UPDATE: INTERSTATE WATER RIGHTS BEFORE THE SUPREME COURT - MISSISSIPPI V. TENNESSEE

Date: 20 November 2020

Environment, Land, and Natural Resources Alert

By: Natalie J. Reid

In August 2020 we previewed four notable interstate water rights cases that would soon be heard by the U.S. Supreme Court. The case of *Mississippi v. Tennessee* is now one step closer to a decision. On 5 November, 2020, the Special Master appointed by the Court to hear the case recommended that Mississippi's complaint be dismissed without prejudice, and that Mississippi be permitted to amend its complaint to request equitable apportionment of the groundwater at issue.[1] This decision may influence groundwater management for decades to come. If the Supreme Court upholds the Special Master's equitable apportionment recommendation, it could lead to the first interstate groundwater conservation effort that would serve as a model for other multistate or even multinational aquifers. If the recommendation is overturned, it could lead to states claiming that they "own" groundwater within the state lines and set off legal battles between the myriad users of a dwindling resource.

BACKGROUND

Mississippi sued Tennessee in an original action before the Supreme Court, alleging that Tennessee, through the City of Memphis's water utility, was essentially stealing its groundwater via pumping activities conducted in Tennessee.[2] The water at issue is located below ground in Mississippi, but connected to a much larger aquifer system, the Sparta-Memphis Aquifer, that spans at least eight states and would fill Lake Michigan. Typically, disputes between states over interstate water resources are resolved by requesting an equitable apportionment of the resource from the Supreme Court. However, Mississippi's complaint did not seek an equitable apportionment of this water resource. Rather, Mississippi's complaint sought declaratory and injunctive relief establishing Mississippi's sovereign right, title, and exclusive interest in the groundwater, as well as money damages from Tennessee for taking of its groundwater, or, in the alternative, restitution based on its claims of trespass, conversion, and tortious interference with protected interests in tangible personal property. Tennessee moved to dismiss the case on grounds that the only available relief was equitable apportionment, which Mississippi never requested. Instead of dismissing the case, on 12 August, 2016, the Special Master ordered an evidentiary hearing, which took place in May 2019, to resolve the issue of whether the aquifer at issue was, in fact, an interstate resource.

CONCLUSION OF THE SPECIAL MASTER

In the most recent decision, the Special Master found that the aquifer is part of a single interconnected hydrogeological unit underneath multiple states and is therefore an interstate resource. The Special Master's

©2005-2026 K&L Gates LLP. All Rights Reserved.

analysis was notably fact-specific, relying on an in-depth review of both expert opinion and scientific information describing the geology of the Sparta-Memphis Aquifer. Ultimately, the Special Master made four evidentiary findings supporting his conclusion:

- First, the aquifer and the groundwater inside it is a single hydrogeological unit underneath several states.
- Second, Tennessee's water pumping affected the groundwater underneath Mississippi, showing that the aquifer is an interconnected resource.
- Third, natural flow patterns indicate that the water inside the aquifer would ultimately, even if slowly, flow across Mississippi's borders.
- Fourth, the water within the aquifer interacts with, and discharges into, interstate surface waters.[3]

Based on these findings, the Special Master recommended that Mississippi's complaint be dismissed with leave to amend to include a claim for equitable apportionment of this interstate resource. The Special Master noted that equitable apportionment of groundwater may present unique difficulties, but nonetheless declined Mississippi's request to establish a new rule exempting groundwater from equitable apportionment. The Special Master also rejected Mississippi's claim to have sole authority over waters located within its boundaries, noting that the Court has never allowed one state's sovereignty to subsume an entire interstate resource. Finally, the Special Master rejected Mississippi's state-law theories of trespass, conversion, and tortious interference, and its prayer for restitution, by pointing out that federal common law displaces those claims when the dispute involves an interstate body of water.

IMPLICATIONS

While the Special Master's recommendations are the first of its kind in an interstate *groundwater* case, the decision will not become precedent until the Supreme Court reviews the recommendations, any objections to them by the parties, and then either adopts or revises the Special Master's findings and recommendations. If the Court agrees with the recommendations, the ruling will confirm that groundwater must be treated like other interstate water resources. But, if the Supreme Court finds Mississippi's arguments more persuasive, it could issue a ruling that redefines how the law views groundwater resources that span multiple states.

If the Supreme Court rules *against* Mississippi's claims, the task of equitably apportioning groundwater among multiple states could present a staggering challenge, particularly in aquifers as deep and extensive at the Sparta-Memphis Aquifer. As already experienced by many groundwater users, curtailing groundwater use is no easy task thanks to the nature of the resource. Drawdown levels tend to occur equally across the resource, making it difficult to prioritize senior users over junior users. In other areas, “cones of depression” create scarcity for urban and industrial needs with continuous demand. And, as illustrated by *Texas v. New Mexico and Colorado*,[4] the interrelationship between surface water and groundwater can make managing the resource even more complex, especially as climate change and growing populations increase demand on water resources.

Fortunately, in*tra*state management methods such as aquifer authorities and conservation districts can offer insights and practical models for in*ter*state cooperation and allocation as the needs of industries, municipalities, agriculture, and energy continue to re-balance and evolve. Tracking day-to-day management decisions and notable legal decisions will be critical to all water users as they consider near- and long-term resource needs.

©2005-2026 K&L Gates LLP. All Rights Reserved.

FOOTNOTES

[1] *Mississippi v. Tennessee*, No. 22O143, Report of the Special Master at 1 (U.S. Nov. 5, 2020).

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

[3] *Mississippi v. Tennessee*, No. 22O143, Report of the Special Master at 11 (U.S. Nov. 5, 2020).

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

KEY CONTACTS



NATALIE J. REID
ASSOCIATE

SEATTLE
+1.206.370.6557
NATALIE.REID@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.