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No. 22O143, Original

In the Supreme Court of the United States

STATE OF MISSISSIPPI,

Plaintiff,

v.

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

Defendants.

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

**BRIEF OF THE CITY OF MEMPHIS, TENNESSEE,
AND MEMPHIS LIGHT, GAS & WATER DIVISION
IN OPPOSITION TO THE STATE OF MISSISSIPPI'S
MOTION FOR LEAVE TO FILE BILL OF
COMPLAINT IN ORIGINAL ACTION**

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QUESTIONS PRESENTED

The State of Mississippi seeks leave to file an original action in tort against the State of Tennessee, the City of Memphis, Tennessee (“Memphis”), and its utility division, Memphis, Light, Gas & Water Division (“MLGW”), for the alleged wrongful taking of “Mississippi’s groundwater” from an unapportioned interstate aquifer that underlies both states. The questions presented here are:

1. Whether Mississippi should be granted leave to file its proposed complaint when (a) this Court previously denied Mississippi leave to file the same claims in 2010, and (b) Mississippi’s proposed complaint directly conflicts with this Court’s well-settled decisions holding that the doctrine of equitable apportionment governs disputes over interstate resources.

2. Whether the doctrine of issue preclusion forecloses Mississippi’s proposed complaint because the legal and factual issues on which Mississippi bases its claims have previously been litigated and decided adversely to Mississippi.

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INTRODUCTION

Mississippi seeks leave to sue the City of Memphis, Tennessee (“Memphis”), its utility division, Memphis, Light, Gas & Water Division (“MLGW”), and the State of Tennessee for the alleged wrongful taking of groundwater from an unapportioned interstate aquifer underlying Mississippi and Tennessee – groundwater that Mississippi inaccurately refers to as “Mississippi’s groundwater.”

Mississippi’s ability to obtain and use groundwater from the Memphis Sand Aquifer, also called the Sparta Aquifer (the “Aquifer”), is not at issue here. Mississippi’s complaint alleges no loss of use of water. Instead, Mississippi alleges that Defendants diverted groundwater it claims to “own” from beneath Mississippi into Tennessee.

The allegations in Mississippi’s proposed complaint are not new. In 2005, Mississippi sued Memphis and MLGW in the U.S. District Court for the Northern District of Mississippi for the alleged wrongful taking of “Mississippi’s groundwater” from the Aquifer. The district court rejected Mississippi’s arguments, finding that the Aquifer was an interstate resource, and therefore, Mississippi’s rights in that resource could be determined only by interstate compact or an equitable apportionment action filed in this Court. The district court concluded that Mississippi could not be afforded any relief unless and until the Aquifer is apportioned. The U.S. Court of Appeals for the Fifth Circuit affirmed, and this Court denied Mississippi’s Petition for Writ of Certiorari.

In 2009, simultaneous with its certiorari petition, Mississippi filed a motion seeking this Court's leave to file an original action against Memphis, MLGW, and Tennessee. In its 2009 proposed complaint, Mississippi reasserted the same tort-based claims against Memphis and MLGW for misappropriation of groundwater from the interstate Aquifer, but also included a "provisional" claim for equitable apportionment against Tennessee. This Court properly denied Mississippi's 2009 motion for leave.

The claims in Mississippi's latest proposed complaint are the same as those Mississippi litigated and lost in its 2005 district court action and again in its 2009 motion for leave to file an original action in this Court. Now, for the third time, Mississippi attempts to evade, or overturn, more than one hundred years of this Court's equitable apportionment jurisprudence and renounce the principles underlying that doctrine.

The motive behind Mississippi's new proposed complaint is obvious. As it did twice before, Mississippi seeks only to "provide a windfall to the public treasury [of Mississippi]." *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1247 (10th Cir. 2006) (quoting *Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 676 (1st Cir. 1980)). Such a goal lacks the "seriousness and dignity," *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 93 (1972), that "justif[ies] the expense and time necessary to obtain a judicial resolution" from this Court, *Texas v. New Mexico*, 462 U.S. 554, 576 (1983).

This Court should deny Mississippi's motion for leave.

STATEMENT OF THE CASE

Factual Background

At issue is groundwater flowing through the Aquifer, an interstate water resource underlying and shared by several states, including Tennessee and Mississippi. For more than a century, Memphis has relied on the Aquifer as its primary public water source. It is undisputed that Memphis withdraws groundwater from the Aquifer through wells located entirely within Tennessee and operates those wells in compliance with Tennessee's laws and regulations. The Aquifer has never been apportioned by judicial decree, interstate compact, or congressional act.

Mississippi's First Lawsuit Against Memphis and MLGW

In 2005, Mississippi filed suit in the U.S. District Court for the Northern District of Mississippi alleging that Memphis and MLGW were wrongfully taking "Mississippi's groundwater" from the interstate Aquifer that lies beneath both states – the same conduct and the same Aquifer that is the subject of Mississippi's current motion for leave. The district court dismissed Mississippi's tort claims under Rule 19 of the Federal Rules of Civil Procedure, finding Tennessee was an indispensable party but could not be joined without divesting the district court of its jurisdiction. *See Hood ex rel. Miss. v. City of Memphis, Tenn.*, 533 F. Supp. 2d 646 (N.D. Miss. 2008). App. 1-12. "It 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; such relief, however, is in the original and exclusive jurisdiction of the United States

Supreme Court because such a dispute is necessarily between the State of Mississippi and the State of Tennessee.” App. 7. Mississippi appealed, and the Fifth Circuit affirmed the district court’s decision in all respects. *See Hood ex rel. Miss. v. City of Memphis, Tenn.*, 570 F.3d 625 (5th Cir. 2009). App. 13-28. Mississippi filed a Petition for Writ of Certiorari (Case No. 09-289), which this Court denied on January 25, 2010. *See Mississippi v. City of Memphis, Tenn.*, 130 S. Ct. 1319 (2010). App. 29.

Mississippi’s First Motion for Leave to File an Original Action Against Memphis, MLGW, and Tennessee

At the same time it sought certiorari, Mississippi filed a Motion for Leave to File Bill of Complaint in an Original Action (Case No. 139, Original). Mississippi’s bill of complaint repeated the claims asserted in *Mississippi I*¹ against Memphis and MLGW, but also included a “provisional” or “conditional” claim for equitable apportionment against Tennessee. This Court denied Mississippi’s motion for leave on January 25, 2010, citing *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003), and *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982). App. 29.

Mississippi’s Latest Motion for Leave to File an Original Action

On June 6, 2014, Mississippi filed its latest Motion for Leave to File Bill of Complaint. In its proposed

¹ This brief refers to the litigation filed in the Northern District of Mississippi and appealed to the Fifth Circuit, which culminated in Mississippi’s unsuccessful certiorari petition as “*Mississippi I*.”

complaint, Mississippi once again seeks to sue Defendants for the alleged wrongful taking of “Mississippi’s groundwater” from the unapportioned interstate Aquifer. While conceding that the Aquifer lies beneath both Mississippi and Tennessee and that both states withdraw water from it, Mississippi alleges that the Aquifer is not subject to equitable apportionment because it is “*neither interstate nor a naturally shared resource.*” Compl. ¶ 50. Mississippi alleges it “owns” a fixed portion of the groundwater in the Aquifer defined solely by its state boundary lines. *Id.* ¶¶ 9-12, 51.

Mississippi alleges that MLGW’s pumping (from entirely within Tennessee) has pulled “Mississippi’s groundwater” across its northern border into Tennessee. Mississippi seeks a declaratory judgment, injunctive relief, and money damages arising out of what it asserts to be Defendants’ conversion of that portion of groundwater in the Aquifer “owned” by Mississippi.

REASONS FOR DENYING MISSISSIPPI’S MOTION

Mississippi’s Proposed Complaint Fails to State a Viable Claim.

Mississippi’s proposed complaint is not viable in light of this Court’s Order denying Mississippi’s 2009 motion for leave to file a bill of complaint. Relying on *Virginia v. Maryland*, 540 U.S. 56 (2003), and *Colorado v. New Mexico*, 459 U.S. 176 (1982), this Court affirmed its long-standing decisions holding that the doctrine of equitable apportionment governs disputes between states over rights to interstate water resources. App.

29. In so doing, this Court necessarily rejected Mississippi's attempt to bring tort claims against Memphis and MLGW for what Mississippi alleged to be the "wrongful taking" of "Mississippi's groundwater" from the Aquifer – the very claims Mississippi now seeks leave to reassert.

Mississippi's proposed complaint repeats the same erroneous contentions and relies on the same flawed assumptions as its 2009 bill of complaint. Mississippi mischaracterizes this dispute as a "state border and sovereignty issue," Compl. ¶ 51, defying this Court's pronouncement that a state's border is "essentially irrelevant to the adjudication of these sovereigns' competing claims," *Colorado v. New Mexico*, 467 U.S. 310, 323 (1984). Mississippi's unilateral declaration that it "owns" a fixed portion of the interstate groundwater by reason of the public trust doctrine and its own "Omnibus Water Rights Act," Compl. ¶¶ 9-12, is irreconcilable with the purpose of equitable apportionment – to resolve interstate resource disputes in a way that recognizes the equal rights of each state and "establish[es] justice between them," *Kansas v. Colorado*, 206 U.S. 46, 98 (1907).

Mississippi's motion for leave seeks to circumvent this Court's equitable apportionment jurisprudence. The respective rights of Mississippi and Tennessee in the interstate Aquifer can be determined judicially only by equitable apportionment. Absent apportionment, Mississippi can be afforded no relief for what it alleges to be the wrongful taking of "Mississippi's groundwater." Nothing has changed since the Court's 2010 order rejecting these same arguments. The Court should deny Mississippi's motion for leave.

Mississippi's Complaint Is Also Barred by Issue Preclusion.

The dismissal of *Mississippi I* for failure to join an indispensable party was based on specific findings by the district court and Fifth Circuit including: (1) the Aquifer is an interstate resource, (2) the Aquifer must be apportioned “before one state may sue an entity for invading its share,” and (3) the Aquifer can only be apportioned through an interstate compact or an equitable apportionment action. App. 20.

