No. 143, Original

IN THE

Supreme Court of the United States

STATE OF MISSISSIPPI,

Plaintiff,

v.

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

Defendants.

ON EXCEPTION TO REPORT OF THE SPECIAL MASTER, HON. EUGENE E. SILER, JR.

REPLY OF THE CITY OF MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION TO THE EXCEPTIONS OF THE STATE OF MISSISSIPPI

DAVID L. BEARMAN
Counsel of Record
KRISTINE L. ROBERTS
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
(901) 526-2000
dbearman@bakerdonelson.com

Counsel for Defendants City of Memphis, Tennessee, and Memphis Light, Gas & Water Division

(For Continuation of Appearances See Inside Cover)

April 23, 2021

303916

Cheryl W. Patterson
Charlotte Knight Griffin
Memphis Light, Gas & Water Division
220 South Main Street
Memphis, Tennessee 38103
(901) 544-6549

Counsel for Defendant Memphis Light, Gas & Water Division

Jennifer Sink
City of Memphis, Tennessee
125 North Main Street, Room 336
Memphis, Tennessee 38103
(901) 636-6540

Counsel for Defendant City of Memphis, Tennessee

TABLE OF CONTENTS

Table of Contents

Table of Contents

Page

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Statutes

Other Authorities

Page

GLOSSARY

2014 Compl.	Compl., *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. June 6, 2014)
2014 Compl. App.	Appendix to Compl., *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. June 6, 2014)
2016 Op.	Memorandum of Decision on Motions to Dismiss and Motion to Exclude, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. Aug. 12, 2016) (Special Master's Dkt. #55)
2018 Op.	Memorandum of Decision on Defendants' Motion for Summary Judgment, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. Nov. 29, 2018) (Special Master's Dkt. #93)
Amicus NYC	Amicus Brief for the International Law Committee of the New York City Bar Association in Support of Neither Party, *Mississippi v. Tennessee, et al.*, No. 143 Orig. (U.S. March 1, 2021)

Glossary

App.	Appendix to Exceptions in Part of Defendants State of Tennessee, City of Memphis, and Memphis Light, Gas & Water Division to Report of the Special Master and Brief in Support, No. 143, Orig. (U.S. Feb. 22, 2021)
App. Mem. Reply	Appendix bound together with this brief
Aquifer	Middle Claiborne Aquifer
Def. Exhibit	Exhibit filed by Defendants in the evidentiary hearing before the Special Master in May 2019
DFOF	Defendants' Proposed Findings of Fact, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. Sept. 19, 2019) (Special Master's Dkt. #115) (reproduced at App. 65a-140a)
Hood 2005 Compl.	Compl., *Hood ex rel. Mississippi v. City of Memphis, et al.*, No. 2:05CV32-GHD, Dkt. #2 (N.D. Miss. Feb. 1, 2005) (reproduced at App. 1a-29a)

Hood 2005 Reply to Mot. to Dismiss	Reply Memorandum of Authorities in Support of Plaintiff's Response to Defendants' Motion (I) to Dismiss for Lack of Ripeness / Lack of Standing, (II) to Dismiss for Failure to Join Indispensable Party, and (III) to Dismiss the Tort Claims For Lack of Subject Matter Jurisdiction / Improper Venue, *Hood ex rel. Mississippi v. City of Memphis, et al.*, No. 2:05CV32-GHD, Dkt. #32 (N.D. Miss. Apr. 22, 2005) (excerpt reproduced at App. Mem. Reply 1a-3a)
Hood 2006 Am. Compl.	First Am. Compl., *Hood ex rel. Mississippi v. City of Memphis, et al.*, No. 2:05CV32-GHD, Dkt. #112 (N.D. Miss. Oct. 5, 2006) (reproduced at App. 30a-50a)
Hood 2007 Surreply to Mot. for Judgment	Plaintiff's Surreply to Defendant's Reply to Plaintiff's Response to Defendants' Motion for Judgment on the Pleadings, *Hood ex rel. Mississippi v. City of Memphis, et al.*, No. 2:05CV32-GHD, Dkt. #250 (N.D. Miss. Sept. 7, 2007) (excerpt reproduced at App. Mem. Reply 4a-10a)

Hood 2008 Miss. Fifth Cir. Br.	Brief of Appellant, *Hood ex rel. Mississippi v. City of Memphis, et al.*, Case No. 08-60152 (5th Cir. May 14, 2008) (excerpt reproduced at App. Mem. Reply 11a-18a)
Hr'g Tr.	Transcript of Evidentiary Hearing Before Special Master, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (May 20-24, 2019) (Special Master's Dkts. #105-#109)
Joint Exhibit	Exhibit filed jointly by the parties in the evidentiary hearing before the Special Master in May 2019
Miss. Ex. Brief	Exceptions to Report of the Special Master by Plaintiff State of Mississippi and Brief in Support of Exceptions, No. 143, Orig. (Feb. 22, 2021)
Rep. or Report	Report of the Special Master, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. Nov. 5, 2020) (Special Master's Dkts. #135 & #136)
Special Master	Honorable Eugene E. Siler, Jr.

Stip. Fact	Plaintiff's and Defendants' Joint Statement of Stipulated and Contested Facts, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. Feb. 27, 2018) (Special Master's Dkt. #64)
Tr. (Branch)	Deposition Transcript of Charles Thomas Branch, *Hood ex rel. Mississippi v. City of Memphis, et al.*, No. 2:05CV32-GHD (N.D. Miss. July 30, 2007) (excerpt reproduced at App. 53a) (excerpt submitted as part of the record by Defendants in Joint Submission of Deposition Designations (Sept. 14, 2018))
Tr. (Crawford)	Deposition Transcript of Jamie Crawford, *Hood ex rel. Mississippi v. City of Memphis, et al.*, No. 2:05CV32-GHD (N.D. Miss. July 30, 2007) (excerpt reproduced at App. 51a-52a) (excerpt submitted as part of the record by Defendants in Joint Submission of Deposition Designations (Sept. 14, 2018))
USGS	United States Geological Survey

INTRODUCTION

Mississippi has sued Defendants over rights to use interstate groundwater. Mississippi does not, however, seek to abate any scarcity of water for its cities, farms, or wildlife. No such scarcity exists. Instead, Mississippi seeks a monetary windfall for water that flowed underground from Mississippi to Tennessee in an interstate aquifer that is continually replenished by recharge. The aquifer has never been equitably apportioned by this Court and is not subject to an interstate compact.

The natural resource at issue is the Middle Claiborne Aquifer (the "Aquifer"), a massive underground water resource that lies beneath portions of Tennessee, Mississippi, and six other states: Kentucky, Illinois, Missouri, Arkansas, Louisiana, and Alabama. DFOF 64 (App. 88a). The Aquifer has been the primary source of public water for the City of Memphis, Tennessee ("Memphis"), for more than 100 years and is the "most widely used aquifer for industry and public supply . . . in Arkansas, Louisiana, Mississippi, and Tennessee." Joint Exhibit 71.[1] The geographic extent of the Aquifer is shown below in the shaded area.

1. The document submitted as Joint Exhibit 71 is a USGS scientific investigations map, which can be found at https://pubs.usgs.gov/sim/3014/pdf/sim3014.pdf.

Id.

The Court has long applied the doctrine of equitable apportionment to disputes between states to determine their respective rights to use interstate resources including rivers, groundwater connected to rivers, and migrating fish. The question presented in this case is whether equitable apportionment should apply to disputes between States over rights to use an interstate aquifer. The Special Master correctly found that "equitable apportionment is the appropriate remedy." Rep. 2.

Mississippi takes exception to the Special Master's report and recommendation and argues that the Court should decline to hold that equitable apportionment is the appropriate remedy. Miss. Ex. Brief 4. Mississippi instead argues that the Court should apply tort law principles, award monetary damages, and enjoin Defendants' use of

the Aquifer – even in the absence of an interstate compact or apportionment quantifying the States' respective rights to that Aquifer. Miss. Ex. Brief 46. To permit Mississippi to proceed with its monetary claim and seek injunctive relief would have devastating consequences for Memphis by threatening its public water supply and would encourage similar opportunistic lawsuits between States.

The Special Master properly rejected Mississippi's position and reached the correct conclusion. The Aquifer is an interstate resource. No State should be permitted to sue another State over use of an interstate resource until their respective rights to the resource have been quantified. Absent an interstate compact, equitable apportionment is the doctrine to determine the rights of states to interstate groundwater. Mississippi expressly disavowed equitable apportionment, and therefore, its lawsuit should be dismissed with prejudice.

PROCEDURAL HISTORY

I. Mississippi's Previous Litigation of the Same Issues.

This action is not the first time that Mississippi has sued Memphis and Memphis Light, Gas & Water Division ("MLGW") seeking a monetary award and injunctive relief for their withdrawal and use of water from the Aquifer within Tennessee's borders. Mississippi brought similar tort claims in *Hood, ex rel. Mississippi v. City of Memphis, Tenn.*, 533 F. Supp. 2d 646 (N.D. Miss. 2008), *aff'd*, 570 F.3d 625 (5th Cir. 2009), *cert. denied*, 559 U.S. 904 (2010) (the "*Hood* Litigation").

