment.

20. As a direct result of Defendants' pumping, taking and use of Mississippi's ground water from the Aquifer, Memphis boasts water rates well below other peer cities, including other large cities located on the Mississippi River and using primarily river water. By misappropriating Mississippi's ground water, Memphis-MLGW has avoided costs of constructing and operating alternate water supply systems and facilities and is, therefore, benefitting substantially and unjustly to the detriment and damage of Mississippi. Defendants have the capability to access and use water available from the Mississippi [sic] River, or other sources, to supply its customers' requirements without improperly usurping and relying on the valuable, high-quality ground water Memphis-MLGW has taken, and continues to take, unlawfully, without permit or payment, from Mississippi.

21. Defendant's pumping and use of Mississippi's ground water will invariably increase proportionate to Memphis' growth and further expansion of residential, commercial and municipal water needs. Public and private studies and reports available to Memphis-MLGW demonstrate that Defendants have known that MLGW has been pumping, diverting and taking Mississippi's ground water for many years and that Memphis-MLGW will in the future have to cease, or reduce, its taking of Mississippi's ground water. Even so, Memphis-MLGW has made no plans and taken no action to reduce or eliminate its known and undeniable taking and use of ground water sourced in and withdrawn from Mississippi.

22. As a result of the acts complained of herein, Mississippi is entitled to (a) recovery of damages measured by and equal to, *inter alia*, (i) the value, plus interest, of all of Mississippi's Aquifer ground water pumped and taken by Memphis-MLGW annually from 1985 to the present (or such other time-frames that may apply) and/or (ii) the monetary equivalent of the past and future unjust benefits derived or costs avoided by Memphis-MLGW due to its taking and use of Mississippi's Aquifer ground water; and (b) order(s) requiring Memphis-MLGW to stop taking and misappropriating Mississippi's ground water and to plan, fund and implement all operational strategies and alternate facilities as may be required to eliminate Defendants' misappropriation of Mississippi's ground water now and in the future.

CLAIMS FOR RELIEF

COUNT I: CONVERSION

23. Mississippi adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1

through 22 of this First Amended Complaint to the extent such allegations, statements or averments support or are consistent with the claims or causes of action of Mississippi herein.

24. Memphis-MLGW is now, and has been, taking and using Aquifer ground water owned by Mississippi for the wrongful purpose and intent of misappropriating and selling Mississippi's water to Memphis-MLGW customers. As a result of the tortious acts of Defendants, MLGW and Memphis have unjustly and improperly benefitted, and have enjoyed substantial gains and profits, to the ultimate detriment of Mississippi.

25. Defendants have assumed and exercised, and continue to assume and exercise, unlawful control and dominion over Mississippi's ground water in a manner which interferes and is inconsistent with and detrimental to the rights and interests of Mississippi. Memphis-MLGW has knowingly and intentionally taken and used, and continues to unlawfully take and use, Mississippi's ground water and has, as a result, enjoyed illegally and inequitably, tremendous profits and benefits in relation to its business operations conducted for, or as part of, its utility service to Memphis and its customers.

26. Memphis-MLGW's conduct constitutes conversion of the property of Mississippi. Defendants' misappropriation or conversion of Mississippi's property is unlawful and inequitable, and, alternatively, its actions are and have been willful, malicious and fraudulent, such that Mississippi is entitled to receive, and Memphis-MLGW is liable for and must unconditionally pay to Mississippi, the fair market value, plus interest, of Mississippi's converted property and/or any and all amounts or values received

by Memphis-MLGW as a result of, or relating to, Defendants' misappropriation or conversion of Mississippi's property, together with values of any profits or other benefits derived or costs avoided by MLGW and Memphis by virtue of Defendants' conduct complained of herein.

27. In accordance with the foregoing, Mississippi is entitled to, and claims alternatively or in addition to the other claims or causes of action set forth herein, restitution, equitable disgorgement, and/or the recovery of actual and compensatory damages in an amount, sum or value currently estimated as several hundred million dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein.

COUNT II: TRESPASS

28. Mississippi adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 through 27 of this First Amended Complaint to the extent such allegations, statements or averments support or are consistent with the claims or causes of action of Mississippi herein.