Under the doctrine of issue preclusion, “a ‘right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies.’” *Montana v. United States*, 440 U.S. 147, 153 (1979) (quoting *Southern Pac. R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)).² Accordingly, the factual and legal issues that were fully litigated and “directly determined” in *Mississippi I* are conclusive. *Id.*

The preclusive effect afforded to the issues decided in *Mississippi I* is fatal to Mississippi’s proposed complaint. Mississippi has already raised and lost the same factual and legal issues that it seeks to reassert now. Issue preclusion forecloses Mississippi’s attempt to relitigate them. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (“Under collateral estoppel, once a court has

² See *Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008) (noting that “issue preclusion” encompasses the doctrines once known as collateral estoppel and direct estoppel). This brief uses the term “issue preclusion” except when quoting a decision using the term “collateral estoppel.”

decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of an issue in a suit on a different cause of action involving a party to the first case.”).

Mississippi’s Proposed Complaint Is “Peculiarly Susceptible” to Dismissal.

The requirement that a party request and obtain leave from the Court to file an original action “serves an important gatekeeping function,” *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995), and allows the Court “to dispose of matters at a preliminary stage,” *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). This Court has shown “reluctance to exercise original jurisdiction in any but the most serious of circumstances, even where, as in cases between two or more States, [the Court’s] jurisdiction is exclusive.” *Nebraska v. Wyoming*, 515 U.S. at 8. The “threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.” *New York v. New Jersey*, 256 U.S. 296, 309 (1921).

Mississippi’s proposed complaint is “peculiarly susceptible” to dismissal at this stage, *Ohio v. Kentucky*, 410 U.S. 641, 645 (1973), because it asserts the same factual and legal contentions this Court necessarily rejected in denying Mississippi’s first bill of complaint and the Fifth Circuit similarly rejected in *Mississippi I*.

ARGUMENT

I. MISSISSIPPI FAILS TO STATE A VALID CLAIM.

A. Mississippi's Proposed Claims Are Contrary to This Court's Order Denying Mississippi's 2009 Motion for Leave.

The faulty premise of Mississippi's motion for leave is its self-serving and conclusory position that the water at issue is "Mississippi's groundwater" by virtue of its "sovereign rights over groundwater within its borders." *E.g.* Miss. Br. at 3-6, 15. While Mississippi concedes – as it must – that the interstate Aquifer underlies both "north Mississippi and west Tennessee," *id.* at 7, Mississippi makes the unsupportable and illogical claim that the Aquifer is "not a shared natural resource." *Id.* at 6. Mississippi alleges that only Mississippi has a right to water that originated as "rainwater entering the Sparta Sand at Mississippi outcrops" that was "naturally drawn by the force of gravity and seeped through pores in the sandstone." *Id.* at 8. Based on this flawed logic, Mississippi contends that the groundwater at issue "cannot be subject to equitable apportionment, because it is not a naturally shared natural resource; rather, it falls under the exclusive sovereignty of the state in which it resides." *Id.* at 18.

The claims in Mississippi's present proposed complaint are the same ones that Mississippi sought to bring in its 2009 bill of complaint against Memphis and MLGW. Mississippi's 2009 motion for leave also relied on the unsupportable contention that Mississippi already "owned" a portion of the interstate

groundwater by virtue of the public trust doctrine and Mississippi's "Omnibus Water Rights Act." Miss. 2009 Br. at 14-16. As it does now, Mississippi conceded that the Aquifer existed beneath both Mississippi and Tennessee and that both states relied on the interstate resource, *id.* at 6, but Mississippi nonetheless alleged that the Aquifer "is not a natural resource shared between" Mississippi and Tennessee, Miss. 2009 Compl. ¶ 2. As it does now, Mississippi's 2009 bill of complaint sought "monetary damages . . . equal to the value of Mississippi's water diverted and wrongfully taken" and injunctive relief. *Id.* ¶ 5(a)-(b). Unlike its present complaint, however, Mississippi's 2009 bill of complaint included a conditional claim for equitable apportionment against Tennessee. *Id.* ¶ 5(c).

This Court denied Mississippi's 2009 motion for leave without prejudice, citing *Virginia v. Maryland*, 540 U.S. 56 (2003), and *Colorado v. New Mexico*, 459 U.S. 176 (1982). App. 29. This Court's reliance on *Virginia v. Maryland* affirms that the doctrine of equitable apportionment governs disputes between states concerning their respective rights to use an interstate resource. *Virginia v. Maryland*, 540 U.S. at 74. n.9. The Court thus necessarily rejected the validity of Mississippi's tort claims – the very same ones that Mississippi seeks leave to reassert now. This Court's reliance on *Colorado v. New Mexico* demonstrates that Mississippi's fall-back claim for equitable apportionment failed to allege a "real or substantial injury or damage" sufficient to warrant this Court's consideration. *Colorado v. New Mexico*, 459 U.S. at 187 n.13.

Neither the facts nor the law has changed since this Court denied Mississippi's 2009 motion for leave. Equitable apportionment remains the doctrine that governs the adjudication of the rights of states to use interstate natural resources. *Virginia v. Maryland*, 540 U.S. at 74 n.9.

B. Mississippi's Proposed Complaint Is Contrary to This Court's Equitable Apportionment Jurisprudence.

In its motion for leave, Mississippi incorrectly asserts that "the separate states' sovereign authority" over the groundwater at issue "is an undecided Constitutional question of great seriousness and magnitude which must be resolved by this Court before equitable apportionment can even be discussed." Miss. Br. at 1 n.2. In so arguing, Mississippi disregards not only this Court's denial of its 2009 motion for leave and the holding of the Fifth Circuit in *Mississippi I*, but also this Court's well-settled equitable apportionment decisions.

For more than a century, "[e]quitable apportionment [has been] the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream." *Colorado v. New Mexico*, 459 U.S. at 183. The doctrine of equitable apportionment reflects and embraces the "cardinal rule, underlying all the relations of the states to each other" – "that of equality of right." *Kansas v. Colorado*, 206 U.S. at 97; *see also Tarrant Reg. Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2125 (2013) ("Absent an agreement among the States, disputes over the allocation of water are subject to equitable apportionment by the courts");

Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931) (stating that equitable apportionment “disputes are to be settled on the basis of equality of right”).

Mississippi’s strained position that its claims are not governed by equitable apportionment appears to be based on the allegation that the groundwater in the Aquifer flows slowly, and according to Mississippi, some portion of groundwater would not have flowed into and been available for pumping in Tennessee if not for MLGW’s pumping. Miss. Br. at 14-16. Even if true, Mississippi’s contention does not, and cannot, alter the fact that the Aquifer is an interstate natural resource. The fact that Mississippi and Tennessee citizens in their respective states withdraw water from the same Aquifer confirms it is “an interstate natural resource shared by the competing states under the conditions put into place by nature.” *Id.* at 15. This Court, in *Kansas v. Colorado*, observed that “[b]efore either Kansas or Colorado was settled the Arkansas river was a stream running through the territory which now composes these two states.” *Kansas v. Colorado*, 206 U.S. at 98. In the same way, before either Tennessee or Mississippi was settled, the Aquifer was a natural water resource underlying the territory that now composes those two states.

By unilaterally claiming sovereign rights over a specific portion of the Aquifer or the groundwater in the Aquifer, Mississippi seeks to “reach, through the agency of natural laws, into the territory of another state.” *Id.* Mississippi’s request for declaratory and injunctive relief, by definition, infringes on Tennessee’s sovereignty because Mississippi wrongly presumes its rights to the unapportioned water in the Aquifer are

superior to Tennessee's rights to the same interstate resource.

Moreover, by purporting to bring tort claims premised on a unilateral declaration of "Mississippi's sovereign territorial rights," Miss. Br. at 20, Mississippi seeks to usurp this Court's original and exclusive jurisdiction to apportion interstate waters between states under 28 U.S.C. § 1251(a). *See Arizona v. California*, 373 U.S. 546, 564 (1963) (acknowledging the Court's "serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States"), *abrogated on other grounds by California v. United States*, 438 U.S. 645 (1978); *see also Texas v. New Mexico*, 462 U.S. at 567 ("There is no doubt that this Court's jurisdiction to resolve controversies between two States extends to a properly framed suit to apportion the waters of an interstate stream between States through which it flows . . .") (citations omitted).

Finally, Mississippi's attempt to distinguish this case on the basis that the Aquifer is underground or that the water flows slowly cannot be sustained. This Court's equitable apportionment precedents apply equally to groundwater and other natural resources. *See, e.g., Wisconsin v. Illinois*, 449 U.S. 48, 48 (1980) (applying equitable apportionment to "water diverted from Lake Michigan"); *Kansas v. Colorado*, 206 U.S. at 114-15 (rejecting the argument that "subsurface water" should be distinguished from a surface stream in an equitable apportionment analysis); *cf. Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024 (1983) (applying equitable apportionment to migratory fish because "the

natural resource of anadromous fish is sufficiently similar” to water in an interstate stream).

1. The Aquifer has never been apportioned between Mississippi and Tennessee.

Mississippi’s claims against Memphis and MLGW presuppose that some portion of the Aquifer has already been apportioned to Mississippi (*i.e.*, the portion over which Mississippi asserts its “sovereign rights”). *Mississippi I* and Mississippi’s first bill of complaint were based on the same assumption: that the groundwater at issue is “Mississippi’s groundwater.” This assumption was and is wrong.³

The Constitution provides for the resolution of “interstate controversies” over natural resources through an equitable apportionment “suit in this Court” or an interstate compact “with consent of Congress.” *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-06 (1938). Mississippi can have no right to relief for the alleged wrongful taking of groundwater this Court has not yet apportioned – and may never apportion – to Mississippi.

In *Mississippi I*, the district court rejected the same tort-based claims that Mississippi seeks to reassert here because those claims were based on the false assumption that Mississippi has a predetermined claim to a specific portion of the groundwater in the Aquifer:

³ And, as explained in Section II below, the factual and legal issues on which Mississippi’s claims are based were already litigated and decided adversely to Mississippi.