In 2005, Mississippi filed suit in the Northern District of Mississippi for the alleged wrongful taking of "Mississippi's water" from the Aquifer. The district court ultimately rejected Mississippi's claim that Memphis and MGLW were "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." *Hood* Litigation, 533 F. Supp. 2d at 648. The court held that "the doctrine of equitable apportionment has historically been the means by which disputes over interstate waters are resolved" and that the dispute fell within "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." *Id.* The Fifth Circuit affirmed. *Hood* Litigation, 570 F.3d at 633. Mississippi filed a Petition for Writ of Certiorari (Case No. 09-289), which this Court denied.

At the same time Mississippi sought certiorari, it also filed a separate Motion for Leave to File Bill of Complaint in an Original Action (No. 139, Orig.). Mississippi reasserted the same tort claims brought in the *Hood* Litigation against Memphis and MLGW but also included a "conditional" claim for equitable apportionment against Tennessee. The Court denied Mississippi's Motion for Leave on January 25, 2010, citing *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003),[2] and *Colorado v. New Mexico*,

2. *Virginia v. Maryland* holds that "Federal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other's interest in the river." 540 U.S. at 74 n.9.

459 U.S. 176, 187 n.13 (1982).[3] *Mississippi v. City of Memphis, Tennessee*, 559 U.S. 901, 901 (2010).

II. Mississippi's Current Lawsuit.

In this action, Mississippi seeks more than $615 million in money damages, again alleging that it "owns" a fixed portion of the Aquifer. 2014 Compl. ¶¶ 44, 53, 55. Mississippi claims that Defendants' withdrawal of water from the Aquifer through wells located entirely within Tennessee has pulled "Mississippi's groundwater" across the state line, 2014 Compl. ¶ 24, and constitutes "a violation of Mississippi's retained sovereign rights under the United States Constitution, and a wrongful and actionable trespass upon, and conversion, taking and misappropriation of, property belonging to Mississippi and its people," 2014 Compl. ¶ 52.

Mississippi concedes that the Aquifer lies beneath both Mississippi and Tennessee. 2014 Compl. ¶ 41. Mississippi also concedes that water in the Aquifer naturally flowed across the Mississippi-Tennessee state line before any pumping from the Aquifer began. 2014 Compl. App. 70a. Yet Mississippi asserts that the Aquifer "is *neither* interstate water *nor* a naturally shared resource." 2014 Compl. ¶ 50.

3. *Colorado v. New Mexico* holds that "a state seeking to prevent or enjoin a diversion by another state bears the burden of proving that the diversion will cause it 'real or substantial injury or damage.'" 459 U.S. at 187 n.13.

A. The Special Master's Ruling on Defendants' Motions for Judgment on the Pleadings.

Defendants filed Motions for Judgment on the Pleadings in February 2016, asking the Special Master to grant judgment in their favor and dismiss Mississippi's claims. The Special Master recognized that "'[e]quitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream.'" 2016 Op. 19 (quoting *Colorado v. New Mexico*, 459 U.S. at 183). Because "groundwater pumping generally resembles surface water pumping" and "both could have an effect on water in another state through the operation of natural laws," the Special Master held that "equitable apportionment appears to apply to disputes between States over interstate groundwater." *Id.* at 20, 25.

The Special Master concluded that Mississippi had failed to allege plausibly that the Aquifer at issue is not interstate. As such, "dismissal would likely be appropriate under Rule 12(c)." *Id.* at 35. However, noting his "responsibility to prepare an adequate record for review," the Special Master denied Defendants' motions and ordered an evidentiary hearing on the threshold "limited issue of whether the Aquifer and the water constitutes an interstate resource." *Id.* at 36.

B. The Special Master's Ruling on Defendants' Joint Motion for Summary Judgment.

After the close of discovery, Defendants filed a joint Motion for Summary Judgment. Defendants sought judgment in their favor on the basis that "(1) the water at

issue is interstate in nature, (2) equitable apportionment is the exclusive remedy for interstate water disputes when States have not entered into a compact, (3) no compact exists here, and (4) Mississippi has not sought equitable apportionment." 2018 Op. 2. Defendants asserted that there were no disputed material facts concerning the interstate character of the Aquifer because Mississippi's experts had conceded that the Aquifer underlies eight states, including Tennessee and Mississippi; groundwater pumping from the Aquifer in one state can and does affect groundwater in the Aquifer beneath another state; before pumping began, groundwater in the Aquifer flowed naturally from Mississippi to Tennessee; and the Aquifer is hydrologically connected to interstate surface water. *Id.* at 8.

The Special Master stated that "Defendants present a strong case" and warned that, "by rejecting equitable apportionment, Mississippi might have abandoned [its] only mechanism for relief." 2018 Op. 3, 27. However, the Special Master denied Defendants' motion in the interest of creating a "robust record." *Id.* at 27.

C. The Evidentiary Hearing.

During the week of May 20, 2019, the Special Master held an evidentiary hearing "on the limited – and potentially dispositive – issue of whether the Aquifer is, indeed, an interstate resource." 2016 Op. 1. The parties presented testimony from their expert witnesses. The parties also submitted proof in the form of exhibits and deposition designations. The Special Master directed the parties to submit post-hearing briefing and heard closing arguments on February 25, 2020.

D. The Special Master's Report.

On November 5, 2020, the Special Master issued his Report correctly recommending that the Supreme Court find "(1) the groundwater contained in the Middle Claiborne Aquifer is the resource at issue; (2) that resource is interstate; and (3) equitable apportionment is the appropriate remedy for the alleged harm." Rep. 2. Mississippi takes exception to the Special Master's report and recommendation that its case should be dismissed. Miss. Ex. Brief i-iii.

ARGUMENT

I. EQUITABLE APPORTIONMENT SHOULD APPLY TO INTERSTATE GROUNDWATER DISPUTES.

A. The Equitable Apportionment Doctrine Quantifies the Rights of States to a Shared Resource.

For more than a century, the Court has held that "[a]bsent an agreement among the States, disputes over the allocation of water are subject to equitable apportionment." *Tarrant Reg. Water Dist. v. Herrmann*, 569 U.S. 614, 619 (2013); *Florida v. Georgia*, 138 S. Ct. 2502, 2513 (2018) ("Where, as here, the Court is asked to resolve an interstate water dispute raising questions beyond the interpretation of specific language of an interstate compact, the doctrine of equitable apportionment governs [the Court's] inquiry."); *Colorado v. New Mexico*, 459 U.S. at 183 ("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."); *see also* 2016 Op. 35 ("[I]n the absence of an interstate compact, the Court has authorized only one avenue for states to pursue a claim that another State has depleted the availability of interstate water within its borders: equitable apportionment."). 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. 46, 97 (1907); *see also 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"). "At the root of the doctrine is the same principle that animates many of the Court's Commerce Clause cases: a State may not preserve solely for its own inhabitants natural resources located within its borders." *Idaho v. Oregon*, 462 U.S. 1017, 1025 (1983).

When equitably apportioning an interstate resource between the States with interests in it, the Court's goal is to "secure a just and equitable apportionment, 'without quibbling over formulas.'" *Colorado v. New Mexico*, 459 U.S. at 183-84 (quoting *New Jersey v. New York*, 283 U.S. 336, 343 (1931)). Thus, the doctrine of equitable apportionment is "'flexible,' not 'formulaic'" and considers "all relevant factors." *Florida v. Georgia*, 138 S. Ct. at 2515 (quoting *South Carolina v. North Carolina*, 558 U.S. 256, 271 (2010)). Such factors include "physical and climatic conditions, the consumptive use of water in the several sections of the [resource], the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a

limitation is imposed on the former." *South Carolina v. North Carolina*, 558 U.S. at 271-72 (quoting *Colorado v. New Mexico*, 459 U.S. at 183). The remedy of equitable apportionment requires the complaining State to prove "real and substantial injury or damage." *Colorado v. New Mexico*, 459 U.S. at 187 n.13 (quoting *Connecticut v. Massachusetts*, 282 U.S. at 672).

B. Equitable Apportionment Should Govern This Interstate Aquifer Dispute.

1. It is undisputed that the Aquifer is interstate.

Mississippi cannot credibly dispute that the Aquifer is an interstate resource. An "interstate aquifer" is an aquifer that extends beneath two or more States. DFOF 86 (App. 92a). Defining an "interstate aquifer" as one that lies beneath two or more states is consistent with the plain meaning of the words and the use of the term "interstate aquifer" in scientific and technical literature, DFOF 89 (App. 92a-93a), including by the Advisory Committee on Water Information's groundwater subcommittee, DFOF 88 (App. 92a).[4]

---

4. This definition of an interstate aquifer is consistent with the analogous term "transboundary aquifer." *See, e.g.*, United States-Mexico Transboundary Aquifer Assessment Act, Pub. L. No. 109-448, § 3(9), 120 Stat. 3328 (2006) (codified at 42 U.S.C. § 1962) ("The term 'transboundary aquifer' means an aquifer that underlies the boundary between a Participating State and Mexico."); The Law of Transboundary Aquifers, G.A. Res. 63/124, Art. 2(c), U.N. Doc. A/RES/63/124 (Dec. 11, 2008) ("'[T]ransboundary aquifer' or 'transboundary aquifer system' means respectively, an aquifer or aquifer system, parts of which

Based on the proof presented by the parties at the evidentiary hearing, the Special Master correctly found that the Aquifer is interstate because: (1) the Aquifer exists beneath portions of eight states, including Tennessee and Mississippi; (2) pumping from the Aquifer in one state can and does impact the groundwater in the Aquifer in other states; (3) before pumping began, groundwater in the Aquifer naturally flowed across state borders, including the Mississippi-Tennessee border; and (4) the Aquifer is hydrologically connected to interstate rivers. Rep. 15-26; *see also* 2018 Op. 13-19. While each factor alone is an independent basis for holding the Aquifer is interstate, together the interstate character of the Aquifer cannot be reasonably contested. Thus, it is noteworthy that all of the factors identified by the Special Master are *undisputed* and *conceded* by Mississippi. *See infra* Section II(A)(1)-(2).

a. The Aquifer exists beneath portions of eight states, including Tennessee and Mississippi.

