

No. 143, Original

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**In the Supreme Court of the United States**

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STATE OF MISSISSIPPI,

*Plaintiff,*

v.

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

*Defendants.*

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

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**SUPPLEMENTAL BRIEF OF THE STATE OF  
MISSISSIPPI IN RESPONSE TO BRIEF FOR  
THE UNITED STATES AS AMICUS CURIAE**

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**SUPPLEMENTAL BRIEF OF MISSISSIPPI IN  
RESPONSE TO BRIEF FOR THE UNITED  
STATES AS AMICUS CURIAE<sup>1</sup>**

**INTRODUCTION**

Mississippi has tendered a proposed Complaint in Original Action together with evidence demonstrating facts which neither the United States nor the Tennessee Parties dispute: Since 1985 the Tennessee Parties have knowingly and intentionally used, and expanded, one of the world's largest commercial pumping operations<sup>2</sup> to reach into Mississippi's sovereign territory, and to forcibly take, by artificial means and without notice or permission, hundreds of millions of gallons of high quality groundwater naturally collected and stored within Mississippi's sovereign territory. Under natural conditions, none of the groundwater being claimed would have ever entered Tennessee.

While the United States has not asserted an independent federal interest, it implicitly joins the Tennessee Parties in their argument for the perfunctory, unlimited expansion of the federal

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<sup>1</sup> BRIEF FOR THE UNITED STATES AS AMICUS CURIAE is hereinafter referred to as "United States Brief."

<sup>2</sup> "MLGW operates one of the largest artesian well systems in the world. It is through this system that MLGW taps into the aquifer and delivers water to more than 257,000 customers. MLGW operates 10 water pumping stations and more than 175 wells throughout Shelby County." <http://www.mlgw.com/about/>. Tennessee authorizes all MLGW development and pumping together with additional wells in Shelby County. Data presented is for MLGW only.

common law of equitable apportionment to all groundwater one state can mechanically extract from its neighbor—without regard to the natural geology, and limited only by the ever growing reach of advancing technology. Nothing in the Court’s existing jurisprudence supports this construction of the Constitution. The Court should grant Mississippi’s Motion for Leave to File Complaint in Original Action, affirm each state’s sovereign authority over its lands and waters, and grant Mississippi appropriate equitable relief.

## STATEMENT

The United States’s STATEMENT adds little but confusion to the issues before the Court, as it jumps back and forth between the Parties’ contentions, arguments, and positions together with some facts interspersed with characterizations. To be fair, groundwater issues can be confusing and counterintuitive, and adding to such confusion, the facts have not always been carefully articulated in the published lower court proceedings that focused on jurisdiction.<sup>3</sup> First and foremost, the disputing states’ respective rights are determined under the Constitution of the United States. The dispute brought to the Court by Mississippi seeks to reaffirm the state’s sovereignty under the Constitution over all lands and waters within its borders, including groundwater. As

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<sup>3</sup> Relying on loose characterizations in prior proceedings, the United States describes the “Aquifer” as covering 70,000 square miles in parts of Louisiana, Mississippi, Tennessee, Alabama, Arkansas, Missouri, Kentucky and Illinois. (United States Brief, p. 2, ¶1.) This dispute does not implicate this entire territory in any way.

discussed below, a careful reading of the Court's decisions addressing disputes over water between states reveals that the natural conditions at the time a state was admitted to the Union are constitutionally significant; accordingly, the geology and the natural process by which the groundwater at issue was trapped and stored in the Sparta Sand in each state is important.