29. Memphis-MLGW's actions constitute an unlawful present and continuing physical invasion of Mississippi's rights and interests in the Aquifer made and committed without authority, permission, permit, license, consent, approval or acquiescence of Mississippi. Memphis-MLGW's pumping, diversion, withdrawal, and taking and improper use of Mississippi's ground water has been, and continues to be, intentional, willful, wanton and reckless in direct infringement upon or usurpation of the ground water resources of Mississippi. Alternatively, the actions of

Memphis-MLGW constitute negligence on the part of Defendants for, *inter alia*, (a) pumping Memphis' water supply from the Aquifer so aggressively as to divert and take, without payment or permission, substantial volumes of Mississippi's ground water to be sold to customers of Memphis-MLGW and (b) failing to establish, develop and utilize existing available alternate sources for supplying its customers' water requirements other than the ground water unlawfully taken from Mississippi.

30. Accordingly, Memphis-MLGW has committed, and continues to commit, a willful, intentional and/or negligent trespass for which Defendants are liable to Mississippi for, *inter alia*, damages and/or injunctive relief as requested herein.

31. In accordance with the foregoing, Mississippi is entitled to, and claims alternatively or in addition to the other claims or causes of action set forth herein, recovery of actual and compensatory damages in an amount, sum or value currently estimated as several hundred million dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein.

COUNT III: UNJUST ENRICHMENT/ RESTITUTION

32. Mississippi adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 through 31 of this First Amended Complaint to the extent such allegations, statements or averments support or are consistent with the claims or causes of action of Mississippi herein.

33. Memphis-MLGW has exercised illegal control and dominion over, and taken wrongful and improper possession, without right, authority, permit, payment or permission, of Mississippi's valuable ground water in direct contravention of Plaintiffs' ground water rights. As a result, MLGW has been unjustly enriched and has improperly and inequitably obtained, and continues to reap, substantial economic benefits in relation to, and because of its misappropriation and unreasonable use of, Mississippi's property, which in good conscience and justice Memphis-MLGW should not retain.

34. By virtue of Defendants' unjust enrichment, to the ultimate detriment and injury of Mississippi, Memphis-MLGW is liable for, and must pay over and return to Mississippi, the use value and value of benefits derived by Defendants attributable to the Aquifer ground water taken from Mississippi.

35. In accordance with the foregoing, Mississippi is entitled to, and claims herein, restitution, equitable disgorgement and/or recovery of actual and compensatory damages in an amount, sum or value currently estimated as several hundred million dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein.

COUNT IV: IMPOSITION OF CONSTRUCTIVE, IMPLIED OR RESULTING TRUST

36. Mississippi adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 - 35 of this First Amended Complaint to the extent such allegations, statements or averments support or are

consistent with the claims or causes of action of Mississippi herein.

37. Memphis-MLGW's pumping of Aquifer ground water and its improper taking and use of, and exercise of illegal control and dominion over, Mississippi's property, have unjustly enriched, and continue to improperly and inequitably inure to the benefit of, MLGW and Memphis.

38. Mississippi owns unique and valuable rights and interests in relation to the Aquifer ground water, including the ground water unlawfully taken, used and sold by Memphis-MLGW. As a result of Defendants' unjust and inequitable conduct described herein, Memphis-MLGW has obtained, held or enjoyed property rights and interests, and derived monies, profits or benefits therefrom, which rightfully belong to Mississippi and which Memphis-MLGW, in equity or good conscience, has no right or entitlement to hold or enjoy.

39. Memphis-MLGW's conduct is such that warrants the imposition of a constructive, implied or resulting trust over all properties or rights and interests therein owned by Mississippi, as well as all revenues or funds or other profits, benefits or values derived, claimed or held by MLGW, for itself or on behalf of Memphis, in relation to all of the ground water diverted, withdrawn, taken and used by Memphis-MLGW to the ultimate detriment of Mississippi.

40. Accordingly, Mississippi is entitled to, and requests alternatively or in addition to the other claims or causes of action set forth herein, the imposition of an implied, constructive or resulting trust upon all property and rights and interests converted by Memphis-MLGW and all monies, revenues, funds or

other benefits, profits or values conferred upon or derived, claimed or illegally retained by MLGW and/or Memphis, together with an order requiring Defendants to pay the State all monies, revenues, funds, benefits, profits or values unjustly obtained or retained by Memphis-MLGW. Mississippi also requests an award of actual and compensatory damages in an amount, sum or value currently estimated as several hundred million dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein.