The Aquifer is a single hydrogeological unit that continues without interruption across the Mississippi-Tennessee state line. Borehole log data confirms this fact. DFOF 65 (App. 88a). While there are variations

---

are situated in different States."); *see also* DFOF 90 (App. 93a) (citing Hr'g Tr. 279:19-22 (Spruill) (May 21, 2019); Hr'g Tr. 491:15-20 (Wiley) (May 22, 2019) (testifying that a transboundary aquifer is one that underlies a political boundary)); *see also* Amicus NYC 15-16 (noting that the Aquifer would fit the definition for an "international watercourse" according to the UN Watercourses Convention because "parts . . . are situated in different States") (quoting UN Watercourses Convention, Art. 2(b)).

in the hydrogeological properties of the Aquifer, those variations are not affected by political borders. DFOF 67-69 (App. 88a-89a). Nor do the variations in properties create barriers to groundwater flow or pumping. DFOF 70 (App. 89a). Properties such as hydraulic conductivity are continuous in the Aquifer across state borders. DFOF 71 (App. 89a). Potentiometric levels in the Aquifer extend uninterrupted across state borders demonstrating the continuity of groundwater flow patterns within the resource. DFOF 72, 73 (App. 89a). Cones of depression caused by pumping across state lines demonstrate the continuity of the Aquifer beneath those states. DFOF 74 (App. 89a-90a).

The Special Master noted that "scientific consensus holds that the Middle Claiborne Aquifer is a single hydrogeologic unit." Rep. 20. For at least 90 years, the U.S. Geological Survey ("USGS") has recognized the Aquifer as a regional resource extending beneath multiple states. DFOF 97 (App. 89a). Hydrogeologists from USGS and the U.S. Environmental Protection Agency have recognized the importance of studying the Aquifer on a regional scale. DFOF 98-103 (App. 94a-95a). Mississippi has participated in regional studies of the Aquifer including the Mississippi Arkansas Tennessee Regional Aquifer Study. DFOF 104 (App. 95a).

b. Before pumping began, groundwater in the Aquifer naturally flowed across state borders, including the Mississippi-Tennessee border.

There is not now and has never been any barrier in the Aquifer aligned with state boundaries that impairs or

impedes the flow of groundwater in the Aquifer. DFOF 76, 77 (App. 90a). Every study of pre-development conditions in the Aquifer, including those by Mississippi's expert witnesses, concludes that there was natural flow across state lines. DFOF 135, 136 (App. 102a). In fact, Mississippi's expert David Wiley created an illustration for his report that identified pre-development flow in the Aquifer moving from Mississippi to Tennessee, which he called "interstate flow." DFOF 139 (App. 103a). The existence of natural flow across state lines in the Aquifer is also confirmed by all of the numerical models of the Aquifer, DFOF 144 (App. 104a), including the ones relied on by Memphis and MLGW's expert witness David Langseth, DFOF 147-150 (App. 105a-106a); Tennessee's expert witness Brian Waldron, DFOF 151-154 (App. 106a-107a); and Mississippi's expert witness David Wiley, DFOF 146 (App. 105a). "Mississippi does not dispute the expert consensus that at least some quantity of groundwater naturally crossed the border under natural conditions." Rep. 24. The Special Master thus concluded that "[u]nder natural conditions, groundwater flowed between Mississippi and Tennessee." *Id.*

c. Pumping from the Aquifer in one state can and does impact the groundwater in the Aquifer in other states.

Wells in Mississippi and Tennessee are pumping groundwater from the Aquifer. DFOF 66 (App. 88a). A cone of depression is a natural effect of pumping. DFOF 112 (App. 97a). Cones of depression that cross state lines confirm that the aquifer in which the cone exists also crosses state lines. DFOF 113 (App. 97a-98a). Wells pumping from the Aquifer in Tennessee are drilled

straight down; they do not slant into Mississippi. DFOF 117 (App. 98a). Likewise, wells pumping from the Aquifer in Mississippi do not cross into Tennessee. DFOF 118 (App. 98a). Cones of depression caused in part by pumping in Tennessee extend into Mississippi. DFOF 121, 124 (App. 99a). Cones of depression caused by pumping in Mississippi extend into Tennessee. DFOF 119 (App. 98a). The regional cone of depression in the Memphis area is the result of cumulative pumping in Tennessee, Mississippi, and Arkansas. DFOF 42, 120-125, 227 (App. 78a-79a, 98a-99a, 123a). As the Special Master found, the pumping "effects seen in Mississippi show that there is an interconnected hydrogeological unit that crosses the Mississippi-Tennessee border. That alone undermines Mississippi's primary theory that the resource is intrastate in nature." Rep. 21.

d. The Aquifer is hydrologically connected to interstate rivers.

The Aquifer is hydrologically connected to interstate surface water. DFOF 176, 177 (App. 112a). For example, the Aquifer has a direct hydrological connection to the Wolf River, which begins in Mississippi and flows into Tennessee before discharging in the Mississippi River. DFOF 179, 180 (App. 112a-113a). The Aquifer also is hydrologically connected to the Mississippi River, whose interstate character is apparent. DFOF 181-184 (App. 113a). The Aquifer's "hydrologic[] connect[ion] to interstate surface waters" is further proof of the Aquifer's interstate character. Rep. 25.

2. Interstate groundwater is "sufficiently similar" to interstate surface water.

The Special Master found that "groundwater pumping generally resembles surface water pumping; both could have an effect on water in another state through the operation of natural laws," and, therefore, "equitable apportionment appears to apply to disputes between States over interstate groundwater." 2016 Op. 20, 25; *see also* 2018 Op. 21 ("And when a resource is interstate in nature, equitable apportionment supplies the proper method for determining rights."). The concept of an interstate or transboundary aquifer is not new. The Court has recognized "[t]he multi-state character of the Ogallala aquifer – underlying tracts of . . . land in Colorado and Nebraska, as well as parts of Texas, New Mexico, Oklahoma, and Kansas," noting the "significant federal interest in conservation as well as *fair allocation* of the . . . resource." *Sporhase v. Nebraska*, 458 U.S. 941, 953 (1982) (emphasis added).[5]

5. Water law scholars agree that equitable apportionment should govern the allocation of groundwater between states overlying a common aquifer. *See, e.g.*, Anthony Dan Tarlock, *Law of Water Rights and Resources* § 10:24 (July 2020 Update) ("Interstate conflicts are becoming more common, and the widespread assumption among water lawyers is that the U.S. Supreme Court will apply equitable apportionment to groundwater."); Noah D. Hall & Benjamin L. Cavataro, *Interstate Groundwater Law in the Snake Valley: Equitable Apportionment and a New Model for Transboundary Aquifer Management*, 2013 Utah L. Rev. 1553, 1607-12 (2013) (identifying "indicator[s] that the Court views interstate groundwater as subject to the equitable apportionment doctrine"); Albert E. Utton, *Sporhase, El Paso, and Unilateral Allocation of Water Resources: Some Reflections on International and Interstate Groundwater Law*, 57 U. Colo.

The Court has applied equitable apportionment broadly, finding it the appropriate mechanism to adjudicate disputes over rights to interstate rivers, including rivers that share a direct hydrological connection with groundwater, *Texas v. New Mexico*, 462 U.S. 554, 556-57 nn.1-2 (1983); *Wisconsin v. Illinois*, 449 U.S. 48, 50 (1980), and anadromous fish that migrate across state borders, *Idaho v. Oregon*, 462 U.S. at 1024 (finding a dispute over migratory fish "sufficiently similar" to water rights litigation "to make equitable apportionment an appropriate mechanism for resolving allocative disputes"). The Special Master's recommendation is also consistent with this Court's reliance on its equitable apportionment rulings when it denied Mississippi's 2009 Motion for Leave to file an Original Action. *Mississippi v. City of Memphis, Tennessee*, 559 U.S. at 901.[6]

L. Rev. 549, 556 (1986) ("Water resources which underlie a state boundary should be treated in the same way as those that flow on the surface across state boundaries. Unilateral, or self-allocation of groundwater resources should be restrained, just as it is in the case of surface waters.").

6. Mississippi's reliance on Joint Exhibit 27 to distinguish groundwater from surface water is unhelpful to its position. Miss. Ex. Brief 5. The document submitted as Joint Exhibit 27 is a textbook, C.W. Fetter, *Applied Hydrogeology* (4th ed. 2001). On the page quoted by Mississippi, the author cautions, "as *groundwater is not isolated from surface water*, a study of ground-water development necessarily encompasses many aspects of surface-water flow." Joint Exhibit 27 at 441 (emphasis added). Similarly, Mississippi cites to Joint Exhibit 2, Miss. Ex. Brief 5 n.2, but omits a statement affirming that "ground water and surface water are closely related and in many areas comprise a single resource," Joint Exhibit 2 at 9 of 68. The document submitted as Joint Exhibit 2 is publicly available at https://pubs.usgs.gov/circ/circ1186/pdf/circ1186.pdf.