The subject aquifer in the case *sub judice* has not been apportioned, neither by agreement of the involved States nor by the U.S. Supreme Court. However, absent apportionment, this court cannot afford relief to the Plaintiff and hold that the Defendants are pumping water that belongs to the State of Mississippi, because it has not yet been determined which portion of the aquifer's water is the property of which State.

App. 5. In affirming the district court's ruling, the Fifth Circuit likewise recognized 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." App. 20 (emphasis added) (citations omitted).

2. Mississippi's geographic boundary is not determinative of Mississippi's rights to use groundwater in the Aquifer.

Mississippi's allegations incorrectly assume that Mississippi's geographic boundary alone determines the specific portion of groundwater within the Aquifer to which Mississippi claims ownership. *See* Miss. Br. at 5 (asserting that "Mississippi holds and retains full control and authority over the groundwater stored naturally within its territorial borders"); Compl. ¶ 38 (claiming that this case "does not fall within the Court's equitable apportionment jurisprudence" because the groundwater "naturally accumulated within Mississippi's sovereign territory before the formation of the States" and "would never through 'the agency of natural laws' have moved into, or been available in Tennessee"). Invoking the equal footing

doctrine and Mississippi statutes claiming sovereign rights to water “within its borders,” Mississippi claims that the groundwater at issue has already been apportioned to it “[a]s a sovereign state.” Miss. Br. at 5. Mississippi’s position is contrary to this Court’s long-standing equitable apportionment precedents.

This Court has found that, in the context of interstate water disputes, a state’s border is “essentially irrelevant to the adjudication of these sovereigns’ competing claims.” *Colorado v. New Mexico*, 467 U.S. at 323; *see also id.* (rejecting “the notion that the mere fact that the [river] originates in Colorado automatically entitles Colorado to a share”); *Hinderlider*, 304 U.S. at 102-03 (rejecting an upstream state’s claim that it has “such ownership or control” to divert all the water in an interstate resource as having been “consistently denied” and “adjudged untenable”); *cf. Idaho ex rel. v. Oregon*, 462 U.S. at 1028 n.12 (“While the origin of the fish may be a factor in the fashioning of an equitable decree, it cannot by itself establish the need for a decree.”).

Mississippi’s contention that the allocation of groundwater within the interstate Aquifer should be determined solely by territorial borders also conflicts with this Court’s holdings requiring “consideration of many factors to ensure a fair and equitable allocation.” *Idaho ex rel. v. Oregon*, 462 U.S. at 1026 n.10; *see also id.* at 1025 (noting that “apportionment is based on broad and flexible equitable concerns rather than on precise legal entitlements”); *Colorado v. New Mexico*, 459 U.S. at 186 (stating that “in an equitable apportionment of interstate waters it is proper to weigh the harms and benefits to competing states”); *Nebraska*

v. Wyoming, 325 U.S. 589, 618 (1945) (stating that “[a]ppportionment calls for the exercise of an informed judgment on a consideration of many factors”).

Mississippi’s legal position is without merit because, if a state’s boundary line alone determined that state’s allocation of an interstate resource, then this Court’s settled application of the doctrine of equitable apportionment to resolve interstate resource disputes would have been unnecessary. This Court should reject Mississippi’s repeated attempts to brush aside those precedents and to establish a new allocation standard based on state borders.

3. Mississippi does not “own” the groundwater at issue.

Finally, as in *Mississippi I* and its 2009 bill of complaint, Mississippi’s proposed claims are premised on Mississippi’s erroneous assertion of “ownership and plenary authority over its water resources, including subterranean resources.” Compl. ¶ 10; *see also id.* ¶¶ 8, 11-12, 44; Miss. Br. at 5 (“As a sovereign State, Mississippi holds and retains full control and authority over the groundwater stored naturally within its territorial borders.”).

Mississippi’s assertion of “ownership” of a portion of the Aquifer groundwater is contrary to this Court’s jurisprudence. In *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), this Court explained groundwater is not subject to state “ownership” in the proprietary or possessory sense. *Id.* at 949-51. A state’s claimed “ownership” of groundwater is merely a legal fiction:

[T]his Court traced the demise of the public ownership theory and definitively recast it as “but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.”

Id. at 951 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 334 (1979)) (internal quotation marks omitted).⁴

As it did in its 2009 bill of complaint, Mississippi again contends that Defendants’ withdrawals of groundwater from the Aquifer “constitute trespass, conversion, and intentional tortious conduct,” and Mississippi “seeks damages in an amount equal to the value of the water wrongfully taken.” Miss. Br. at 22-23. Yet because a state’s interest in groundwater is usufructuary and not proprietary, traditional common law tort claims for conversion or trespass are inapplicable.⁵ See *Dycus*, 557 So. 2d at 501-02 (holding

⁴ The Supreme Court of Mississippi itself has rejected Mississippi’s assertion that some portion of the water in the interstate Aquifer is necessarily “Mississippi’s groundwater,” holding that groundwater is not susceptible to absolute ownership:

“In its ordinary or natural state water is neither land, nor tenement, nor susceptible of absolute ownership. It is a movable, wandering thing and admits only of a transient, usufructuary property.”

Dycus v. Sillers, 557 So. 2d 486, 501-02 (Miss. 1990) (quoting *State Game & Fish Comm’n v. Louis Fritz Co.*, 193 So. 9, 11 (Miss. 1940)).

⁵ In its proposed complaint, Mississippi requests that the Court declare that Defendants’ groundwater withdrawals “constitute a violation of Mississippi’s retained sovereign rights under the

groundwater rights are usufructuary only); 4 *Waters & Water Rights* § 36-8 to 36-9 & nn.16-17 (Robert E. Beck ed., 1991 ed. replacement volume 2004) (“[T]he Supreme Court has made it abundantly clear that it has little patience with claims of absolute ‘ownership’ by either [state or federal] government.”).⁶

C. There Is No Authority to Support Mississippi’s Claims for Relief.

The authorities cited by Mississippi do not support Mississippi’s claim for damages and/or restitution against Memphis and MLGW. See Miss. Br. at 24 (citing *Kansas v. Colorado*, 533 U.S. 1 (2001), and *Texas v. New Mexico*, 482 U.S. 124 (1987)). Those decisions hold only that a state can seek money damages from another state if the states have entered into a compact allocating an interstate resource, and thereafter, one state withdraws a volume of water that exceeds its apportioned share. See *Kansas v. Colorado*, 533 U.S. at 6-7; *Texas v. New Mexico*, 482 U.S. at 130. There is no support for Mississippi’s claim for money damages against Memphis and MLGW in the context

United States Constitution, and a wrongful and actionable trespass upon, and conversion, taking and misappropriation of property belonging to Mississippi and its people.” Compl. ¶ 52.

⁶ See also *New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1234-35 (D.N.M. 2004) (rejecting New Mexico’s claim of absolute ownership of its groundwater and holding that the state’s asserted interest “[fell] outside of the scope of the law’s protection traditionally afforded to private landowners’ right of exclusive possession by the law of trespass”), *aff’d*, 467 F.3d 1223 (10th Cir. 2006).

of this interstate dispute over unapportioned groundwater.

Mississippi likewise has no basis to ask this Court to require Defendants to cease withdrawals from the Aquifer or to construct and operate an alternative system to obtain water from the Mississippi River. *See* Miss. Br. at 25-26. The cases cited by Mississippi are factually distinct from and do not support the allegations here. For example, *Missouri v. Illinois*, 180 U.S. 208 (1901), was a nuisance case in which Missouri sued Illinois and Chicago to prevent the discharge of sewage into the Mississippi River. *See id.* at 248. The ruling in *Wisconsin v. Illinois*, 278 U.S. 367 (1929), was that the Chicago Sanitary District “defied the authority of the national government resting in the Secretary of War” when the Secretary “refused a permit by which there would be more than 4,167 feet a second diverted” and the Sanitary District “proposed to ignore that limitation.” *Id.* at 419-20. Finally, *New Jersey v. New York*, 283 U.S. 336 (1931), was an equitable apportionment case in which the Court entered a decree that established the amount of water that New York City could divert from the Delaware River. *Id.* at 346. No authority justifies Mississippi’s attempt to enjoin Memphis and MLGW’s withdrawal of groundwater from within Tennessee⁷ in compliance

⁷ Throughout its motion for leave, Mississippi claims that Defendants are “reaching beneath the state border into Mississippi’s territory to seize and convert a Mississippi natural resource,” Miss. Br. at 12, which suggests that MLGW’s wells are located in Mississippi or are somehow drilled at an angle to reach into Mississippi. That is not the case. As Mississippi’s own motion shows, all of MLGW’s pumping operations are well within

with Tennessee law, prior to an equitable apportionment of the Aquifer.

D. Mississippi Has No Real or Substantial Injury Warranting an Equitable Apportionment Action, Even if Mississippi Had Sought Such Relief.

Mississippi’s proposed complaint expressly disavows any claim for equitable apportionment. *See* Compl. ¶ 51. The reason is clear: Mississippi cannot satisfy the “real and substantial injury or damage” standard to show by clear and convincing evidence that it is entitled to an equitable decree. *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1027.

By denying Mississippi’s 2009 motion for leave, this Court found that Mississippi had failed to meet the heightened standard required to state a claim for equitable apportionment. App. 29. In its latest proposed complaint, Mississippi does not – and cannot – allege the type of injury that would support an equitable apportionment action or any other basis to enjoin Memphis and MLGW’s withdrawals of water from the Aquifer. Mississippi does not, for example, claim there is a current or foreseeable shortage of groundwater in Mississippi. Mississippi does not allege loss of use of groundwater in the Aquifer. Instead, as in its 2009 bill of complaint, Mississippi’s only claim of “injury” is that MLGW’s pumping of water from the interstate Aquifer within Tennessee “[has] effectuated and continue[s] to effectuate a permanent taking of a

Tennessee’s borders, and no part of the structure of the wells reaches into Mississippi. Miss. App. 58a.

limited natural resource belonging to Mississippi and its people.” Miss. Br. at 3; *see* Miss. 2009 Compl. ¶¶ 1, 4, 14, 21, 24.⁸

Nothing has changed – except that now Mississippi does not even ask for equitable apportionment. Mississippi’s motion for leave should be denied. *See Kansas v. Colorado*, 206 U.S. at 117 (dismissing the action because this Court was “not satisfied that Kansas [had] made out a case entitling it to a decree”); *see also Connecticut v. Massachusetts*, 282 U.S. at 674 (dismissing an action because Connecticut’s “substantial interests” were not “being injured” by alleged diversions of water).

