

Mississippi v. Tennessee

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On November 5, 2020, the Special Master released a report in Mississippi v. Tennessee, a case presently pending before the United States Supreme Court involving the right to the groundwater in the Claiborne Aquifer. This case represents the first water war focusing on groundwater. The litigation began in 2006, when Mississippi filed suit against the City of Memphis and Memphis Light, Gas and Water Division (MLGW). Essentially, Mississippi alleged that MLGW, by pumping groundwater near the state boundary, was stealing groundwater from the state. Absent the pumping by MLGW, according to Mississippi, the water would remain in the aquifer beneath Mississippi. However, the pumping causes the water to artificially migrate to Tennessee, resulting in a theft.

The initial litigation failed, as the federal courts dismissed the lawsuit, finding that Tennessee must be a party and lawsuits between states must be filed with the Supreme Court of the United States (SCOTUS). SCOTUS initially refused to hear the amended lawsuit. However, Mississippi tried again in 2014, and against the recommendations of the Obama Administration, SCOTUS agreed to take the case. Since then, the Special Master, an attorney appointed by SCOTUS to gather evidence, hold hearings and make recommendations to the Court, has been guiding the parties.

The main issue has been whether the Claiborne Aquifer is an interstate or intrastate aquifer. Mississippi claims that, due to the complex hydrology and various rock formations, the water lying beneath that state should be distinguished from other water in the aquifer and be reserved for Mississippi. Mississippi asks the Court to enjoin further pumping and compensate the state for the water already pumped. Mississippi has never requested an equitable apportionment. Equitable apportionment is the method that SCOTUS has used for decades to divide surface water between competing states.

Proceedings focusing on whether the aquifer is intrastate or interstate culminated in this report. Mississippi objected to testimony from experts as to the characteristics of the aquifer as interstate or intrastate. The Special Master overruled the objection and considered the evidence in his report. After reviewing the expert testimony and hearing the arguments of the parties, the Special Master recommended that SCOTUS find that the aquifer is interstate and that the lawsuit be dismissed, with a right to amend to add an equitable apportionment request.

First, the Middle Claiborne Aquifer and the groundwater inside it is a single hydrogeological unit beneath several states. Mississippi did not challenge expert testimony, but alleged that the aquifer should not be viewed as a whole. Instead, differences such as thickness and permeability justify segmenting the aquifer into parts, one of which lies solely beneath Mississippi. The Special Master rejected this argument.

Second, Tennessee's water pumping affected the groundwater beneath Mississippi, showing that the aquifer is an interconnected resource. Tennessee did not use slanted drilling, nor did Tennessee physically enter Mississippi to pump water. The fact that the pumping in Tennessee draws groundwater from Mississippi shows that the resource is interstate.

Third, natural flow patterns indicate that the water inside the aquifer would ultimately, if slowly, flow across state boundaries. The expert testimony showed that groundwater naturally migrates very slowly, perhaps inches per day, from Mississippi to Tennessee. Even gradual migration indicates that the resource is interstate.

Fourth, the water inside the aquifer interacts with, and discharges into, interstate water resources. The groundwater in the Middle Claiborne Aquifer outcrop zone meets the surface water in the Wolf River, which flows from Mississippi, eventually discharging into the Mississippi.

Therefore, reasoned the Special Master, the Middle Claiborne Aquifer is part of a single interconnected hydrogeological unit beneath multiple states, and thus an interstate resource. Equitable apportionment is the appropriate and exclusive remedy. The Special Master recommends that the complaint be dismissed with leave to amend to include a claim for equitable apportionment.

Equitable apportionment has never been applied to groundwater. The report acknowledges that application to groundwater may be more difficult than application to surface water. However, the Special Master concludes that equitable apportionment applies to groundwater.

Mississippi and Tennessee will now each be given an opportunity to file objections to the report. Outside parties wishing to weigh in will be able to file amicus (or friend-of-court) briefs. SCOTUS will then either rule upon the recommendations of the report without oral argument or, more likely, hold arguments and then rule on the recommendations.

The report notably and meticulously relies on expert testimony for the conclusions. Although the holding that equitable apportionment applies to groundwater disputes between states would be a first, the case law precedents clearly point in that direction. In my opinion, SCOTUS will accept the recommendations of the Special Master in this case. Should Mississippi “decline[] the favor” of leave to amend to request equitable apportionment, the case will likely be dismissed.

Significant takeaways from the Special Master’s report include the importance of expert testimony in water disputes, particularly in complex groundwater cases. If the case moves forward as an equitable apportionment case, many different stakeholders will be watching, as the rulings will set precedents that will govern future groundwater wars, wars that will inevitably occur.