The groundwater at issue was naturally collected and stored over thousands of years within Mississippi in the Sparta Sand, a geological formation sandwiched between impermeable upper and lower clay formations. The Sparta Sand in Mississippi can transmit (albeit at the rate of an inch or two a day) and store water under pressure, classifying it as a confined aquifer. The part of the Sparta Sand formation under examination originates at surface outcrops east of the Mississippi River in both Mississippi and Tennessee. From these outcrops it slopes west down a gradient in a predominantly east to west/southwest direction until it bottoms out deep beneath the Mississippi River. Under these natural, pre-pumping conditions, substantially all<sup>4</sup> surface water falling on Mississippi outcrops seeped into the Sparta Sand and naturally crept from east to west/southwest essentially parallel to the

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<sup>4</sup> Compare Figures 30 (pre-pumping) and 31, State of Mississippi's Brief in Support of Motion for Leave to File Bill of Complaint in Original Action, Appendix B, Exhibit 1 at 93a and 94a. Groundwater in area of Limited Natural Flow shown on Figure 31 is not included in Mississippi's claim for damages for past takings; however, the Tennessee Parties have no right under the Constitution to take any groundwater from this area without submitting to Mississippi's regulation enforcing its laws and policies.

common north/south border between Mississippi and Tennessee. At the time of their admission to the Union, each state became sovereign over a large quantity of high quality groundwater which had been stored in place over thousands of years within its constitutionally established borders.

Tennessee is clearly entitled to the groundwater naturally stored within its borders in the Sparta Sand, and in the other water-bearing geological formations within Tennessee, but no more. That right is limited, however, to groundwater naturally occurring in Tennessee, which is substantial. It is not entitled to use technology to forcibly reach outside Tennessee's sovereign territory into Mississippi to take groundwater which never fell under its Constitutional grant. But this is exactly what it has authorized and approved—and not out of necessity. The Tennessee Parties could and should have located MLGW's massive well fields further from the Mississippi/Tennessee border, limiting withdrawal to the natural recharge in Tennessee, and supplementing their needs with the abundant water from the Mississippi River. Instead, it is undisputed that for purely economic reasons, they have consciously chosen to use modern pumping technology to reach into Mississippi, and forcibly take hundreds of millions of gallons of irreplaceable groundwater out of Mississippi's groundwater storage, drawing down water levels in wells throughout DeSoto County, Mississippi. This intentional, unauthorized taking of Mississippi's valuable natural resource, solely for the Tennessee Parties' economic advantage, is an actionable violation of Mississippi's sovereignty under the Court's decisions.



## DISCUSSION

The Court's original and exclusive jurisdiction ceased to be an issue when the Court denied Mississippi's Petition for Writ of Certiorari following dismissal of the federal court action for failure to join Tennessee as a party. Mississippi's Motion presents an appropriate case involving a serious claim for the intentional violation of its territorial sovereignty, and the unlawful taking of its natural resources under the Constitution and Laws of the United States; and the Court possesses complete authority to grant all necessary and appropriate relief as requested by Mississippi. The argument that Mississippi has suffered no damage assumes Mississippi has no legitimate claim to any of the groundwater forcibly taken from its sovereign territory and simply defies Mississippi's retained rights under the United States Constitution and the decisions of the Court. Accordingly, the Court should grant Mississippi's Motion for Leave to File Complaint in Original Action.

**I. Mississippi Has Alleged an Intentional Violation of its Territorial Sovereignty by the Tennessee Parties under the Constitution, and the Court Has Equitable Jurisdiction to Grant All Relief Requested.**

**A. The Court's Decisions Do Not Support the Application of the Federal Common Law of Equitable Apportionment to Mississippi's Intrastate Groundwater.**

*Kansas v. Colorado*, 206 U.S. 46 (1907) provides no support for the United States's position. *Kansas v. Colorado* involved water of the Arkansas River

originating in Colorado which—untouched by man—has always flowed along a path created by nature through Kansas, Oklahoma, Indian Territory, Arkansas, and into the Mississippi River. It was shared by the inhabitants of all these states well before any of the states were created as a natural attribute of the land they occupied. *Id.* at 98. Kansas filed a bill in equity alleging that Colorado and its citizens were depriving and threatening to deprive Kansas and its citizens of all the water theretofore naturally flowing through Kansas, and invoked the Court’s original and exclusive jurisdiction over disputes between states. *Id.* Colorado demurred alleging the Court had “no jurisdiction” over the dispute, and that Colorado law controlled all uses of the River in Colorado. *Kansas v. Colorado*, 185 U.S. 125 (1902) (Syllabus demurrer averments 1 and 9). The Court denied without prejudice Colorado’s demurrer, reserving the jurisdictional question until the development of a full record. *Id.* at 144.