II. MISSISSIPPI’S PROPOSED COMPLAINT IS ALSO BARRED BY APPLICATION OF ISSUE PRECLUSION TO THE LEGAL AND FACTUAL ISSUES DECIDED IN MISSISSIPPI I.

A. The Doctrine of Issue Preclusion Bars Relitigation of Previously Decided Issues of Fact and Law.

This Court has long adhered to the doctrines of claim preclusion and issue preclusion. *See Allen v.*

⁸ Mississippi does not claim any injury to its use of the Aquifer from MLGW’s pumping because there is no such harm. In response to Mississippi’s 2009 motion for leave, Memphis and MLGW cited the testimony of Mississippi’s own witnesses and retained expert, which conclusively established that there has been no injury to Mississippi’s use of the Aquifer. *See* 2009 Mem. Br. Opp. at 24-28.

McCurry, 449 U.S. at 94.⁹ Both doctrines reflect the “fundamental precept of common-law adjudication . . . that a ‘right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies.’” *Montana v. United States*, 440 U.S. at 153 (quoting *Southern Pac. R. Co.*, 168 U.S. at 48-49); see also *Arizona v. California*, 460 U.S. 605, 619 (1983) (“[A]n issue once determined by a competent court is conclusive.”). Precluding “parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Arizona v. California*, 460 U.S. at 619 (quoting *Montana v. United States*, 440 U.S. at 153-54); see also *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 154 (2009) (“It is just as important that there should be a place to end as that there should be a place to begin litigation”) (citations and internal quotation marks omitted).

“Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of an issue in a suit on a different cause of action involving a party to the first case.” *Allen*, 449 U.S. at 94; see *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-04 (1940) (noting that a decision by the National

⁹ Federal law governs the application of issue preclusion in this case. See *Semteck Int’l v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 324 n.12 (1971).

Bituminous Coal Commission (which was affirmed by the Fifth Circuit) had determined an appellant's coal was "bituminous" in character and holding the appellant's attempt to reargue the same issue in a subsequent action was precluded).¹⁰

Issue preclusion "does not depend on an earlier adjudication of the substance of the underlying claim." *Sonus Networks, Inc. v. Ahmed*, 499 F.3d 47, 59 (1st Cir. 2007). Accordingly, "even adjudications such as dismissal for lack of jurisdiction or failure to join an indispensable party, which are expressly denominated by Rule 41(b) as not being 'on the merits,' are entitled to issue preclusive effect," *id.*, and are, therefore, "conclusive as to matters actually adjudged," *Equitable Trust Co. v. Commodity Futures Trading Comm'n*, 669 F.2d 269, 272 (5th Cir. 1982); *see also Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) ("Although the dismissal was without prejudice, 'an issue actually decided in a non-merits dismissal is given preclusive effect in a subsequent action between the same parties.'" (quoting *Pohlmann v. Bil-Jax, Inc.*, 176 F.3d 1110, 1112 (8th Cir. 1999))); *Bromwell v. Michigan Mut. Ins. Co.*, 115 F.3d 208, 212-13 (3d Cir. 1997) ("A dismissal for lack of subject-matter jurisdiction, while "not binding as to all matters which could have been raised," is, however, conclusive as to matters actually

¹⁰ This Court has noted that "[s]ome courts and commentators use 'res judicata' as generally meaning both forms of preclusion." *Allen*, 449 U.S. at 94 n.5. *Sunshine* illustrates this point. In *Sunshine*, the issue precluded was the character of appellant's coal (*i.e.*, that it was bituminous coal). *Sunshine*, 310 U.S. at 402. However, the Court referred to the applicable preclusion doctrine as "res judicata." *Id.* at 403.

adjudged.” (quoting *Equitable Trust Co.*, 669 F.2d at 272)); *GAF Corp. v. United States*, 818 F.2d 901, 912 (D.C. Cir. 1987) (noting dismissals for lack of subject matter jurisdiction “have preclusive effect as to matters actually adjudicated” and “preclude relitigation of the precise issue of jurisdiction that led to the initial decision”); *In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973) (finding that, even though “a judgment for the defendant is not on the merits, the plaintiff . . . is precluded from relitigating the very question which was litigated in the prior action”).

An issue decided as grounds for a dismissal without prejudice can have preclusive effect in a subsequent action outside the context of the original decision and preclude a plaintiff from re-arguing an essential element of its claim. As one commentator observed:

The weight of the cases, expressly or by inference, supports the rule that where a question of fact material to the merits has been decided by and is essential to a judgment for defendant based on lack of jurisdiction, such determination is conclusive upon the parties in a subsequent action either for the same or a different cause of action.

E.H. Schopler, Annotation, *Res Judicata Effect of Judgment Dismissing Action, or Otherwise Denying Relief, for Lack of Jurisdiction or Venue*, 49 A.L.R. 2d 1036, 1068 (1956); see also *Allen*, 449 U.S. at 94 (explaining that “once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a *different* cause of action”) (emphasis added); 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal*

Practice & Procedure § 4435 (2d ed. 2002) (“Thus it is clear that an entire claim may be precluded by a judgment that does not rest on any examination whatever of the substantive rights asserted.”); Restatement (Second) of Judgments § 27, illus. 3 (1982).

The Circuit Courts of Appeal have applied the doctrine of issue preclusion to foreclose a plaintiff from relitigating an issue that was essential to the merits of its claim, even though the issue precluded was decided in a previous case as grounds for dismissal for lack of jurisdiction. *See, e.g., Matosantos Commercial Corp. v. Applebee’s Int’l*, 245 F.3d 1203, 1210 (10th Cir. 2001) (holding the doctrine of issue preclusion barred a plaintiff’s argument on the merits of its claim, even though the issue precluded was previously decided by a court in the context of a dismissal for lack of personal jurisdiction and noting that “it is not legally significant that the issue foreclosed in the present case goes to the merits of [the plaintiff’s] claim”); *Roth v. McAllister Bros., Inc.*, 316 F.2d 143, 144-45 (2d Cir. 1963) (holding a defendant was precluded from arguing that a plaintiff was not its employee, when the defendant had successfully moved to dismiss a prior state administrative proceeding for lack of jurisdiction because the plaintiff was a crew member on a vessel in navigable waters whose exclusive remedy was under federal statutes); *Grudzinski v. Staren*, 87 F. App’x 508, 511 (6th Cir. 2004) (holding issue preclusion barred a plaintiff from arguing an essential element of her claim under 42 U.S.C. § 1983, even though the issue precluded was previously decided as grounds for a dismissal for lack of jurisdiction); *Unity House, Inc. v. First Commercial Fin. Grp., Inc.*, 175 F.3d 1022, No.

98-1060, 1999 WL 164924, at *2 (7th Cir. Mar. 17, 1999) (explaining that a “dismissal on jurisdictional grounds” does “have collateral estoppel effect over all issues actually litigated that were necessary for the dismissal on jurisdictional grounds” and that “[o]nce an issue is litigated . . . that issue is determined regardless of what context it appears”).

B. In *Mississippi I*, the District Court and Fifth Circuit Made Specific Findings on Legal and Factual Issues That Were Necessary to the Dismissal of *Mississippi I* for Failure to Join an Indispensable Party.

In *Mississippi I*, the district court held Tennessee was a “necessary party” under Rule 19(a)(1) of the Federal Rules of Civil Procedure “because in its absence complete relief cannot be accorded among those already parties to the action.” App. 7. The district court held that the factors of Rule 19(b) requiring dismissal had been met because a judgment against Memphis and MLGW “would determine the rights of the State of Tennessee and its citizens to the valuable water resources in the subject aquifer, without Tennessee having been a party to this action.” App. 8-9. The Fifth Circuit affirmed. App. 28.

The dismissal of *Mississippi I* under Rule 19 was based on specific factual and legal issues decided by the district court and Fifth Circuit:

1. The Aquifer is a shared interstate water resource.

“The Aquifer is an interstate water source” App. 20; *see also* App. 4-5 (“[I]t is admitted by all parties and revealed in exhibits that the Memphis Sands or Sparta aquifer lies under several States including the States of Tennessee and Mississippi.”); App. 14 (“The Aquifer is located beneath portions of Tennessee, Mississippi, and Arkansas.”).

2. Mississippi’s right to use groundwater in the Aquifer can be judicially determined only by an equitable apportionment action filed in this Court.

“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.” App. 20 (quoting *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982)); *see also id.* App. 25-26 (“Mississippi’s suit necessarily asserts control over a portion of the interstate resource Memphis currently utilizes pursuant to Tennessee law. . . . Tennessee’s water rights are clearly implicated, even if Mississippi has sued only Memphis.”).

“Determining Mississippi and Tennessee’s relative rights to the Aquifer brings this case squarely within the original development and application of the equitable apportionment doctrine.” App. 21. “The Aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests, and whose allotment is subject to

interstate compact or equitable allocation.” App. 22-23.¹¹

A “suit between Mississippi and Tennessee for equitable apportionment of the Aquifer implicates the exclusive jurisdiction of the Supreme Court under 28 U.S.C. § 1251(a).” App. 26; *see also id.* App. 5 (“[T]he doctrine of equitable apportionment has historically been the means by which disputes over interstate waters are resolved.”).

3. Unless and until the Aquifer is equitably apportioned, Mississippi cannot state a viable claim for misappropriation of groundwater from the Aquifer.

Absent an apportionment of the Aquifer by equitable apportionment or interstate compact,¹² Mississippi cannot state a viable claim for the alleged wrongful taking of “Mississippi’s groundwater.” “The 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.” App. 20 (emphasis added). Thus, as the district court held,

¹¹ The Fifth Circuit noted that “[a] handful of Supreme Court cases mention aquifers in the context of interstate water disputes.” App. 21 n. 5 (citing *Texas v. New Mexico*, 462 U.S. at 556-57 nn.1-2, and *Wisconsin v. Illinois*, 449 U.S. 48, 50 (1980)).