II. THE SPECIAL MASTER CORRECTLY REJECTED MISSISSIPPI'S ARGUMENT THAT EQUITABLE APPORTIONMENT SHOULD NOT APPLY.

A. Mississippi's contention that the Aquifer is not interstate is unsupportable.

Mississippi wrongly alleges that the doctrine of equitable apportionment does not apply to its claims because the Aquifer is "*neither* interstate water *nor* a naturally shared resource." 2014 Compl. ¶ 50. In its Brief in Support of Exceptions, however, Mississippi offers nothing of substance to refute the Special Master's finding that the Aquifer, including the groundwater in it, is an interstate resource. Instead, Mississippi asserts, without support or explanation, that the groundwater at issue is "'intrastate' by definition" merely because it "has 'existed' and 'occurred' within the land making up Mississippi for centuries." Miss. Ex. Brief 35.[7] Said differently, Mississippi argues that, within the interstate Aquifer, there exist specific, identifiable water molecules that were beneath Mississippi for some period of time and for that reason constitute an "intrastate" resource of Mississippi. *Id.* Mississippi thus purports to unilaterally apportion to itself water within an interstate resource based solely on its contention that the water "existed"

7. The Special Master previously noted Mississippi's failure to support its contention that the water at issue is "intrastate" in nature. 2018 Op. 18 (noting that "Mississippi contends that because it takes up to thousands of years for water within the Aquifer to travel to interstate surface waters, the water retains an intrastate character[,] [b]ut Mississippi does not say why").

within its state borders.[8]

Such "line-drawing finds no support in the law." 2018 Op. 14; *see also id.* at 16 (acknowledging "the Court has explicitly drawn [a] parallel between the Commerce Clause and equitable apportionment jurisprudence" and noting that "[u]nder the Commerce Clause States cannot keep resources only for themselves; they must share") (citing *Evans*, 462 U.S. at 1025); *id.* (Mississippi "cannot make resources intrastate in nature by preventing out-of-state residents from having access"); *id.* at 17 ("if Mississippi got its way, a resource could never be interstate in nature when a defendant state acted within its own borders but affected resources in the other state"). The Special Master properly rejected Mississippi's position, observing that "no Supreme Court decision appears to have endorsed one State suing another State, without equitable apportionment, for the depletion of water that is part of a larger interstate resource by limiting its claims to a specific portion of the water." 2016 Op. 32; 2018 Op. 13; *see also Kansas v. Colorado*, 206 U.S. at 115; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938) ("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 *Kansas v. Colorado*, 206 U.S. at 97).

8. *See* Utton, *supra* note 5 at 556 ("Unilateral, or self-allocation of groundwater resources should be restrained, just as it is in the case of surface waters. Self-allocation, whether under the guise of the commerce clause or of being upstream, is not in the best interest of the planned use of the resource, nor of good federalism.").

1. Mississippi has conceded facts that prove the Aquifer is interstate.

Mississippi's expert witnesses David Wiley and Richard Spruill have conceded all of the factors cited by the Special Master as proving the Aquifer is interstate, in addition to other evidence demonstrating the interstate character of the Aquifer. For example, both Spruill and Wiley agree that the Aquifer underlies eight states including Tennessee and Mississippi. DFOF ¶ 64 (App. 88a). Both Mississippi experts agree there is no physical or hydrological barrier in the Aquifer that impedes the flow of water across the Mississippi-Tennessee border in either direction. DFOF ¶¶ 76, 77 (App. 90a). Both Mississippi experts testified that groundwater in the Aquifer naturally flowed across state lines before pumping began in the late nineteenth century. DFOF ¶ 135 (App. 102a). Wiley's expert report includes a figure that identifies an area from which water in the Aquifer naturally flowed from Mississippi to Tennessee before pumping. DFOF ¶¶ 139-141 (App. 103a). Spruill and Wiley admit that groundwater pumping from the Aquifer in one state impacts groundwater in the Aquifer in other states. DFOF ¶¶ 123-125 (App. 99a). Both Mississippi experts testified that the Aquifer is hydrologically connected to interstate rivers. DFOF ¶ 176 (App. 112a). Further, both Mississippi experts concede that the Aquifer is a transboundary resource. DFOF ¶ 94 (App. 93a). Finally, Mississippi's Rule 30(b)(6) representatives testified that all states overlying the Aquifer – including Tennessee, Arkansas, and Mississippi – have an interest in the Aquifer. *See* Tr. (Crawford) (App. 51a-52a); Tr. (Branch) (App. 53a).

2. Mississippi previously asserted the Aquifer is interstate and conceded that federal common law applies.

The positions taken by Mississippi in this case directly contradict those it took in the *Hood* Litigation. For example, in this case, Mississippi asserts that the Aquifer is not an interstate resource. However, in the *Hood* Litigation, Mississippi repeatedly asserted that the Aquifer is interstate and affirmatively relied on the interstate character of the Aquifer as the basis for subject-matter jurisdiction. *See, e.g.*, *Hood* 2005 Compl. ¶ 11 (App. 5a) ("This is an interstate groundwater action . . . ."); 2006 Am. Compl. ¶ 14 (App. 35a) ("The Memphis Sand Aquifer, or 'Sparta Aquifer' as it is known in Mississippi . . . is an underground reservoir that underlies portions of West Tennessee and Northwest Mississippi."); *Hood* 2007 Surreply to Mot. for Judgment 5 (App. Mem. Reply 5a) ("Mississippi's claims against Memphis arise in the context of a transboundary dispute involving an interstate body of water."); *Hood* 2008 Miss. Fifth Cir. Br. 1 (App. Mem. Reply 12a) (asserting that the "Memphis Sand Aquifer [is] an interstate underground body of water"); *id.* at 21 (App. Mem. Reply 13a) ("The interstate nature of the aquifer confers federal question jurisdiction on the District Court.").

Mississippi has also reversed course on the law governing its claims. In the *Hood* Litigation, Mississippi asserted that "federal common law" applies to its claims. *Hood* 2006 Am. Compl. ¶ 8 (App. 33a) (calling for the application of "federal and/or interstate common law"); *Hood* 2005 Reply to Mot. to Dismiss 27 n.27 (App. Mem. Reply 3a) ("Of course, in the instant matter, it is

universally recognized that in the context of disputes involving an interstate body of water, such as the Sparta Aquifer, federal common law applies."). In this case, Mississippi takes the opposite position and rejects the application of federal common law because the federal common law remedy would be equitable apportionment, which Mississippi has disclaimed.

In the *Hood* Litigation, the district court and Fifth Circuit agreed with Mississippi's position that the Aquifer is an interstate resource and federal common law – equitable apportionment – should govern its claims. Having previously taken that position, Mississippi should not be permitted to take a contrary position now. The prejudice to Defendants from Mississippi's reversal of position is evident from the time and resources spent defending this litigation. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("'[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'") (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).

B. The Special Master Correctly Rejected Mississippi's Sovereign Territory Theory.

1. The public-trust doctrine does not support Mississippi's position.

Mississippi relies on a selective and incomplete reading of *Kansas v. Colorado*, 206 U.S. 46 (1907), to support its flawed argument that the equal footing and

public trust doctrines are incompatible with or somehow supersede the equitable apportionment doctrine. Miss. Ex. Brief 26-31. Mississippi's argument fails because the equal-footing and public-trust doctrines are not only consistent with, but also are foundational pillars of equitable apportionment. The Court expressly relied on the co-equal status of the States, *Kansas v. Colorado*, 206 U.S. at 95-96 ("when the states of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other states"); *id.* at 97-98 ("One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest."), as well as each State's authority to regulate within its own borders, *id.* at 94 ("it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised").

Mississippi's argument ignores the pivotal next step in the Court's analysis in *Kansas v. Colorado*. Because States are co-equal, and "[n]either state can legislate for, or impose its own policy upon the other," *id.* at 95-96, the question becomes what happens when the "actions of one state reaches, through the agency of nation laws, into the territory of another state," *id.* at 97-98.[9] Then, as now, the 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." *Id.* The doctrine of equitable apportionment, rather than Mississippi's

9. Mississippi concedes that Tennessee has the right to regulate groundwater pumping within its borders. 2014 Compl. ¶ 21 ("Tennessee's control over public water systems extends to the location and drilling of water wells and the withdrawal of groundwater from MLGW wells.").

assertion of tort claims, is the appropriate mechanism to adjudicate this dispute and respect the "equality of right" among all States. 2016 Op. 21 ("Mississippi's discussion of equal footing does not appear to show that the doctrine applies to disputes concerning a State's pumping from an interstate resource.").

Mississippi's attempt to frame its argument as being supported by the Constitution ignores that this Court's authority to equitably apportion interstate resources is "part of the Constitution's grant of original jurisdiction." *Kansas v. Nebraska*, 574 U.S. 445, 454 (2015).

2. Mississippi does not own the groundwater.

Central to Mississippi's position is its claim of ownership over the groundwater in the interstate Aquifer within its borders. Miss. Ex. Brief 19-23. The Court has already rejected the notion of a state's proprietary ownership of natural resources. In a series of cases culminating in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), the Court held that States do not hold absolute title to groundwater. The theory of public ownership urged by Mississippi is 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)).