The Court’s 1907 Opinion discusses the competing federal and state jurisdictional claims in detail, and affirmed its original and exclusive Article III jurisdiction to resolve the dispute. *Kansas v. Colorado*, 206 U.S. at 80-96. In so doing, the Court concluded “[i]t is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters.” *Id.* at 93. The separate states’ sovereign authority over all water residing within their own borders was not questioned, nor was the sovereign authority of each state to control the law and policy regarding the preservation and use of all water within that territory. *Id.* at 93-95. Rather, the Court found the controversy to

be justiciable under its original and exclusive jurisdiction because of the simultaneous existence of each state's sole Constitutional authority to establish its own policies within its own territory, and a Constitutional prohibition against enforcing its policies on another state; while both states had a transient claim to use the surface water while it naturally traveled down the interstate stream. *See id.* at 95-96.

Using its equitable jurisdiction and stating that the “[o]ne cardinal rule, underlying all the relations of the States to each other, is that of equality of right,” the Court created equitable apportionment for disputes over surface water naturally flowing interstate. *Id.* at 97. All of the Court's subsequent equitable apportionment cases involve the actual or threatened interruption of the natural flow of water (or natural movement of anadromous fish) on an interstate path. None of these cases apportion an “interstate water source,” through which groundwater not otherwise available can be mechanically extracted from another state; nor do they divest a state of the authority to preserve and regulate the use of natural resources naturally residing within its sovereign territory for the benefit of its citizens as argued by the United States. United States Brief, 13-15.

Likewise, the United States's argument that Tennessee's massive commercial pumping operation siphoning Mississippi groundwater into Tennessee is an example of the “agency of natural laws” referred to in *Kansas v. Colorado* finds no support in that, or any subsequent Supreme Court case. Without getting into the ramifications of accepting this novel argument, it is simply a distortion of the Court's decision. *Kansas v.*

*Colorado*, cites *Missouri v. Illinois*, 180 U.S. 208 (1901), for its exercise of jurisdiction over the state parties in a case actually involving natural interstate water flow through rivers and streams. *Id.* at 97-98. The reaching of Illinois into Missouri “by the agency of natural laws” was Chicago’s dumping of sewage into the Chicago River, which naturally flowed into the Des Plaines River, which naturally flowed into the Illinois River (all wholly within Illinois), which ultimately flowed into the Mississippi River, and was deposited in Missouri. *Missouri v. Illinois*, 180 U.S. 208 (PRIOR HISTORY). The “agency of natural law” was the undisturbed flow of surface water downstream carrying pollution deposited by Illinois in Missouri. Pumping groundwater out of Mississippi is not the “agency of natural laws” under any case decided by the Court or the plain meaning of the words. Nor is the “agency of natural laws” discussed remotely similar to the mechanical application of the law of physics (i.e., the use of scores of turbine pumps).

To apply equitable apportionment under the facts pleaded by Mississippi would require a radical extension of the federal common law remedy of equitable apportionment for which there is no Constitutional foundation. It would also conflict with the Court’s opinions addressing the extension of federal common law. See e.g., *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535-37 (2011). As explained in *Kansas v. Colorado*, state law—not federal common law—controls all water naturally residing within a state’s sovereign boundaries.

**B. The Fact That Equitable Apportionment Is Not the Appropriate Remedy Does Not Leave Mississippi Without Claims under Which the Court Can Provide and Enforce Judicial Relief.**

As noted above, the use of the word Aquifer in this case is more confusing than helpful. Even if the United States's definition of "Aquifer" were referring to the Sparta Sand geological formation (i.e., land), the part of the formation existing within Mississippi's sovereign territory belongs to Mississippi under the Constitution. The part within Tennessee belongs to Tennessee. The essence of the Tennessee Parties' position is that they can take all the water out of Mississippi they can reach using continuing advances in technology without any permission from or compensation to Mississippi. This is clearly an unconstitutional invasion of Mississippi's sovereign territory and imposition of Tennessee law and policy in Mississippi. *See Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132-33 (2013); *Kansas v. Colorado*, 206 U.S. 46 (1907).