¹² The Aquifer “has not been apportioned, neither by agreement of the involved States nor by the U.S. Supreme Court.” App. 5; *see also* App. 14 (“There is no interstate compact governing use of the Aquifer’s water, and thus no specific volumes of groundwater from the Aquifer have been apportioned to Mississippi, Tennessee, or Arkansas.”).

to afford “any relief to [Mississippi] of necessity requires apportionment of the subject aquifer.” App. 9. The Fifth Circuit affirmed this ruling. App. 20 (finding “that the district court made no error of law as to the necessity of equitably apportioning the Aquifer”) (citing *Hinderlider*, 304 U.S. at 104-05); *see also* App. 5 (“[A]bsent apportionment, this court cannot afford relief to the Plaintiff and hold that the Defendants are pumping water that belongs to the State of Mississippi, because it has not yet been determined which portion of the aquifer’s water is the property of which State.”); App. 7 (“[T]o afford the State of Mississippi the relief sought and to hold that the Defendants have misappropriated Mississippi’s water from the Memphis Sands aquifer, the court must necessarily determine which portion of the aquifer’s water belongs to Mississippi, which portion belongs to Tennessee, and so on, thereby effectively apportioning the aquifer. Mississippi cannot be afforded any relief otherwise.”).

C. Therefore, the Claims Asserted in Mississippi’s Proposed Complaint Are Barred by the Application of Issue Preclusion to the Legal and Factual Issues Decided in *Mississippi I*.

1. The claims and allegations in Mississippi’s proposed bill of complaint are virtually identical to those Mississippi raised, argued, and lost in *Mississippi I*.

As it did in *Mississippi I*, Mississippi brings tort claims seeking relief for Defendants’ “wrongful taking” of “Mississippi’s groundwater.” *See* Compl. ¶¶ 24-26. Mississippi repeats its allegation that Memphis and

MLGW's pumping in Tennessee is "siphon[ing] Mississippi's groundwater northward," resulting in a "cone of depression" or lower pressure extending southward into Mississippi. *Id.* ¶¶ 24-25. As in its prior suit, Mississippi alleges (and improperly presumes) it already owns a fixed portion of the interstate water in the Aquifer based on the public trust doctrine and Mississippi's "Omnibus Water Rights Act." *Id.* ¶¶ 9-12. Mississippi again alleges that the respective states' "rights" to the Aquifer are defined by state boundary lines. *Id.* ¶ 51 ("This case presents a state border and sovereignty issue . . .").

Mississippi asks this Court to "enter a declaratory judgment establishing Mississippi's sovereign right, title and exclusive interest" in that portion of the Aquifer that lies within its borders. *Id.* ¶ 40. Mississippi alleges that the Aquifer "is an intrastate natural resource, not a naturally shared interstate resource," and, therefore, its lawsuit "presents a different factual and legal situation from the shared interstate river or stream disputes resolved under the Court's original and exclusive jurisdiction through 'equitable apportionment.'" *Id.* ¶ 41. Mississippi does not, however, ask for an equitable apportionment.

As it did in *Mississippi I*, Mississippi seeks money damages "in an amount equal to the value of the Mississippi groundwater Defendants have wrongfully taken," *id.* ¶ 55, "and/or requiring Defendants to . . . pay over to Mississippi all profits, proceeds, consequential gains, saved expenditures, and other benefits realized by Defendants," *id.* Prayer for Relief ¶ B(1)-(2). Mississippi also seeks injunctive relief requiring Defendants to "take all actions necessary to

eliminate the subject cone of depression *vis-à-vis* Mississippi,” including the complete restructuring of MLGW’s groundwater pumping systems or the conversion of Memphis’ water supply to the Mississippi River. *Id.* Prayer for Relief ¶ D.

2. The issues decided in *Mississippi I* that were necessary to the Rule 19 dismissal preclude the claims asserted in Mississippi’s proposed complaint.

Every issue essential to the claims asserted in Mississippi’s proposed complaint was raised and fully litigated in *Mississippi I*, and every such issue was decided adversely to Mississippi. For example, in *Mississippi I*:

- The district court and Fifth Circuit considered and rejected Mississippi’s contention that the Aquifer was not an interstate water resource. App. 14, 20.¹³
- The Fifth Circuit considered and rejected Mississippi’s contention that there was no need to equitably apportion the interstate Aquifer

¹³ The district court also noted that Mississippi’s position was not only contrary to established law, but was also in conflict with other positions taken by Mississippi in the same lawsuit:

The court also notes that, while Plaintiff contends on the one hand that only Mississippi water is involved in this suit, it also contends that the sole basis for the court’s jurisdiction is the existence of a federal question because interstate water is the subject of the suit. Plaintiff cannot have it both ways.

because Mississippi already owned a portion of the groundwater by virtue of its state sovereignty. App. 20 (noting this Court has “consistently rejected the argument advanced . . . by Mississippi in this lawsuit, that state boundaries determine the amount of water to which each state is entitled from an interstate water source”).

- The Fifth Circuit considered and rejected Mississippi’s argument that equitable apportionment did not apply to its claims because the water in the Aquifer does not flow or move at the same rate as a river or stream. App. 22 (“Despite Mississippi’s contentions, it is clear that the Aquifer is not a fixed resource like a mineral seam, but instead migrates across state boundaries.”); App. 21 (“The 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.”).
- The Fifth Circuit considered and rejected Mississippi’s ill-conceived position that equitable apportionment does not apply because the interstate Aquifer is beneath the ground. App. 21 (“The fact that this particular water source is located underground, as opposed to resting above ground as a lake, is of no analytical significance.”).
- The district court and Fifth Circuit considered and rejected the very premise of Mississippi’s lawsuit – that the state could seek damages for the alleged wrongful taking of “Mississippi’s

groundwater” even though the Aquifer had not been apportioned. App. 20 (noting the district court’s finding “that it could not determine whether Memphis had misappropriated water from the Aquifer without determining *what portion* of the Aquifer belongs to Mississippi and Tennessee respectively, and thus an equitable apportionment of the Aquifer between the states was required”); *id.* (affirming the district court’s finding on the “necessity of equitably apportioning the Aquifer”).

Mississippi “has [had its] day in court, with opportunity to present [its] evidence and [its] view of the law.” *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). Mississippi lost. That the issues now precluded were decided as grounds for a dismissal “without prejudice” in *Mississippi I* is “not legally significant.” *Matosantos*, 245 F.3d at 1210. These issues are to be afforded preclusive effect. Applying issue preclusion to those issues that were litigated and decided in *Mississippi I* completely and wholly forecloses the merits of Mississippi’s proposed complaint.

D. The dismissal of *Mississippi I* was “without prejudice” only to Mississippi’s right to seek an equitable apportionment of the Aquifer.

The lower courts in *Mississippi I* dismissed that case “without prejudice” only as to Mississippi’s right to petition this Court for an equitable apportionment. The district court and Fifth Circuit both made an express finding that, “in equity and good conscience,” dismissal was appropriate under Rule 19(b), in part, because Mississippi would still have an adequate

remedy if the action were dismissed. App. 8-10, 26-28. The district court explained there is a “well-established means . . . for Mississippi to petition the Supreme Court for apportionment of the waters of the Memphis Sands aquifer in a suit that properly joins all necessary and indispensable parties, including the State of Tennessee.” App. 9-10 (citing *Louisiana v. Mississippi*, 516 U.S. 22 (1995); *Mississippi v. Louisiana*, 506 U.S. 73 (1992); *Kansas v. Colorado*, 206 U.S. 46 (1907)). The Fifth Circuit observed that, “[i]n an equitable apportionment action, the Supreme Court might take one of several actions, such as concluding that the existing withdrawals of groundwater from the Aquifer in Tennessee are appropriate or limiting the total volume of the Aquifer water that may be withdrawn by either party.” App. 28 (citing *Colorado v. Kansas*, 320 U.S. 383, 391 (1945); *New Jersey v. New York*, 283 U.S. at 346).

By operation of issue preclusion, the dismissal of *Mississippi I* was, in effect, “with prejudice” as to those issues that were litigated and decided. See *In re Kauffman Mutual Fund Actions*, 479 F.2d at 267. Mississippi had its day in court and had the opportunity to present its evidence and its view of the law. *Stoll*, 305 U.S. at 172. The district court and Fifth Circuit duly considered and expressly rejected the very issues that Mississippi attempts to relitigate in its proposed complaint. One trial of these issues is enough. *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939).

CONCLUSION

The City of Memphis, Tennessee, and Memphis Light, Gas & Water Division respectfully request that this Court deny Mississippi's Motion for Leave to File a Bill of Complaint with prejudice.

Respectfully submitted,

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APPENDIX

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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

vs.

THE CITY OF MEMPHIS, TENNESSEE;
and MEMPHIS LIGHT, GAS & WATER
DIVISION

DEFENDANTS

The United States Supreme Court held, in Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 101-102 (1998), that Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case and that “for a court to pronounce upon [the merits] when it has no jurisdiction to do so is for a court to act *ultra vires*.” See also Villarreal v. Smith, 201 Fed. Appx. 192, 194 (5th Cir. 2006) (“A federal court has the affirmative duty to inquire into

jurisdiction whenever the possibility of a lack of jurisdiction arises.”); Warren v. United States, 874 F.2d 280, 281-82 (5th Cir. 1989) (holding that “federal courts are under a continuing duty to inquire into the basis of jurisdiction . . .”); Giannakos v. M/V Bravo Trader, 762 F.2d 1295, 1297 (5th Cir. 1985) (“United States District Courts . . . have the responsibility to consider the question of subject matter jurisdiction *sua sponte* . . . and to dismiss any action if such jurisdiction is lacking.”); Fed. R. Civ. P. 12(h)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”).

Discussion

The Plaintiff initiated this action seeking past and future damages as well as equitable relief related to the Defendants’ alleged wrongful appropriation of groundwater from the Memphis Sands Aquifer.