> [Mississippi's] remarkable claim departs from the almost uniformly established position that states do not "own" the water within their borders, but instead are authorized to manage that water for the "use" of their citizens. It also

> departs from the U.S. Supreme Court doctrine of "equitable apportionment" under which the Court has resolved interstate surface water conflicts, determining relative rights of use rather than awarding monetary damages based on water ownership.
>
> This conflation of use and ownership has the potential to affect the outcome of this case, as well as distort future litigation involving equitable apportionment, regulatory takings, state water rights law, and other legal doctrines.

Christine A. Klein, *Owning Groundwater: The Example of* Mississippi v. Tennessee, 35 Va. Envtl. L.J. 474, 474 (2017).

Mississippi's claim to own a portion of the groundwater in the Aquifer has been rejected by its own Supreme Court. The Mississippi Supreme Court has held 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)).

3. Mississippi's lawsuit seeks to control and punish lawful conduct in Tennessee.

a. Defendants' wells are located entirely within Tennessee and pump groundwater solely from Tennessee.

Mississippi's oft-repeated accusation that Defendants are engaged in "cross-border" pumping and extraction of groundwater "located in" Mississippi, Miss. Ex. Brief 1-3, 16, 19, 23, 31, 33, 36, 38, is demonstrably false. Mississippi stipulated that all of MLGW's "wells are physically located entirely within Tennessee," Stip. Fact 34 (at p. 106); that "[g]roundwater wells in . . . Tennessee are drilled straight down," Stip. Fact 35 (at p. 106); and that "[t]here are no wells in [Tennessee] that are drilled at a slant so that part of the pump or well physically crosses the Mississippi-Tennessee state line," Stip. Fact 35 (at p. 106). Thus it is undisputed that MLGW's wells are "located in" Tennessee and pump groundwater "located in" Tennessee. Having stipulated to those facts, Mississippi cannot now credibly assert a conflicting position.

Mississippi's reliance on the regional cone of depression does not support its position. Every groundwater well creates a cone of depression when it pumps. DFOF 41 (App. 78a). Lowering the pressure near the pump creates a gradient causing water to flow from points of higher pressure to the pump itself. DFOF 38-40 (App. 78a). Cones of depression are the natural consequence, or natural agency, of pumping. DFOF 41 (App. 78a). The cone of depression in southwest Tennessee, northwest Mississippi, and east-central Arkansas is the result of cumulative pumping in all three states. DFOF 42, 120-

125, 227 (App. 78a-79a, 98a-99a, 123a). The existence of the regional cone of depression does not change the fact that pumping by MLGW in Tennessee occurs solely within Tennessee. *See* 2016 Op. 20 (finding that "groundwater pumping generally resembles surface water pumping").

b. Mississippi has no valid claim to regulate lawful conduct in Tennessee.

"A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). While Mississippi has jurisdiction to regulate the withdrawal of groundwater from wells located within Mississippi, it cannot extend "the effect of its laws beyond its borders so as to destroy or impair the right of citizens of [Tennessee]." *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934); *see also Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction . . . ."). Tennessee, as a co-equal State, is granted the same authority and limitations with respect to its own territory.

Mississippi's improper attempt to extend its authority outside its own boundaries "throw[s] down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). To attack Memphis and MLGW

for doing in Tennessee what Tennessee law allows "is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). That Mississippi is prohibited from doing so "is so obviously the necessary result of the Constitution that it has rarely been called into question and hence authorities directly dealing with it do not abound." *New York Life Ins. Co.*, 234 U.S. at 161.

Simply put, under the U.S. Constitution, Mississippi's right to swing its arms ends just where Tennessee's nose begins.[10] Mississippi "has not met the exacting standard necessary to warrant the exercise of this Court's extraordinary authority to control the conduct of a coequal sovereign." *Florida v. Georgia*, 141 S. Ct. 1175, 1183 (2021). This Court should not permit it.

c. *Tarrant Regional Water District v. Herrmann* does not support Mississippi's position.

Relying on *Tarrant Regional Water District v. Herrmann*, 569 U.S. 614 (2013), Mississippi repeatedly claims that "cross-border" pumping will lead to a "borderless common." Miss. Ex. Brief 2, 3, 9, 19, 31. Mississippi's reliance on *Tarrant* is misplaced. In *Tarrant*, the Court interpreted an interstate compact allocating "water rights among the States within the Red River basin." *Tarrant*, 569 U.S. at 618. Mississippi cites the portion of *Tarrant* in which the Court construed the interstate compact by determining the "intent of the Compact's signatories." *Id.* at 632-33. Specifically,

10. Adapted from Zechariah Chafee, *Freedom of Speech in Wartime*, 32 Harv. L. Rev. 932, 957 (1919).

the Court was addressing Tarrant's assertion that the compact should be construed to include "cross-border rights" because the provision relied upon by Tarrant did not mention state borders. *Id.* at 638-39.

Tarrant, from Texas, wanted to pump interstate water from pumps physically located in Oklahoma and bring the water back to Texas. Tarrant asserted that the compact should be construed to grant it a "right to *cross state lines* and divert water from" a different state. *Id.* at 626 (emphasis added). As a matter of contract interpretation, the Court found Tarrant's position unconvincing because "States do not easily cede their sovereign powers, including their control over waters within their own territories." *Id.* at 631. "If any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens." *Id.* at 632 (quoting *Virginia v. New York*, 523 U.S. 767, 783 n.6 (1998)).

In this case, there is no interstate compact or cross-border pumping. Defendants are neither "cross[ing] state lines" nor "divert[ing] water from" Mississippi. The specter of a "borderless common" raised by Mississippi does not exist. *Tarrant* does not support Mississippi's reliance on the public-trust doctrine. *Tarrant* does, however, support Defendants' position by reaffirming that, "[a]bsent an agreement among the States, disputes over the allocation of water are subject to equitable apportionment by the courts." *Id.* at 619 (citing *Arizona v. California*, 460 U.S. 605, 609 (1983)).

4. Mississippi's position conflicts with foundational concepts of equitable apportionment.

The position advocated by Mississippi is irreconcilable with the Court's equitable apportionment jurisprudence. Mississippi's sovereign territory theory is based entirely on a single factor: a State's border. Miss. Ex. Brief 26. The Court, however, has held that borders are "essentially irrelevant" in equitable apportionments. *Colorado v. New Mexico*, 467 U.S. 310, 323 (1984). Further, when analyzing the equitable apportionment of a resource, the Court considers all relevant factors. *South Carolina v. North Carolina*, 558 U.S. at 271. *See supra* Section I(A). Mississippi asks the Court to focus solely on the boundary line and ignore relevant facts including, without limitation: Memphis's use of Aquifer as a source of public water since approximately 1886, DFOF 259 (App. 129a); the significant increase in pumping from the Aquifer in northwest Mississippi, DFOF 231 (App. 123a-124a); the decrease in pumping in Memphis during the past twenty years, DFOF 226 (App. 123a); and Mississippi's own experts' concession that the amount of the groundwater in storage in the Aquifer beneath northwest Mississippi is virtually unchanged since pumping began, DFOF 241 (App. 125a).

Mississippi's position, if adopted, would allow States to sue other States for monetary relief even though the rights of the States to use a shared resource have not been established by interstate compact or equitable apportionment. In contrast, an equitable apportionment "decree is not intended to compensate for prior legal wrongs. Rather, a decree prospectively ensures that a

State obtains its equitable share of a resource." *Idaho v. Oregon*, 462 U.S. at 1025. Mississippi argues that it is entitled to a monetary award merely by showing that groundwater in an unapportioned aquifer has moved from one State to another. In an equitable apportionment action, the complaining State must prove a real and substantial injury by a heightened burden of proof. *Colorado v. New Mexico*, 459 U.S. at 187 n.13.

Finally, while Mississippi purports to invoke state sovereignty, it ignores the rights of Tennessee to the Aquifer. Equitable apportionment recognizes the rights of all States with an interest in the interstate resource and seeks to find a "just and equitable" result. The position urged by Mississippi is neither just nor equitable. *See supra* Section II(B)(3)(b). The Special Master was correct to reject Mississippi's position. The Court should do the same.

5. Mississippi's legal position conflicts with Mississippi law.

Mississippi's contention that interstate groundwater should be treated differently than interstate surface water is refuted by its own policy. Mississippi's legislature has declared that interstate groundwater and interstate surface water should be treated the same. For example, Mississippi Code Annotated § 51-3-41 grants authority to the Commission on Environmental Quality to negotiate agreements concerning the "state's share of ground water and waters flowing in watercourses where a portion of those waters are contained within the territorial limits of a neighboring state." Thus, in Section 51-3-41, the Mississippi legislature acknowledges (1) interstate

surface water and interstate groundwater are treated alike, and (2) interstate surface water and interstate groundwater are subject to apportionment. These critical points are irreconcilable with the questionable premise of Mississippi's claims – that groundwater should be treated differently than surface water.

III. IF ADOPTED, MISSISSIPPI'S POSITION WILL DEVASTATE ESTABLISHED MEMPHIS AREA USERS OF THE AQUIFER AND LEAD TO VEXATIOUS LITIGATION.

