SUPREME COURT'S 2020–2021 PREVIEW: INTERSTATE WATER RIGHTS

Date: 4 August 2020

U.S. Energy Infrastructure and Resources, Litigation and Dispute Resolution, Policy and Regulatory, and Real Estate Alert

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As climate change accelerates, clashes between states over water rights are heating up due to this resulting strained resource. The only court with authority to adjudicate these interstate disputes is the U.S. Supreme Court. In the 2020–2021 session, the Court likely will issue rulings that could alter the landscape of interstate water disputes and impact millions of people and thousands of businesses who rely on interstate water resources. A preview of the four cases slated for the 2020–2021 session and potential implications follows. Below is a map to illustrate the geographical reach of these disputes.

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MISSISSIPPI V. TENNESSEE

In June 2014, Mississippi filed a Supreme Court original action[1] against Tennessee, alleging that Tennessee's practice of drawing groundwater from an aquifer that lies below both states violates Mississippi's sovereign rights, constitutes an actionable trespass and effects a conversion, taking, and misappropriation of property belonging to Mississippi.[2] The core of the dispute centers on Tennessee's pumping activities, which take place in Tennessee, but the groundwater is pulled from beneath Mississippi through geologically connected aquifers. Mississippi claims that the water is the exclusive property of the State of Mississippi and that it would not have moved were it not for Tennessee's pumping activities; Tennessee, on the other hand, claims that the water is an “interstate resource,” much like a river that passes through several states.

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The Court-assigned Special Master, which is essentially an interstate water brawl mediator, held an evidentiary hearing on this issue on 20 May 2020. The Special Master has not yet issued his report, but either way, the findings will be reviewed by the Supreme Court. Significantly, the Supreme Court has never decided whether groundwater can qualify as an interstate resource.

TEXAS V. NEW MEXICO AND COLORADO

A related question is presented in the case of *Texas v. New Mexico and Colorado*: whether groundwater connected to surface water may be subject to apportionment under an interstate water compact. In 2013, Texas filed an original action against New Mexico and Colorado,[3] alleging that New Mexico is violating terms of the Rio Grande Compact (Compact), an interstate agreement between Colorado, New Mexico, and Texas apportioning water from the Rio Grande River. Texas's principle allegation is that New Mexico is unlawfully allowing groundwater wells to divert water that is hydrologically connected to the Rio Grande and thereby depriving Texas of the full amount of water it is due under the Compact. For more details on this dispute see our previous alerts on this case.[4]

The matter is still in discovery before the Special Master. Ultimately, the outcome of Mississippi v. Tennessee may impact the fate of this case.

TEXAS V. NEW MEXICO

At issue in the case of *Texas v. New Mexico* is the question of whether water lost due to evaporation while in storage in New Mexico may be credited as delivered to Texas under the terms of the Pecos River Compact. In 2014, a heavy storm caused a reservoir located in the northern-most portion of Texas along the Pecos River to fill to capacity. In response, Texas requested that New Mexico store water allocated to Texas under the Pecos River Compact until Texas had the reservoir capacity to hold it. Nearly a year later, when New Mexico started releasing the water to Texas, significant evaporative losses were discovered. In 2015 and 2016, the River Master, a type of Special Master responsible for adjudicating the water use between the states under the Pecos River Compact, did not credit New Mexico as having delivered to Texas the water lost through evaporation. New Mexico moved before the River Master to receive credit for delivering the water because the evaporative losses occurred while it was storing the water at Texas's request.

The River Master ruled in favor of New Mexico, and Texas filed a motion for review before the Supreme Court. Oral argument is scheduled for the 2020–2021 session. The decision here will help define responsibility for water loss under the terms of an interstate water compact.

FLORIDA V. GEORGIA

This years-long dispute between the two states is again headed for review by the Supreme Court.[5] At issue is the question of whether the Supreme Court should equitably apportion Georgia's water use based on its alleged harmful impacts to Florida. In the most recent round of hearings before a second Special Master, Georgia again emerged as the prevailing party. The Special Master found that Florida had not shown by clear and convincing evidence that Georgia's use of the Flint River had harmed Florida's seafood industry and that the benefits to Florida of an equitable apportionment would not substantially outweigh the harms to Georgia, especially because

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an intercepting reservoir operated by the Army Corps of Engineers could prevent most of the anticipated streamflow increases from reaching Florida anyway.[6] Notably, the Special Master agreed with Georgia that the harms to Florida's seafood industry, specifically the collapse of the Apalachicola Bay oyster fishery, were primarily the result of Florida's mismanagement of that resource.[7]

In response, Florida has filed exceptions[8] to the Special Master's report with the Supreme Court, urging the Supreme Court to decline to adopt any of its recommendations and setting the stage for what may be the final review of this dispute. The hearing is expected to be scheduled for the 2021 term, assuming the Supreme Court chooses to set the case for oral argument.

IMPLICATIONS

These four cases, while geographically diverse, have several things in common with respect to how they will potentially impact water use across the country.

First, the *Texas v. New Mexico* and *Texas v. New Mexico and Colorado* cases both involve interstate compacts, legal devices entered into decades ago that were designed to avoid disputes between states. However, these static legal tools are unable to weather the changes incurred by increasing populations, decreasing rainfall and water storage capabilities, and shifts in between urban and rural economies. As a result, these interstate compacts appear to be sometimes causing more disagreement than resolution.

Second, *Mississippi v. Tennessee* and *Texas v. New Mexico and Colorado* both invite the Court, effectively, to allocate groundwater between states. Groundwater traditionally has been managed and regulated by state law. A decision in one or both of these cases could lay the foundation for federal intervention into state sovereign rights over groundwater regulation.

Third, all four of these legal battles underscore the increased demand placed on this natural resource. Whether the competition is between traditional irrigation and increased population growth, aquaculture and urban needs, industrial use versus municipal use, or energy production versus instream flow, water users of all types will either need to be prepared to draw their lines in the sand to defend their use or collaborate to use both legal and technical tools to efficiently and effectively allocate this resource to meet the ecological and economic needs that it serves.

FOOTNOTES

[1] *Mississippi v. Tennessee*, No. 22O143 (U.S. filed 1 June 2014).

[2] Complaint at 19, *Mississippi v. Tennessee*, No. 22O143 (U.S. 6 June 6, 2014).

[3] *Texas v. New Mexico and Colorado*, No. 22O141 (U.S. filed 1 Jan. 2013).

[4] *See, e.g.*, K&L Gates U.S. Environment, Land, and Natural Resources Alerts, SCOTUS Wades into Water Wars (12 Feb. 2018); SCOTUS Rules United States May Pursue Its Interstate Water Compact Claims in Texas v. New Mexico and Colorado (12 Mar. 2018); New Mexico Files Counterclaims Against Texas and the United States in Latest Chapter of Interstate Water Compact Dispute (4 June 2018).

[5] For additional details and analysis on this case, see our previous alert, “SCOTUS Ruling Gives Florida Chance

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to Prevail in Water War Against Georgia," (17 July 2018.

[6] Report of the Special Master, *Florida v. Georgia*, No. 142, at 9 (U.S. 11 Dec. 2019).

[7] *Id*. at 8–9.

[8] Exceptions to Report of the Special Master by Plaintiff State of Florida and Brief in Support of Exceptions, Florida v. Georgia, No. 142 (U.S. 13 Apr. 2020).

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