Although it is the Defendants that seek a ruling that the State of Tennessee is an indispensable party to this action, “when an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder.” Pulitzer-Polster v. Pulitzer, 784 F.2d 1305, 1309 (5th Cir. 1986). Because the court has indicated that a possibly necessary party is absent from this action, the burden of disputing joinder falls on the Plaintiff.

Rule 19(a) of the Federal Rules of Civil Procedure provides in part that:

A person who is subject to service of process and whose joinder will not deprive the court of

App. 3

jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (I) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

Rule 19(b) states that:

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors a court should consider in determining whether a party is indispensable include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the

App. 4

plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

Under Rule 19, the court's analysis is conducted as follows:

The court initially must determine whether the absent person's interest in the litigation is sufficient to satisfy one or more of the tests set out in the first sentence of Rule 19(a). There is no precise formula for determining whether a particular nonparty must be joined under Rule 19(a). Rather, the decision has to be made in terms of the general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them. If joinder under Rule 19(a) is not feasible because, e.g., it will deprive the court of subject matter jurisdiction, the court must examine the four considerations described in Rule 19(b) to determine whether the action may go forward (without the absentee) or must be dismissed, the absent person being thus regarded as indispensable.

Faloon v. Sunburst Bank, 158 F.R.D. 378, 380 (N.D. Miss. 1994).

While there are apparently no reported cases dealing with interstate subsurface water or aquifers, it

is admitted by all parties and revealed in exhibits that the Memphis Sands or Sparta aquifer lies under several States including the States of Tennessee and Mississippi.

In applying the dictates of Rule 19 to the facts of this case, the court holds that the State of Tennessee is a necessary and indispensable party. First, the doctrine of equitable apportionment has historically been the means by which disputes over interstate waters are resolved. The United States Supreme Court has held that it possesses a “serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States.” Arizona v. California, 373 U.S. 546, 564 (1963); see Texas v. New Mexico, 462 U.S. 554, 567 (1983) (The Supreme Court held that “[t]here is no doubt that this court’s jurisdiction to resolve controversies between two states . . . extends to a properly framed suit to apportion the waters of an interstate stream between States through which it flows . . .”).

The subject aquifer in the case *sub judice* has not been apportioned, neither by agreement of the involved States nor by the U.S. Supreme Court. However, absent apportionment, this court cannot afford relief to the Plaintiff and hold that the Defendants are pumping water that belongs to the State of Mississippi, because it has not yet been determined which portion of the aquifer’s water is the property of which State. It 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; such relief, however, is in the original and exclusive jurisdiction of the United States Supreme Court because such a

dispute is necessarily between the State of Mississippi and the State of Tennessee. Throughout the years, the Supreme Court has adjudicated many such disputes pursuant to its original and exclusive jurisdiction, including one between the States of Mississippi and Louisiana involving the Mississippi River. See, e.g., Louisiana v. Mississippi, 516 U.S. 22 (1995); Mississippi v. Louisiana, 506 U.S. 73 (1992); Virginia v. Maryland, 540 U.S. 56 (2003); Kansas v. Colorado, 514 U.S. 673 (1995); Nebraska v. Wyoming, 515 U.S. 1 (1995); Colorado v. New Mexico, 467 U.S. 310 (1984); Arizona v. California, 373 U.S. 546 (1963); New Jersey v. New York, 345 U.S. 369 (1953); Nebraska v. Wyoming, 325 U.S. 665 (1945); Connecticut v. Massachusetts, 282 U.S. 660 (1931); Kansas v. Colorado, 206 U.S. 46 (1907). In another analogous case, the Fifth Circuit held that the United States was an indispensable party in a suit filed by a Texas municipality and other individual landowners against several defendants who claimed irrigation rights to the Rio Grande River; while the Plaintiffs in that case did join the United States as a defendant, the Fifth Circuit held that sovereign immunity prevented joinder of the United States, but because it was a necessary and indispensable party and the suit could therefore not go forward without it as a party, the suit was dismissed. Miller v. Jennings, 243 F.2d 157 (5th Cir. 1957).

While this court, in initially denying the Defendants' motion seeking relief under Rule 19, relied upon another Supreme Court case, Illinois v. City of Milwaukee, Wisconsin, 406 U.S. 91 (1972), for the proposition that a State need not be joined in a nuisance action brought by a neighboring State against cities and local commissions in that State and involving

an interstate waterway, the court finds that cases such as Louisiana v. Mississippi are more closely analogous to the case *sub judice* because the partition of an interstate body of water is a necessary condition of affording the Plaintiff relief in this case. The case *sub judice* involves a proprietary or ownership interest in subsurface water. The Illinois v. City of Milwaukee, Wisconsin case did not involve a dispute over ownership of interstate water or any other property; the Louisiana v. Mississippi case, as well as other *aforecited* cases, did involve disputes over such ownership issues.

Turning to Rule 19(a)'s requirements, the court finds that Rule 19(a)(1) renders the State of Tennessee a necessary party because in its absence complete relief cannot be accorded among those already parties to the action. This is true because to afford the State of Mississippi the relief sought and to hold that the Defendants have misappropriated Mississippi's water from the Memphis Sands aquifer, the court must necessarily determine which portion of the aquifer's water belongs to Mississippi, which portion belongs to Tennessee, and so on, thereby effectively apportioning the aquifer. Mississippi cannot be afforded any relief otherwise. The court also notes that, while the Plaintiff contends on the one hand that only Mississippi water is involved in this suit, it also contends that the sole basis for the court's jurisdiction is the existence of a federal question because interstate water is the subject of the suit. The Plaintiff cannot have it both ways. The court also notes that diversity jurisdiction is not possible in this case because the Plaintiff State of Mississippi brings this suit on its own behalf and it is clear that a State is not a citizen of itself and therefore

cannot sue or be sued in federal court on the basis of federal diversity jurisdiction. Moor v. County of Alameda, 411 U.S. 693 (1973).

However, joinder of the State of Tennessee as a party to this suit is not possible because this court is without jurisdiction to hear such a dispute. As noted previously, original and exclusive jurisdiction of all controversies between two or more States is vested in the United States Supreme Court. See 28 U.S.C. § 1251. Thus, the court must also examine the dictates of Rule 19(b) and determine whether, in equity and good conscience, this action should proceed among the parties before it, or should be dismissed, with the State of Tennessee being thus regarded as indispensable. The court will examine Rule 19(b)'s four considerations in turn.

First, the court must consider to what extent a judgment rendered in Tennessee's absence might be prejudicial to Tennessee or to those already parties to this action. The court holds that a judgment in this matter rendered in the absence of Tennessee will be acutely prejudicial to Tennessee's interests. As the Supreme Court has noted, no single State is permitted to impose its own policy choices on neighboring States. BMW of North Am., Inc. v. Gore, 517 U.S. 559, 572 (1996); see Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143, 149 (1934) (holding that a State "cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of [a neighboring State]."). In effect, a judgment adverse to the Defendants in this case, prior to apportionment of the subject aquifer (which can only occur via agreement by the impacted States or by the

Supreme Court), would determine the rights of the State of Tennessee and its citizens to the valuable water resources in the subject aquifer, without Tennessee having been a party to this action. Thus, the court finds that a judgment rendered in Tennessee's absence in this case would be prejudicial to Tennessee.

Second, the court is unaware of any means by which, via protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice to Tennessee can be lessened or avoided. To afford any relief to the Plaintiff of necessity requires apportionment of the subject aquifer, thereby causing great prejudice to Tennessee.

Third and fourth, a judgment rendered in Tennessee's absence will not be adequate given the factors previously discussed by the court; however, the Plaintiff in this matter will certainly have an adequate remedy if this action is dismissed for nonjoinder. As noted above, original and exclusive jurisdiction over disputes of this type are vested in the United States Supreme Court, which has typically in the past assigned these disputes to a Special Master, who then makes proposed findings of fact and conclusions of law to the Supreme Court, which subsequently renders a decision in the case. This court's decision today in no way ends this dispute or renders the State of Mississippi without its day in court. While the Supreme Court has stated that "where possible, States [should] settle their controversies by mutual accommodation and agreement," if such a resolution is not possible in this case, a well-established means exists for Mississippi to petition the Supreme Court for apportionment of the waters of the Memphis Sands

aquifer in a suit that properly joins all necessary and indispensable parties, including the State of Tennessee. See, e.g., Louisiana v. Mississippi, 516 U.S. 22 (1995); Mississippi v. Louisiana, 506 U.S. 73 (1992); Kansas v. Colorado, 206 U.S. 46 (1907).

Given the foregoing, the court hereby finds that the State of Tennessee is a necessary and indispensable party to this action pursuant to Rule 19 of the Federal Rules of Civil Procedure. Because the joinder of Tennessee is not possible in this court, the court hereby determines that in equity and good conscience this action should be dismissed without prejudice, with the State of Tennessee being regarded by the court as indispensable.

While the court makes no formal determination in its opinion today regarding the necessity or indispensability of the State of Arkansas to this action, the court is of the opinion that Arkansas (via its current Attorney General) should be put on notice of the pendency of this action and any future action filed in the Supreme Court.

This opinion is appealable to the United States Court of Appeals for the Fifth Circuit. The court directs that all submissions to this court be included in and made a part of the record in this case.

A separate order in accordance with this bench opinion shall issue this day.

This the 4th day of February 2008.

/s/ Glen H. Davidson
Senior Judge

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

No. 2:05CV32-D-B

[Filed February 4, 2008]

JIM HOOD, Attorney General, <i>ex rel.</i> ,)
THE STATE OF MISSISSIPPI, acting)
for itself and <i>Parens Patriae</i> for and on)
behalf of the People of the State of)
Mississippi)
PLAINTIFF)
vs.)
)
THE CITY OF MEMPHIS, TENNESSEE;)
and MEMPHIS LIGHT, GAS & WATER)
DIVISION)
DEFENDANTS)
)

**ORDER OF DISMISSAL PURSUANT TO BENCH
RULING**

After hearing oral argument and receiving briefs regarding the court's jurisdiction over this matter, the court rules that the State of Tennessee is a necessary and indispensable party to this action pursuant to Rule 19 of the Federal Rules of Civil Procedure. This court, however, is not empowered to join Tennessee as a party to this action because original and exclusive jurisdiction of disputes between States resides with the United States Supreme Court pursuant to 28 U.S.C. § 1251(a). This action is accordingly dismissed without

prejudice pursuant to Rule 19(b) of the Federal Rules of Civil Procedure.