In its equitable apportionment decisions, the Court has "recognize[d] that the equities of supporting the protection of existing economies will usually be compelling." *Colorado v. New Mexico*, 459 U.S. at 187-88. That is so because the harm caused by "disrupting established uses is typically certain and immediate." *Id.* It is undisputed that the first use of groundwater from the Aquifer in the Memphis area began more than a century ago in 1886. Hr'g Tr. 831:22-831:1, 842:18-23 (Waldron) (May 23, 2019). By 1890, Memphis had "switched [to groundwater] from surface water, which had real bacteriological problems." Hr'g Tr. 991:5-7 (Langseth) (May 24, 2019). Groundwater from the Aquifer is the primary public water source for the areas in and around Memphis, Stip. Fact D62 (at p. 89), which are "the largest and most populous areas" that use groundwater from the Aquifer, Hr'g Tr. 664:5-9 (Larson) (May 22, 2019).

Mississippi, however, urges the Court to ignore Memphis's long-established use of the Aquifer as its primary source of public drinking water and, instead, require Defendants to fund, construct, modify, or

restructure its entire water system to use the Mississippi River as an alternate source. Compl. ¶ 57; Compl. 23 (Prayer for Relief (D)). Mississippi thus seeks to shut down and/or fundamentally alter the public water supply system in the Memphis area. Mississippi's expert Richard Spruill testified that relocating MLGW's wellfields further north, even if that were possible, would require the design and construction of hundreds of new wells and many miles of pipeline. Hr'g Tr. 332:15-333:4 (Spruill) (May 21, 2019). Spruill also agreed that the cost of doing so would be enormous. Hr'g Tr. 333:5-6 (Spruill) (May 21, 2019). The devastating impact of Mississippi's prayer for relief is self-evident and would most certainly cause immediate and drastic consequences.

Mississippi also asks for this extraordinary relief without any proof that Mississippi has suffered harm. To the contrary, the proof in the record is that "water supply users in Mississippi have been able to increase their supply significantly over the last several decades" without any difficulties in obtaining their water supply. Hr'g Tr. 648:4-7 (Larson) (May 22, 2019).

Adopting Mississippi's theory and allowing States to sue in tort over disputed rights to use unapportioned interstate resources would encourage protracted original actions filed by States motivated not by protecting shared interstate water resources, but instead by the possibility of a windfall to their treasuries. The expense and uncertainty of an equitable apportionment lawsuit serves as an incentive for States to work together to share and sustain interstate resources. *See Hinderlider*, 304 U.S. at 105 ("But resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the

States are unable to agree upon the terms of a compact, or Congress refuses its consent. The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary."). If Mississippi's position is adopted, that incentive will be lost. The ability to seek a money judgment without the showing of a real injury to a natural resource would encourage litigation between States because the goal would be monetary gain, not the equitable use of the shared resource nor honoring the co-equal relationship between States.[11]

The potential for a wave of interstate lawsuits is not speculative. The USGS has identified "principal aquifers" across the country. Hr'g Tr. 995:16-996:2 (Langseth)

11. *See* Jamie Huffman, *Mississippi v. Tennessee: Analysis and Implications*, 28 N.Y.U. Env't L.J. 227, 259 (2020) ("And, if states are suddenly allowed to bring claims against one another for past uses of interstate aquifers, then the proverbial floodgates may open and every state may attempt to line its coffers with damages claims from years past. The fact that equitable apportionment forecloses monetary damages for past withdrawals ensures that states only bring claims in which their waters are presently threatened, which essentially prevents states from litigating past withdrawals that have no bearing on current water supplies. Because states know that they may actually lose the right to some of their waters under equitable apportionment, they are incentivized to only bring cases in which there are serious, current risks to their water supplies, and where Supreme Court intervention is absolutely necessary. To allow for damages in *Mississippi v. Tennessee* would therefore remove some of the existing barriers to this sort of litigation.")

(May 24, 2019); Def. Exhibit 12.[12] Most of those aquifers are interstate. Hr'g Tr. 996:3-14 (Langseth) (May 24, 2019); *see also* DFOF 110 (App. 96a-97a) (listing interstate aquifers). If Mississippi's theory is adopted, every State overlying an interstate aquifer would become a putative plaintiff or defendant. Considering only two of the many interstate aquifers – the Middle Claiborne and Ogallala – implicates the rights of at least 14 overlying States. DFOF 56 (App. 84a); *Sporhase*, 458 U.S. at 953.

The motive behind Mississippi's lawsuit is clear. As with its previous suits, 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)); *see also Hood* 2008 Miss. Fifth Cir. Br. 38 (App. Mem. Reply 17a) ("Most importantly, however, equitable apportionment will not redress Mississippi's injuries. Mississippi seeks monetary damages for retroactive periods."). 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. at 576.

The doctrine of equitable apportionment seeks to ensure the just and equal treatment of States in disputes over interstate resources. For more than one hundred twenty years, equitable apportionment has stood against

12. The document submitted as Defendant's Exhibit 12 is a reproduction by Memphis and MLGW's expert witness David Langseth of a USGS map of the principal aquifers in the United States, which can be found at https://www.usgs.gov/media/files/principal-aquifers-united-states-printable-map-explanation.

the very arguments made in this case by Mississippi – many of which were raised and lost in *Kansas v. Colorado.* Mississippi's willingness to cast aside settled law in the pursuit of a windfall should be rejected.[13]

CONCLUSION

The Exceptions of Plaintiff, State of Mississippi, to the Report of the Special Master should be overruled, and Mississippi's Complaint should be dismissed with prejudice.

Respectfully submitted,

DAVID L. BEARMAN
Counsel of Record
KRISTINE L. ROBERTS
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
(901) 526-2000
dbearman@bakerdonelson.com
Counsel for Defendants City of Memphis, Tennessee, and Memphis Light, Gas & Water Division

13. As alternative relief, Memphis and MLGW adopt and incorporate herein by reference the entirety of Section III of Tennessee's Reply to Exceptions of Mississippi (April 23, 2021), arguing that Mississippi's Complaint should be dismissed because its claims are barred by issue preclusion.

CHERYL W. PATTERSON
CHARLOTTE KNIGHT GRIFFIN
MEMPHIS LIGHT, GAS & WATER DIVISION
220 South Main Street
Memphis, Tennessee 38103
(901) 544-6549

Counsel for Defendant Memphis Light, Gas & Water Division

JENNIFER SINK
CITY OF MEMPHIS, TENNESSEE
125 North Main Street, Room 336
Memphis, Tennessee 38103
(901) 636-6540

Counsel for Defendant City of Memphis, Tennessee

APPENDIX

APPENDIX A — EXCERPTS OF REPLY MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, DELTA DIVISION, FILED APRIL 22, 2005

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

CIVIL ACTION NO. 2:05CV32-D-B

JIM HOOD, ATTORNEY GENERAL, *EX REL.*, THE STATE OF MISSISSIPPI, ACTING FOR ITSELF AND *PARENS PATRIAE* FOR AND ON BEHALF OF THE PEOPLE OF THE STATE OF MISSISSIPPI,

Plaintiff,

VS.

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

Defendants.

REPLY MEMORANDUM OF AUTHORITIES IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION (I) TO DISMISS FOR LACK OF RIPENESS/LACK OF STANDING, (II) TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTY, AND (III) TO DISMISS THE TORT CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION/IMPROPER VENUE

***

[27]

A THE COURT HAS ORIGINAL FEDERAL SUBJECT MATTER JURISDICTION OVER ALL OF THE STATE'S TORT CLAIMS

Memphis' argument is premised on the false assumption that this Court can only hear the State's tort claims through the exercise of supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). However, as noted *supra*, federal common law applies to all of Mississippi's claims. This Court therefore has original subject matter jurisdiction over all of Mississippi's claims, and there is no need for the Court to exercise any "supplemental" jurisdiction. See, *e.g.*, *Illinois v. Milwaukee*, 406 U.S. 91, 103-08 (1972) and related authorities[27] discussed *supra*.

---

27. Federal courts have historically recognized the need to create and apply federal common law. *See generally, Davis v. Passman*, 442 U.S. 228, 230 n.2, 234 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 688-89 (1979); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395-

****

96 (1971); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 421-27 (1964); *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448, 450-51 (1957); *Priebe & Sons, Inc. v. United* States, 332 U.S. 407, 411 (1947); *United* States *v. Standard Oil Co. of California,* 332 U.S. 301, 304-05 (1947); *National Metro. Bank v. United States,* 323 U.S. 454, 456 (1945); *United States v. Standard Rice Co.,* 323 U.S. 106, 111 (1944); *Clearfield Trust Co. v. United States,* 63 S.Ct. 573, 574-75 (1943); *Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts,* 954 F.2d 299, 305 (5th Cir. 1992); *UNUM Life Ins. Co. of America v. Long,* 227 F.Supp.2d 609, 613-14 (N.D. Tex. 2002). Of course, in the instant matter, it is universally recognized that in the context of disputes involving an interstate body of water, such as the Sparta Aquifer, federal common law applies. *See* discussion at note 11 & accompanying text *supra.*

APPENDIX B — EXCERPTS OF PLAINTIFF'S SURREPLY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, DELTA DIVISION, FILED SEPTEMBER 7, 2007

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

CIVIL ACTION NO. 2:05CV32-D-B

JIM HOOD, ATTORNEY GENERAL, *ex rel.*, THE STATE OF MISSISSIPPI, ACTING FOR ITSELF AND *PARENS PATRIAE* FOR AND ON BEHALF OF THE PEOPLE OF THE STATE OF MISSISSIPPI,

Plaintiff,

vs.