COUNT V: NUISANCE

41. Mississippi adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 through 40 of this First Amended Complaint to the extent such allegations, statements or averments support or are consistent with the claims or causes of action of Mississippi herein.

42. Memphis-MLGW's pumping of its wellfields resulting in Defendants' taking and use, without legal right, permit or authority, of ground water belonging to Mississippi has caused present and continuing, and will cause future, injury and damage to the rights and interests of Mississippi in the Aquifer.

43. Some or all of the actions of Defendants as complained of herein, including those enumerated in Paragraphs 10 & 14 - 22 hereof, constitute a present and continuing significant and unreasonable interference with the ground water ownership rights and interests of Mississippi, *i.e.*, the pumping and taking or misappropriation of Mississippi's ground water without payment or compensation. Memphis-MLGW's

past, present and continuing taking of Mississippi's ground water contravenes, and is proscribed by, state and, where applicable, federal common law, statutory laws and regulations and, if unabated and allowed to continue without monetary compensation to Mississippi, along with other relief sought herein, has had, and will continue to have, a long-lasting, substantial negative effect and adverse impact upon Mississippi. Memphis-MLGW knows, or has reason to know, or has for some time known or had reason to know, that its actions and conduct have had, and continue to have, such financial effect and impact.

44. In accordance with the foregoing, Mississippi is entitled to, and claims alternatively or in addition to their other claims set forth herein, recovery of actual, compensatory damages in an amount, sum or value currently estimated as several hundred million dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein.

COUNT VI: DECLARATORY JUDGMENT

45. Mississippi adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 through 44 of this First Amended Complaint to the extent such allegations, statements or averments support or are consistent with the claims or causes of action of Mississippi herein.

46. Under Rule 57, FED. R. CIV. P. and 28 U.S.C.A. Sections 2201, *et seq.*, this Court has the power and authority to declare the rights, interests and other legal relations of the parties as to the matters which are the subject of this cause. This interstate or transboundary ground water dispute is a present,

justiciable controversy as to which this Court may order a speedy hearing.

47. There exist in this cause questions regarding, *inter alia*, the clarification and establishment of legal relationships between the parties, including, *inter alia*, Memphis-MLGW's liabilities to Mississippi and Memphis-MLGW's duties and obligations to pay damages to Mississippi and to take actions to mitigate or eliminate diminution or destruction of Mississippi's ground water and rights and interests in the Aquifer.

48. Accordingly, Plaintiff, Mississippi, requests declaratory judgment from this Court including, but not limited to: (a) a declaration that, in addition to the payment of damages requested herein, Memphis-MLGW must pay damages prospectively for all quantities of Mississippi's ground water taken in the future; and (b) a declaration appointing a special master and providing for this Court's continuing supervision and oversight over this cause, and future claims and issues, in order to grant further relief to ensure that Mississippi is compensated and receives such damages, payments or other forms of relief necessary or appropriate for the protection and enforcement of Mississippi's Aquifer ground water rights and interests. Plaintiff, Mississippi, requests and reserves the right to expand, clarify, amend and/or supplement the declarations sought or to be sought in this cause.

COUNT VII: INJUNCTIVE RELIEF

49. Mississippi adopts and incorporates by reference, as if fully restated herein, the allegations, statements or averments of Paragraph Nos. 1 through 48 of this First Amended Complaint to the extent such allegations, statements or averments

support or are consistent with the claims or causes of action of Mississippi herein.

50. The ongoing pumping by Memphis-MLGW, siphoning tremendous quantities of valuable ground water each day from Mississippi, has caused, and will continue to cause, immediate and continuing irreparable harm and damage to Mississippi because, among other things, Memphis-MLGW's wrongful diversion and withdrawal of Mississippi's Aquifer ground water constitutes a continuing trespass and/or nuisance for which there is no adequate remedy, in whole or in part, for past, present and/or future damages which will, absent the injunctive relief requested herein, require a multiplicity of suits.