While the court makes no formal determination in this order regarding the necessity or indispensability of the State of Arkansas to this action, the court is of the opinion that Arkansas, via its Attorney General, should be put on notice of this action and any future proceedings herein.

SO ORDERED, this the 4th day of February 2008.

/s/ Glen H. Davidson
Senior Judge

APPENDIX 2

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 08-60152

[Filed June 5, 2009]

JIM HOOD, Attorney General, ex rel;)
STATE OF MISSISSIPPI, Acting for Itself)
and Parens Patriae for and on behalf of the)
People of the State of Mississippi)

Plaintiffs-Appellants)

v.)

THE CITY OF MEMPHIS, TENNESSEE;)
MEMPHIS LIGHT GAS & WATER DIVISION)

Defendants-Appellees)

Appeal from the United States District Court
for the Northern District of Mississippi

Before HIGGINBOTHAM, BENAVIDES, and
STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

In this lawsuit, the state of Mississippi seeks damages from the City of Memphis and Memphis Light, Gas and Water (“MLGW”) (collectively,

“Memphis”), for the alleged conversion of groundwater in the Memphis Sands Aquifer (the “Aquifer”). The district court dismissed Mississippi’s lawsuit without prejudice, holding that Tennessee is an indispensable party to the suit and that the court was without power to join Tennessee. We AFFIRM.

I. BACKGROUND

The Aquifer is located beneath portions of Tennessee, Mississippi, and Arkansas. There is no interstate compact governing use of the Aquifer’s water, and thus no specific volumes of groundwater from the Aquifer have been apportioned to Mississippi, Tennessee, or Arkansas. The Aquifer is the primary water source for both DeSoto County, Mississippi, and the city of Memphis, Tennessee, which lies just across the state line from DeSoto County. Mississippi seeks past and future damages, as well as equitable relief, related to Memphis’s allegedly wrongful appropriation of groundwater from the Aquifer.¹ Mississippi alleges that part of the groundwater that Memphis pumps from the Aquifer is Mississippi’s sovereign property and that the state must therefore be compensated.

MLGW, a division of the City of Memphis, owns and operates one of the largest artesian water systems in the world. It is responsible for providing gas, electricity, and water to its residential, business, governmental, and other customers, who are primarily

¹ Although there was some dispute between the parties below as to the basis of jurisdiction, federal question jurisdiction is present both because 28 U.S.C. § 1331(a) includes suits brought by a state and because federal common law will apply to the dispute. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 99 (1972).

citizens of Memphis. Although three of its groundwater well fields are located near the Tennessee border, all of MLGW's wells are located within Tennessee, and Memphis and Tennessee contend that this municipal water program operates under the direction and control of Tennessee law.²

Mississippi asserts that MLGW's groundwater pumping has created an underground "cone of depression" centered under Memphis and extending into Mississippi. Mississippi states that this cone of depression causes groundwater that would otherwise lie beneath Mississippi to flow across the border and into the cone under Tennessee, and thus become available to be pumped by Memphis. Mississippi argues that due to the growth of Memphis's water system the Aquifer is being drawn down at a higher rate than it is being replenished, thus causing water levels to drop.

Mississippi filed its first complaint against Memphis in February 2005. Memphis filed a motion to dismiss on several bases, including that the state of Tennessee was an indispensable party pursuant to Federal Rule of Civil Procedure 19. The motion to dismiss was denied in August 2005. Memphis then moved to "amend" the district court's order or to certify

² See, e.g., TENN. CODE ANN. § 68-221-707 (Tennessee Department of Environment and Conservation exercises supervision over operation of public water systems, including features of operation that affect quantity of water supplied). Mississippi contends that Memphis's groundwater pumping is not controlled by Tennessee law, but cites no legal authority for that conclusion, and neither does it address the provisions of Tennessee law cited in Memphis's brief.

an interlocutory appeal. Construing the motion to amend as a motion for rehearing, the district court denied both motions in September 2005. Memphis filed an answer and subsequent amended answer. Mississippi filed an amended complaint in October 2006, eliminating certain claims and clarifying its request for an award of monetary damages for Memphis's alleged misappropriation of Mississippi's groundwater.

In June 2007, Memphis moved for judgment on the pleadings, again arguing that Tennessee was an indispensable party to the suit. Memphis also moved for partial summary judgment on several of Mississippi's claims. In September 2007, the court denied the motions.

In late January 2008, shortly before the bench trial was to start, the district court announced that it had decided *sua sponte* to revisit the issue of Tennessee's possible status as an indispensable party and thus the court's subject-matter jurisdiction. After briefing from the parties and oral argument, the district court dismissed the suit for failure to include Tennessee, an indispensable party.³ Mississippi appeals.

³ In its opinion dismissing this suit, the district court directed that the Arkansas Attorney General should be put on notice of the pendency of this action and any future action filed in the U.S. Supreme Court, although the court refrained from determining whether Arkansas is also an indispensable party.

II. DISCUSSION

A. *Standard of Review*

We review the district court's decision to dismiss for failure to join an indispensable party for an abuse of discretion. *HS Res., Inc. v. Wingate*, 327 F.3d 432, 438-39 (5th Cir. 2003). Determining whether an entity is an indispensable party is a highly-practical, fact-based endeavor, and “[Federal Rule of Civil Procedure] 19’s emphasis on a careful examination of the facts means that a district court will ordinarily be in a better position to make a Rule 19 decision than a circuit court would be.” *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir. 2006). However, “[a] court abuses its discretion when its ruling is based on an erroneous view of the law.” *Chaves v. M/V Medina Star*, 47 F.3d 153, 156 (5th Cir. 1995).

Determining whether to dismiss a case for failure to join an indispensable party requires a two-step inquiry. First the district court must determine whether the party should be added under the requirements of Rule 19(a). Rule 19(a)(1) requires that a person subject to process and whose joinder will not deprive the court of subject-matter jurisdiction be joined if:

- (A) in that person's absence, the court cannot accord complete relief among existing parties; or
- (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or

otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19(a)(1). While the party advocating joinder has the initial burden of demonstrating that a missing party is necessary, after “an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder.” *Pulitzer-Polster*, 784 F.2d at 1309.

If the necessary party cannot be joined without destroying subject-matter jurisdiction, the court must then determine whether that person is “indispensable,” that is, whether litigation can be properly pursued without the absent party. *HS Res.*, 327 F.3d at 439. The factors that the district court is to consider in making this determination are laid out in Rule 19(b):

(1) the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by; (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person’s absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

FED. R. CIV. P. 19(b).

Mississippi contends that the district court misapplied Rule 19 in holding that Tennessee is a necessary and indispensable party because its suit does not implicate any sovereign interest of Tennessee. Mississippi argues that its suit does not require an

equitable apportionment of the Aquifer because the state owns the groundwater resources of the state as a self-evident attribute of statehood, and thus there is no interstate water to be equitably apportioned. Mississippi further argues that it is not seeking relief for damages caused by the direct actions of Tennessee, and therefore the suit is not an action between states invoking the original jurisdiction of the Supreme Court.

Memphis responds that the district court correctly determined that the nature of Mississippi's claims and asserted ownership of a water resource that it shares with Tennessee makes Tennessee an indispensable party to suit. Memphis argues that because Tennessee's sovereign ownership rights in the Aquifer water, the same which Mississippi seeks to protect, are implicated, the case cannot be properly resolved without Tennessee's participation. Memphis points to a century of Supreme Court case law addressing the equitable apportionment of interstate waters among states to argue that the district court correctly held that joining Tennessee would create a suit between states that must be filed in the Supreme Court.⁴

B. Tennessee is a Necessary Party to this Water Ownership Dispute

The district court held that Tennessee was a necessary party under Rule 19(a)(1) because in its absence complete relief could not be accorded between

⁴ Tennessee, participating in this appeal as *amicus curiae*, asserts that it has a sovereign interest in its share of Aquifer water as great as that asserted by Mississippi, and it therefore is a necessary and indispensable party to any suit over Memphis's withdrawals from the Aquifer.

Memphis and Mississippi. The court explained that it could not determine whether Memphis had misappropriated water from the Aquifer without determining *what portion* of the Aquifer belongs to Mississippi and Tennessee respectively, and thus an equitable apportionment of the Aquifer between the states was required. In so holding, the district court rejected Mississippi's argument, renewed on appeal, that only Mississippi's water is at issue. Mississippi's fundamental argument as to why Tennessee's presence in the lawsuit is unnecessary is that the Aquifer's water is not an interstate resource subject to equitable apportionment, and therefore Tennessee's sovereign interests are not implicated by the suit.