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

Defendants.

PLAINTIFF'S SURREPLY TO DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

***

[5]

III. Defendants' Arguments Concerning Application of Federal Common Law Versus State Law Are Without Merit and Have Already Been Adjudicated by This Court in Plaintiff's Favor

This Court has already determined that it has federal question jurisdiction. The Court has already accepted supplemental or pendent jurisdiction over Mississippi state law claims under 28 U.S.C. §1367. The arguments advanced by Defendants in their Reply are really a restatement of the arguments made and lost in relation to Defendants' motions to dismiss denied by this Court by its Order of August 9, 2005 [Document No. 47]. Accordingly, Defendants' attempts to re-argue their positions concerning application of federal common law versus state common law should be barred by the law of the case doctrine.

Mississippi's claims against Memphis arise in the context of a transboundary dispute involving an interstate body of water. Under *Illinois v. Milwaukee*, 406 U.S. 91 (1972), these claims involving transboundary or interstate ground water confer federal question jurisdiction on this Court. Because this action does not involve two states, the action is not within the original and exclusive jurisdiction of the United States Supreme Court and, as recognized in *Illinois v. Milwaukee*, the proper forum for this dispute **is** this Court. Although federal common law applies, the *Illinois* Court held that the state's standards may be relevant and considered in dispute resolution. 406

U.S. at 107. *See Reply Memorandum of Authorities in Support of Plaintiff's Response to Defendants' Motion (I) to Dismiss for Lack of Ripeness / Lack of Standing, (II) to Dismiss for Failure to Join Indispensable Party, and (III) to Dismiss the Tort Claims for Lack of Subject Matter Jurisdiction / Improper Venue* [Document No. 32], filed April 11, 2005 and incorporated herein by reference pursuant to Fed.R.Civ.P. 10(c).

Federal courts have long recognized the need to create and apply federal common law.[1] [6]Historically, federal courts have fashioned federal common law remedies in traditional contexts such as claims for trespass[2],

---

1. *See generally Davis v. Passman*, 442 U.S. 228, 230 n.2, 234 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 688-89 (1979); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 395-96 (1971); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964); *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 450-51 (1957); *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947); *United States v. Standard Oil Co. of California*, 332 U.S. 301, 304-05 (1947); *National Metro Bank v. United States*, 323 U.S. 454, 456 (1945): *United States v. Standard Rice Co.*, 323 U.S. 106, 111 (1944); *Clearfield Trust Co. v. United States*, 63 S.Ct. 573, 574-75 (1943); *Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts*, 954 F.2d 299, 305 (5th Cir. 1992); *UNUM Life Ins. Co. of America v. Long*, 227 F.Supp.2d 609, 613-14 (N.D. Tex. 2002).

2. *See, e.g., Cooper v. The Armstrong Rubber Co.*, 1989 U.S. Dist. LEXIS 4099 *3-4, 29-33 (S.D. Miss. 1989) (Court had federal question jurisdiction where CERCLA plaintiff asserted claims under ***federal common law of trespass***; Court denied defense motion to dismiss, finding plaintiff stated claims for trespass and nuisance). The *Cooper* Court also held that "[b]ecause the court

nuisance[3], conversion[4], unjust enrichment[5] and imposition

---

has concluded that plaintiffs have stated a claim within the court's federal question jurisdiction . . . this court has and may exercise pendent jurisdiction over plaintiffs' state law claims which arise from a 'common nucleus of operative fact.'" *Id.* at *32 n. 14, *citing United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

3. *See, e.g., Ouellette v. International Paper Co.*, 666 F.Supp. 58, 60-62 (D. Vt. 1987) (Court found ***federal common law of nuisance*** was preempted by federal legislation; however, Court held state nuisance law available to resolve interstate damages dispute for water and air pollution, "despite the development of federal common law for similar interstate disputes brought by states under the *parens patriae* doctrine"); *State of Tennessee v. Champion International Corp.*, 1985 Tenn. App. LEXIS 3382 *9-10 (Tenn. App. 1985) (absent preemptive federal regulations, federal courts are empowered to create ***federal common law of nuisance***; while federal law governs, consideration of state standards may be relevant). *See also Capital Mercury Shirt Corp. v. Employers Reinsurance Corp.*, 749 F.Supp. 926, 932 (W.D. Ark. 1990) (although not applicable, court acknowledged that "[t]here exists a ***federal common law of nuisance*** separate from and co-existing with the congressional scheme regulating interstate water pollution").

4. *See, e.g., Federal Deposit Ins. Corp. v. Bowles Livestock Comm'n Co.*, 937 F.2d 1350, 1355, 1356 (8th Cir. 1991) (action involving ***federal common law of conversion*** where court noted that state laws provide the content of the controlling federal law); *AG Services of America, Inc. v. United Grain*, 75 F.Supp.2d 1037, 1048 n. 15, 1051 (D. Neb. 1999) (Court acknowledged as viable ***federal common law of conversion***, noting in federal question case, federal court will borrow the forum state's laws if not inconsistent with federal law or policy).

5. *See, e.g., Cooperative Benefit Administrators, Inc. v. Ogden*, 367 F.3d 323, 327, 328-29 (5th Cir. 2004) (court reviewed

of constructive trusts[6].

This Court can look to state court decisions to fashion federal common law applicable to this transboundary dispute. In *Central Pines Land Co. v. United States of America*, 274 F.3d 881, 890 nn. 32 & 34, 892-93 & n. 49 (5th Cir. 2001), the Fifth Circuit held that, absent significant conflict between application of state law and the federal law asserted, state law should be borrowed as the rule of decision. The Court held that the existence of such a conflict is a precondition for recognition [7]of a federal rule of decision. *Id.* at 893 n. 49, *citing O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85-86 (1994). The Federal court begins with the premise that state law should supply the federal rule. State law will be adopted as the federal rule unless there is an expression of federal legislative intent to the contrary or a clear showing that state law conflicts significantly with federal policies or interests present in the case. 274 F.3d at 890 & n. 32, *citing Georgia Power Co. v. Sanders*, 617 F.2d 1112, 1115-16 (5th Cir. 1980) (law of state where condemned property is located is to be adopted as appropriate federal rule for determining measure of compensation). If state law does not conflict, or only arguably interferes with federal interests, then the state's law may be borrowed as the federal rule of decision.

---

federal common law claim grounded in unjust enrichment to recover payments under ERISA plan). *See also Provident Life & Accident Ins. Co. v. Cohen*, 423 F.3d 413, 426 (4th Cir. 2005) (court recognized existence of ***federal common law unjust enrichment*** claim in certain circumstances).

6. *See, e.g., In re Domenic DeLucia*, 261 B.R. 561, 568 (D. Conn. 2001) (court acknowledged ***federal common law of constructive trust*** in proper case).

Here, there are no inconsistencies between the common law principles of Mississippi and Tennessee applicable to the tort claims pled by Plaintiff. As a practical matter, whether federal or state common law principles are applied, the result would be the same. This Court has unchallengeable federal question jurisdiction because the Aquifer is an interstate body of water. Otherwise, there are no federal interests or policies involved, or even affected, by this case. There is no federal legislation or regulatory scheme applicable to this action. This is a tort action where traditional common law principles govern resolution. There is no conflict between federal common law principles or the common law of either state. Hence, Mississippi state law may be borrowed to fashion the rule of decision in this Court to adjudicate Mississippi's common law claims in the context of this transboundary suit. *Illinois v. Milwaukee*, 406 U.S. at 92-94, 107.

Additionally, this Court has already accepted supplemental jurisdiction over Mississippi's state law claims under 28 U.S.C. §1367. State law may, therefore, be applied to address Plaintiff's state law claims under this Court's pendent jurisdiction. The modern doctrine of pendent jurisdiction stems from the United States Supreme Court's decision in *Mine Workers v. Gibbs,* 383 U.S. 715 (1966). Prior to *Gibbs,* the Court had recognized that considerations of judicial economy and procedural convenience justified the recognition of the power of federal courts to decide certain state law claims involved in cases raising federal questions. *See Hurn v. Oursler,* 289 U.S. 238, [8]243047 (1933). The test for determining when a federal court has jurisdiction over such state law claims as adopted in *Gibbs* established the principles for deciding whether a federal court has jurisdiction over

state law claims brought in a case that also involves a federal question. The Court held that a federal court has jurisdiction over an entire action, including state law claims, whenever the federal law claims and state law claims "derive from a common nucleus of operative fact" and are "such that [plaintiff] would ordinarily be expected to try them all in one judicial proceeding." 383 U.S. at 725. *Gibbs* intended this standard not only to clarify, but also to broaden, the scope of federal pendent jurisdiction. According to *Gibbs*, "considerations of judicial economy, convenience and fairness to litigants" support a wide-ranging power in the federal courts to decide state law claims in cases that also present federal questions. *Id.* at 726.

This Court has already determined that it has federal question jurisdiction and has accepted Plaintiff's state law claims under its pendent jurisdiction. There is no conflict between any federal law or policy and Mississippi's common law applicable to these claims and which may be adopted as the federal rule of decision, if necessary, in fashioning federal common law.

****

APPENDIX C — EXCERPTS OF BRIEF FOR APPELLANT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 14, 2008

1N THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 08-60152

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,

Plaintiff-Appellant,

vs.