This is precisely the type of serious violation of sovereign territorial rights by one state against another prohibited under the Constitution of the United States which the Court's original and exclusive jurisdiction was created to address. *Rhode Island v. Massachusetts*, 37 U.S. 657, 731 (1838). The Court will invoke this jurisdiction "to prevent one State from taking advantage of another." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015). Once the Court decides to exercise its jurisdiction, it has all the authority necessary to resolve this dispute and grant all of the relief requested by Mississippi against the Tennessee Parties:

Proceedings under that grant of jurisdiction are “basically equitable in nature.” ... When the Court exercises its original jurisdiction over a controversy between two States, it serves “as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force.” ... That role significantly “differ[s] from” the one the Court undertakes “in suits between private parties.” ... In this singular sphere, “the court may regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice.”

*Id.* (citations omitted). The Tennessee Parties’ knowing and intentional violation of Mississippi’s territorial sovereignty goes to the foundations of the Constitution and its Amendments on which our federal system is built. In this context, the Court possesses the authority to both grant such relief and enforce such remedies as are necessary to prevent such abuses and best promote the purposes of justice. *Id.*

## **II. Mississippi Has Alleged and Offered Evidence of Concrete Injury**

The United States argument that Mississippi has suffered no real and concrete injury is premised entirely on the assumption that the Tennessee Parties have a Constitutional basis for reaching into Mississippi with “one of the largest artesian well systems in the world” to forcibly take groundwater which would never be otherwise available in Tennessee. This is a far more offensive act than Tarrant’s attack on Oklahoma’s refusal to grant Texas a permit to acquire water to which it had a colorable

claim under an interstate compact in *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2132-33.

The knowing and intentional violation of Mississippi's territorial sovereignty to appropriate a Mississippi natural resource is real and concrete injury in and of itself. But Mississippi has put much more before the Court. The Tennessee parties have taken hundreds of millions of gallons of Mississippi groundwater, drawn down water levels in substantially all of DeSoto County, Mississippi, and claims the right to take as much Mississippi groundwater as it can extract over Mississippi's objection without permission, compensation or acknowledgement of any limitation.

The Tennessee Parties' taking of Mississippi groundwater is not out of necessity, but for commercial sale and to obtain economic benefits for the state of Tennessee and the City of Memphis. Memphis actively promotes the fact that it has the best water at the lowest cost in the country for economic development. Memphis claims to have the sweetest water in the world delivered at half the costs of much of the country and one-third the costs of cities which have to highly treat their water: <http://www.waterworld.com/articles/print/volume-19/issue-11/washington-update/memphis-water-termed-sweetest-in-the-world.html>.

Because of Tennessee pumping, Mississippi's groundwater storage in the Sparta Sand is being drawn down much faster than it can be recharged and this valuable natural resource is, for all practical purposes, permanently lost to Mississippi and its people.

## CONCLUSION

The United States Brief simply ignores Mississippi's sovereign rights under the Constitution. The natural hydrogeological characteristics of this Mississippi groundwater under natural conditions make it an intrastate, not interstate, natural resource. Under these conditions, it is trapped and resides in Mississippi, never naturally crossing into Tennessee. The natural intrastate character of the Mississippi groundwater is not changed by the Tennessee Parties' cross-border extraction from Mississippi by modern mechanical pumping. There is nothing "natural" about such forced extraction through artificial means. The groundwater in dispute has never been "interstate" water under natural conditions, and Tennessee has no right under the Constitution to reach into Mississippi and pull it into Tennessee without Mississippi's permission. The United States and the Tennessee Parties essentially ask this Court to strip Mississippi of a fundamental attribute of its sovereignty and empower the Tennessee Parties to, with impunity, forcibly seize groundwater from Mississippi. Such an outcome cannot be allowed under the Constitution of United States, and Mississippi's Motion should be granted.



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