We find that the district court made no error of law as to the necessity of equitably apportioning the Aquifer. The 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. *See Hinterlander v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-05 (1938). Allocation of an interstate water source is accomplished through a compact approved by Congress or an equitable apportionment. *Id.*

"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." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). The Supreme Court has described the applicability of this doctrine in broad terms:

[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. 46, 97-98 (1907). Determining Mississippi and Tennessee's relative rights to the Aquifer brings this case squarely within the original development and application of the equitable apportionment doctrine. The fact that this particular water source is located underground, as opposed to resting above ground as a lake, is of no analytical significance. The 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. See, e.g., *Nebraska v. Wyoming*, 515 U.S. 1 (1995) (allocation of North Platte River); *Wisconsin v. Illinois*, 449 U.S. 48, 50 (1980) (amending order allocating usage of portions of Lake Michigan).⁵

⁵ A handful of Supreme Court cases mention aquifers in the context of interstate water disputes. See *Texas v. New Mexico*, 462 U.S. 554, 556-57, n.1, 2 (1983) (discussing role of New Mexico aquifers feeding the Pecos River, subject of litigation, and possible detrimental effects of pumping); *Wisconsin*, 449 U.S. at 50 (court order amending prior decree with requirements including "to the extent practicable allocations to new users of Lake Michigan water shall be made with the goal of reducing withdrawals from the Cambrian-Ordovician aquifer"). While these opinions do not address aquifer allocation directly, the fact that the aquifers were not treated differently from any other part of the interstate water

Mississippi argues that it owns a fixed portion of the Aquifer because it controls the resources within its state boundaries, citing to Mississippi and federal law demonstrating the state's sovereign rights over the soil, forest, minerals, etc. Despite Mississippi's contentions, it is clear that the Aquifer is not a fixed resource like a mineral seam, but instead migrates across state boundaries. The Supreme Court has consistently rejected the argument advanced by different states, and advanced by Mississippi in this lawsuit, that state boundaries determine the amount of water to which each state is entitled from an interstate water source.⁶ See, e.g., *Hinterlander*, 304 U.S. at 102 (Colorado's contention that it "rightfully may divert and use . . . the waters flowing within her boundaries in this interstate stream . . . cannot be maintained. The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other," quoting *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922)).

The Aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests, and whose allotment is

supply subject to litigation supports the conclusion that the Aquifer at issue must be apportioned.

⁶ Notably, the equitable apportionment doctrine has been used to address other migratory interstate resources, including the apportionment of fish that make an interstate migration. See *Idaho v. Oregon*, 462 U.S. 1017, 1024 (1983) ("Although that doctrine has its roots in water rights litigation, the natural resource of [migratory salmon] is sufficiently similar to make equitable apportionment an appropriate mechanism for resolving allocative disputes.").

subject to interstate compact or equitable allocation. Therefore, we find 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. *See Pulitzer-Polster*, 784 F.2d at 1309.

C. Tennessee's Joinder Would Destroy Subject-Matter Jurisdiction

After finding Tennessee to be a necessary party, the district court held that it was without power to join the state because original and exclusive jurisdiction over a suit between Mississippi and Tennessee would reside in the United States Supreme Court. *See* 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."). Mississippi argues that even if Tennessee's presence in the suit is necessary, it does not invoke the Supreme Court's original jurisdiction, and the district court could therefore retain jurisdiction over the case. We disagree.

Mississippi argues that the district court has subject-matter jurisdiction because this suit is only against Memphis, not Tennessee, and would at most be subject to the Supreme Court's original but non-exclusive jurisdiction. *See* 28 U.S.C. § 1251(b)(3) ("The Supreme Court shall have original but not exclusive jurisdiction of . . . All actions or proceedings by a State against the citizens of another State."). The Supreme Court has in the past stated a preference that such suits be brought in the district court in the first instance. *See United States v. Nevada*, 412 U.S. 534, 538 (1973). Mississippi's argument that its suit is not against Tennessee hangs on the assertion that only Memphis's actions, and not Tennessee's, are at issue.

See *Milwaukee*, 406 U.S. at 97 (holding that where Illinois sued Milwaukee for polluting Lake Michigan, not mandatory to sue Wisconsin as well). However, that contention ignores that, in contrast to *Milwaukee*, this suit requires an allocation of water rights between states: Memphis's actions are not wrongful unless there is a defined allocation of water that it is allowed to pump. Tennessee is a necessary party under Rule 19(a) on that basis, and the suit is thus one between two states.

Mississippi correctly argues that a suit involving interstate water does not *automatically* invoke the jurisdiction of the Supreme Court and strip the district court of jurisdiction. However, the cases to which Mississippi analogizes are distinguishable. Four cases upon which Mississippi relies most heavily are suits against the U.S. Army Corps of Engineers ("Corps of Engineers"), not against other states, and therefore plainly not within the scope of 28 U.S.C. § 1251(a). See *Alabama v. U.S. Army Corps of Eng's*, 424 F.3d 1117, 1130 (11th Cir. 2005) ("*Alabama II*") (recognizing that Alabama's suit against the Corps of Engineers was not a dispute between states, despite intervention of other states as parties, because the litigation was over how the Corps of Engineers should fulfill its obligations under federal law); *Georgia v. U.S. Army Corps of Eng's*, 302 F.3d 1242, 1254-55 (11th Cir. 2002) (same); *Alabama v. U.S. Army Corps of Eng's*, 382 F. Supp. 2d 1301, 1309-12 (N.D. Ala. 2005) ("*Alabama I*") (same); also *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025-26 (8th Cir. 2003) (same).

Mississippi also relies heavily on *Milwaukee v. Illinois*, the case that the district court identified as the

basis for its earlier rulings denying Memphis's arguments that Tennessee is an indispensable party. 406 U.S. 91 (1972). *Milwaukee* is distinguishable. *Milwaukee* involved a federal common law nuisance action to stop alleged pollution of Lake Michigan by the city of Milwaukee's sewage disposal practices. The Supreme Court denied Illinois's motion for leave to file a bill of complaint against Wisconsin, holding that the action did not trigger the Supreme Court's exclusive jurisdiction. The Court found that, under appropriate pleadings, Wisconsin could be joined as a defendant, but that it was not a mandatory defendant on the facts of the case. *Id.* at 97. The Court concluded that the case fell under 28 U.S.C. § 1251(b)(3), giving the Supreme Court original but not exclusive jurisdiction over certain actions, and therefore Illinois could and should file suit in the appropriate federal district court. *Id.* at 108.

Mississippi argues that *Milwaukee* is a more analogous case than the water-allocation cases because Mississippi, like Illinois, merely seeks to enjoin the actions of the city of Memphis and does not have any claim against Tennessee as a state. Mississippi's argument fails, however, because of the crucial factual difference between the two cases: *Milwaukee* involved stopping the pollution of what was agreed to be an interstate water body, while Mississippi claims sole ownership of a portion of the interstate water at issue. Mississippi's suit necessarily asserts control over a portion of the interstate resource Memphis currently utilizes pursuant to Tennessee law. *See, e.g.*, TENN. CODE ANN. § 68-221-707(a)-(b) ("The [Tennessee Department of Environment and Conservation] shall exercise general supervision over the operation and

maintenance of public water systems throughout the state. . . . [including] all the features of operation and maintenance which do or may affect the quality or quantity of the water supplied.”). Tennessee’s water rights are clearly implicated, even if Mississippi has sued only Memphis. *Cf. Colorado v. Kansas*, 320 U.S. at 393 (noting that controversy between states over rightful shares of the Arkansas River “is not to be determined as if it were one between two private riparian proprietors or appropriators”); *Kansas v. Colorado*, 206 U.S. at 100 (noting the court must consider the effect that one state’s increased share of water has on another state in order to determine amount of water each is entitled to from river).

Tennessee cannot be joined to this suit without depriving the district court of subject-matter jurisdiction because a suit between Mississippi and Tennessee for equitable apportionment of the Aquifer implicates the exclusive jurisdiction of the Supreme Court under 28 U.S.C. § 1251(a).

D. There Was No Abuse of Discretion in Dismissing the Suit

Having concluded that Tennessee is a necessary party whose joinder would deprive the district court of subject-matter jurisdiction, we turn to whether the district court abused its discretion in dismissing the suit under Rule 19(b). When assessing the Rule 19(b) factors, the relevant inquiry is “whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.” FED. R. CIV. P. 19(b); *see Pulitzer-Polster*, 784 F.2d at 1312 (“[W]e must assess the factors set out in Rule 19(b), seeking to

avoid manifest injustice while taking full cognizance of the practicalities involved.”).

We find no abuse of discretion in the district court’s determination that Tennessee is an indispensable party and that in equity and good conscience the suit should be dismissed. Clearly a judgment rendered in Tennessee’s absence would be enormously prejudicial to Tennessee’s sovereign interest in its water rights. The specter of a determination of Tennessee’s water rights without the its participation in the suit is itself sufficiently prejudicial to render the state an indispensable party. *Cf. Hinterlider*, 304 U.S. at 106-07 (noting that judicial apportionment of water from an interstate stream is binding on all water claimants from each state); *New Jersey v. New York*, 283 U.S. 336, 346 (1931) (“[A river] offers a necessity of life that must be rationed among those that have power over it. . . . Both States have real and substantial interests in the River that must be reconciled as best they may.”). Further, there was no error in the district court’s finding that it could not fashion restrictions in the judgment so as to avoid the threat of prejudice to Tennessee’s sovereign interests or that a judgment rendered without Tennessee’s participation would be inadequate. *Cf. Idaho v. Oregon*, 462 U.S. 1017, 1025 (1983) (“[W]henver . . . 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. . . .”); *Colorado v. Kansas*, 320 U.S. at 392 (“The reason for judicial caution in adjudicating the relative rights of states [to shares of interstate water] is that . . . they

involve the interests of quasi-sovereigns, [and] present complicated and delicate questions. . . .”).

Finally, Mississippi will have an adequate remedy despite this suit’s dismissal. *See* 28 U.S.C. § 1251(a). In an equitable apportionment action, the Supreme Court might take one of several actions, such as concluding that the existing withdrawals of groundwater from the Aquifer in Tennessee are appropriate or limiting the total volume of Aquifer water that may be withdrawn by either party. *See Colorado v. Kansas*, 320 U.S. at 391; *New Jersey*, 283 U.S. at 346.⁷

III. CONCLUSION

For the foregoing reasons we AFFIRM the judgment of the district court.

⁷ Of course, the parties might also negotiate an interstate compact allocating the resource going forward rather than continue litigation. *See Colorado v. Kansas*, 320 U.S. at 392 (encouraging the parties to seek a negotiated, political solution rather than requiring the Supreme Court to make a necessarily imperfect determination).

APPENDIX 3

(ORDER LIST: 559 U.S.)

MONDAY, JANUARY 25, 2010

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ORDERS IN PENDING CASES

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The motion for leave to file a bill of complaint is denied without prejudice. See *Virginia v. Maryland*, 540 U.S. 56, 74, n. 9 (2003); *Colorado v. New Mexico*, 459 U.S. 176, 187, n. 13 (1982).

* * *

CERTIORARI DENIED

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