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

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, DELTA DIVISION
(2:05CV32-D-B)

BRIEF FOR APPELLANT

***

[1]

STATEMENT OF JURISDICTION

The District Court's Subject Matter Jurisdiction

The District Court has federal question jurisdiction under 28 U.S.C. §1331 and supplemental jurisdiction over Mississippi's state law claims under 28 U.S.C. §1367.[1] The amount in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs.

Mississippi claims that Memphis and MLGW have wrongfully diverted and misappropriated ground water owned by the State, and taken from within its territorial boundaries from the Memphis Sand Aquifer, an interstate underground body of water. Under *Illinois v. Milwaukee*, 406 U.S. 91 (1972), these claims involving transboundary or interstate ground water confer federal question jurisdiction on the District Court. Because the action does not involve two States, the action is not within the original and exclusive jurisdiction of the United States Supreme

1. Mississippi also asserted that the District Court has diversity jurisdiction under 28 U.S.C. §1332 by virtue of the State' s role as *parens patriae. See Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363, 370 (D. Conn. 1979) (state's *parens patriae* role "allows it to gain access to the district court's diversity jurisdiction"). The lower court's Bench Opinion rejects diversity jurisdiction (contrary to its prior rulings, R. at 300); however, this additional basis for federal court jurisdiction need not be considered for ruling on the precise issues presented herein as the District Court clearly has federal question jurisdiction as well as supplemental jurisdiction over Mississippi's state law claims.

Court and, as recognized in *Illinois v. Milwaukee,* the proper forum for trial is the District Court. *Id.* at 97, 103-08; *Alabama v. United States Army Corps of Engineers,* 424 F.3d 1117, [2]1130 (11th Cir. 2005) ("Alabama *II*"); *South Dakota v. Ubbelohde,* 330 F.3d 1014, 1025-26 (8th Cir. 2003), *cert. den.,* 541 U.S. 987 (2004); *Georgia v. United States Army Corps of Engineers,* 302 F.3d 1242, 1254-55 (11th Cir. 2002); *Alabama v. United States Army Corps of Engineers,* 382 F.Supp.2d 1301, 1309-12 (N.D. Ala. 2005) ("*Alabama I*").

***

[21]

C. The District Court Has Proper Federal Question Jurisdiction Under 28 U.S.C. §1331

The interstate nature of the aquifer confers federal question jurisdiction on the District Court. *Illinois, supra,* at 104-07; *Hinderlider v. LaPlata Co.,* 304 U.S. 92, 110 (1938); *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907). Mississippi's tort claims are governed by federal common law[4] because of the transboundary character

4. Federal courts have long recognized the need to create and apply federal common law. *See generally Davis v. Passman,* 442 U.S. 228, 230 n.2, 234 (1979); *Cannon v. University of Chicago,* 441 U.S. 677, 688-89 (1979); *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 395-96 (1971); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 421-27 (1964); *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448, 450-51 (1957); *Priebe & Sons, Inc. v. United States,* 332 U.S.

of the aquifer. It is the interstate context that actually confirms the District Court's subject matter jurisdiction consistent with the rulings of the courts in *Illinois, Alabama I & II, Ubbelohde* and *Georgia.* State law will be adopted as the federal rule in fashioning federal common law remedies for Mississippi's claims against Memphis and MLGW for trespass[5], conversion[6], and [22]unjust enrichment.[7] *Compare Illinois, supra,* at 107 (state's standards relevant and considered in dispute resolution) *with Central Pines Land Co. v. United States,* 274 F.3d 881, 890 nn. 32 & 34, 892-93 & n. 49 (5th Cir. 2001) (state

---

407, 411 (1947); *United States v. Standard Oil Co. of California,* 332 U.S. 301, 304-05 (1947); *National Metro Bank v. United States,* 323 U.S. 454, 456 (1945): *United States v. Standard Rice Co.,* 323 U.S. 106, 111 (1944); *CIearfield Trust Co. v. United States,* 63 S.Ct. 573, 574-75 (1943); *Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts,* 954 F.2d 299, 305 (5th Cir. 1992); *UNUM Life Ins. Co. of America v. Long,* 227 F.Supp.2d 609, 613-14 (N.D. Tex. 2002).

5. *See, e.g., Cooper v. The Armstrong Rubber Co.,* 1989 U.S. Dist. LEXIS 4099 *3-4, 29-33 (S.D. Miss. 1989) (court had federal question jurisdiction where CERCLA plaintiff asserted claims under federal common law of trespass; court denied defense motion to dismiss, finding plaintiff stated claims for trespass).

6. *See, e.g., Federal Deposit Ins. Corp. v. Bowles Livestock Comm'n Co.,* 937 F.2d 1350, 1355, 1356 (8th Cir. 1991) (action involving federal common law of conversion where court noted that state laws provide the content of the controlling federal law); *AG Services of America, Inc. v. United Grain,* 75 F.Supp.2d 1037, 1048 n. 15, 1051 (D. Neb. 1999) (court acknowledged as viable federal common law of conversion, noting in federal question case, federal court will borrow the forum state's laws).

law should be borrowed as the federal rule of decision). Thus, the District Court erred in noting, in *dicta,* that "the existence of a federal question" was inconsistent with the fact "that only Mississippi water is involved in this suit." *Hood., ex rel. Mississippi, supra,* at 649.

***

[36]

A. The Involvement of "Interstate Waters" Does Not Make Mississippi's Action One "Between States" Calling for Application of the Doctrine of Equitable Apportionment.

That the Supreme Court has occasionally exercised original jurisdiction in interstate water disputes "between states" cannot be doubted. *See, e.g., Texas v. New Mexico,* 462 U.S. 554 (1983); *New Jersey v. New York,* 347 U.S. 995 (1954). However, § 1251(a) jurisdiction must be based on the identity of the parties, not the subject matter, *see Alabama I, supra,* at 1310, *citing United States v. Nevada, supra,* at 537; *Mississippi v. Louisiana, supra,* at 78, and an action involving *interstate waters* does not automatically subject the dispute to Supreme Court jurisdiction. *See id.*

To constitute a justiciable controversy "between states," thus invoking § 1251(a), a complaining state must have suffered a wrong through the direct action of the other state. *Alabama II, supra,* at 1130; *Georgia, supra,* at 1256; *Ubbelohde, supra,* at 1025-26. Moreover, the

controversy must present a threatened invasion of one state's rights by another state established by clear and convincing evidence or the Supreme Court will dismiss the complaining state's bill. *See, e.g., Washington v.* [37]*Oregon,* 297 U.S. 517, 522 (1936); *Connecticut v. Massachusetts,* 282 U.S. 660, 673 (1931); *People of the State of New York v. State of New Jersey,* 256 U.S. 296 (1921); *Missouri v. Illinois,* 200 U.S. 496 (1906). *See also Georgia, supra,* at 1255 n. 10, *citing Idaho, ex rel. Evans v. Oregon,* 462 U.S. 1017, 1027 (1983); *Colorado v. New Mexico,* 459 U.S. 176, 187 n. 13 (1982).

Mississippi's action on its face is not a controversy "between states," nor does it implicate the core sovereign interests of any other state, including Tennessee. The District Court opinion that Mississippi *may* have "its day in court" in an equitable apportionment action is not well founded. First, there is no basis for the Supreme Court's §1251(a) jurisdiction as the dispute is not between Mississippi and Tennessee. Second, apportionment of the aquifer is unnecessary as the portions of the aquifer that are owned by Mississippi and Tennessee, respectively, were established when the states attained statehood and control and dominion of the resources inside their respective borders. Third, equitable apportionment is a remedy that does not address the relief sought by Mississippi from Defendants.

The District Court referenced eleven distinguishable cases where the Supreme Court has exercised its original jurisdiction, including two title or border suits, two actions to interpret and enforce interstate compacts, three injunction actions, one case involving congressional

apportionment and three cases applying the doctrine of [38]equitable apportionment. None of the cases cited by the lower court have any application in the instant matter.

Equitable apportionment is a doctrine of federal common law that governs a limited set of surface water appropriation or allocation disputes between states. *See Colorado v. New Mexico,* 459 U.S. 176, 183 (1982), *citing Kansas v. Colorado,* 206 U.S. 46, 98 (1907); *Connecticut v. Massachusetts,* 282 U.S. 660, 670-71 (1931). All equitable apportionment cases involve waters in turbulent flow between states where a lower appropriator seeks to enjoin or restrain an upper appropriator from taking water upstream before it reaches the complaining state's borders. Mississippi's action is distinguished from all equitable apportionment cases because it involves the pumping, diversion and misappropriation by non-state Defendants, Memphis and MLGW, of ground water that has been situated within Mississippi's borders for thousands of years. Indeed, there has never been any case involving any apportionment of an underground aquifer by the Supreme Court. Again, "*apportionment,*" or stated more correctly, determination of each state's water ownership occurred upon establishment of the border between Mississippi and Tennessee.

Most importantly, however, equitable apportionment will not redress Mississippi's injuries. Mississippi seeks monetary damages for retroactive periods. [39]A decree of equitable apportionment is not intended to compensate for prior legal wrongs; rather a decree prospectively ensures that a state obtains its future share of a resource. *Idaho, ex rel. Evans v. Oregon,* 462 U.S. 1017, 1025-26 (1983).

An equitable apportionment case is, therefore, not only inappropriate in this case, it cannot provide an avenue for Mississippi's "day in court" as suggested in the lower court.

****