51. Memphis-MLGW's illegal exploitation of Mississippi's ground water will, absent the injunctive relief requested herein, continue for an indefinite time in the future, and it is, and will be, unconscionable, harsh and inequitable to require Mississippi to bring a multiplicity of successive future suits as Memphis-MLGW continues to aggressively misappropriate Mississippi's ground water quantities and the resulting monetary damages are or become increasingly difficult to measure and quantify. Mississippi's Aquifer ground water is a unique and valuable natural resource and Memphis-MLGW's continuous and repeated invasion upon Mississippi's property and rights and interests therein, and its threatened future diversions, pumping and withdrawals from the Aquifer, entitle Mississippi to the entry of an injunction, in addition to all damages sought in this cause.

52. Because of the important and substantial rights and interests involved in this dispute, and because there exists no complete adequate remedy at

law for a substantial portion of the injuries suffered, and to be suffered, by Mississippi, Plaintiff seeks entry of a permanent, mandatory and/or prohibitory injunction directing and compelling MLGW to cease and desist entirely from the pumping, diversion, withdrawal, taking and/or use of Mississippi's ground water, including the quantities of ground water referenced in this First Amended Complaint.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff, Mississippi, requests an award or judgment from the Court providing:

A. An award of actual and compensatory damages in an amount, sum or value currently estimated as several hundreds of millions of dollars, together with interest, attorneys' fees, costs, expenses or such other monetary sums or values as may be warranted by the evidence presented at trial or other proceedings herein for all injuries sustained and damages caused by Memphis-MLGW's conduct as of the date of the trial of this matter, together with all damages, sums, values and other monetary payments or compensation as may accrue or become due and owing prospectively;

B. An award of pre-judgment interest, post judgment interest, attorney's fees, costs, expenses or other monetary payments, sums or values as may be warranted by the evidence presented at trial or other proceedings herein;

C. Alternatively, or in addition to such damages, payments or compensation, an award of an injunction to prevent, prohibit and stop future, continued wrongs and injuries as specified in this First Amended Complaint, including, but not limited to,

the injunctive relief requested in Paragraph No. 52 hereof;

D. An award of such declarations as may be necessary or appropriate to support or effectuate any damages and/or injunctive relief ordered in this cause, including, but not limited to, the declaratory judgment(s) requested in Paragraph No. 48 hereof;

E. An award of such other or further relief which this Court, in equity and good conscience, finds and declares is necessary or appropriate to afford complete availability and recovery of all damages, payments, compensation, or other forms of remedies or relief sought by Mississippi, for the past, current and continuing, and future, illegal misconduct of Memphis-MLGW as specified herein.

Dated this the 5th day of October, 2006.

Respectfully submitted,

Attorneys for Jim Hood, Attorney General, *ex rel.*, The State of Mississippi, Acting for Itself and *Parens Patriae* for and on behalf of the People of the State of Mississippi

BY: s/ Alan B. Cameron

Alan B. Cameron, MSB #4968
Larry D. Moffett, MSB # 3401
Daniel Coker Horton & Bell, P.A.
Oxford Square North
265 North Lamar Boulevard, Suite R
Post Office Box 1396
Oxford, Mississippi 38655
Telephone: (662) 232-8979
Fax: (662) 232-8940
E-mail: acameron@danielcoker.com

Of Counsel:

Geoffrey C. Morgan
George W. Neville
Mississippi Attorney General's Office
Carroll Gatlin Justice Building
450 High Street, Fifth Floor
Post Office Box 220
Jackson, MS 39205-0220
Telephone: (601) 359-3680
Facsimile: (601) 359-5025
E-mail: gmorg@ago.state.ms.us
gnevi@ago.state.ms.us

John W. (Don) Barrett
David M. McMullan, Jr.
Barrett Law Office, P.A.
404 Court Square North
Post Office Box 987
Lexington, Mississippi 39095
Telephone: (662) 834-2376
Facsimile: (662) 834-2628
E-mail: dbarrett@barrettlawoffice.com

George B. Ready, MSB# 4674
George B. Ready Attorneys
Post Office Box 127
Hernando, Mississippi 38632
Telephone: (662) 429-7088
Facsimile: (662) 429-5474
E-mail:
gbready@georgebreadyattorneys.com

