

Supreme Court, U.S.
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No. 09-289

In The
Supreme Court of the United States

THE STATE OF MISSISSIPPI,

Petitioner,

v.

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

Respondents.

*On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit*

**THE STATE OF MISSISSIPPI'S REPLY TO
RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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INTRODUCTION

The lower courts erred in accepting Respondents' equitable apportionment arguments. The equitable apportionment cases, beginning with *Kansas v. Colorado*, 206 U.S. 46 (1907) address the issue of equality of right between states holding conflicting Constitutionally grounded sovereignty claims to surface water naturally flowing through their territorial boundaries. The fact that the disputed surface water flowed through the territorial lands of each of the sovereign states under natural conditions gave rise to legitimate claims of multiple states to sovereignty over the same flowing water. To resolve these legitimate conflicting rights held by separate states, the Court invoked the cardinal rule of equality of right among the states to apportion a limited supply of surface water naturally flowing through multiple states. This is what the Court did in *Kansas v. Colorado*, and it has not extended this jurisdiction beyond disputes arising from Constitutionally based claims of state sovereignty over water naturally traveling through the states on an interstate path.

Mississippi's case does not invoke the rule of equality of right between separate states asserting a Constitutionally grounded territorial sovereignty claim to the same "interstate water." Mississippi claims damages only for the ground water stored in the aquifer which, under natural conditions, would never flow into Tennessee's territory. This ground water is, within any relevant time, "intrastate water" falling under Mississippi's exclusive territorial sovereignty. Respondents' argument, unlike those of Kansas and Colorado, is not grounded in the Constitution; rather, it rests solely in Respondents' power to mechanically

divert Mississippi's intrastate ground water away from its natural course within Mississippi and draw it into Tennessee using one of the world's largest artesian well pumping operations to extract approximately 200,000,000 gallons of ground water out of the aquifer every day.

Nothing in the equitable apportionment cases supports their application to the intrastate ground water naturally residing in Mississippi which is the subject of Mississippi's case, and Tennessee is not a necessary party. Tennessee does not have, and has never asserted, any sovereign territorial claim to Mississippi's ground water naturally residing within Mississippi, this is not a dispute between states, and the cardinal rule of equality of right is not at issue; accordingly, the opinions of the lower courts should be reversed and the case remanded for trial against Respondents.

REPLY TO RESPONDENTS' STATEMENT OF CASE

In their paragraphs titled "Factual Background" and "Rule 15(2) Misstatements of Fact in Mississippi's Petition" Respondents carefully avoid relevant facts in favor of a semantic clouding of conclusions and arguments to mask Respondents' total lack of any legitimate legal or equitable interest in the ground water they are draining from beneath Mississippi's sovereign territory. This brief section of the reply will address relevant facts.

A. Reply to Respondents' "Factual Background"

Significantly, Respondents never assert that the Mississippi intrastate ground water they appropriate through pumping would ever naturally flow into the territorial boundaries of Tennessee; instead, they only assert that the aquifer contains "ground water flowing" and that the aquifer [geological formation] crosses the Mississippi-Tennessee state border. This does not support any legitimate claim of right to ground water naturally residing in Mississippi.

The fact that Tennessee authorizes Respondents to pump ground water *naturally residing* within Tennessee's territorial borders is equally irrelevant. Tennessee's sovereign powers over ground waters naturally residing within its boundaries are not challenged, nor has Tennessee challenged Mississippi's correlative sovereignty over its ground water in this proceeding; accordingly, the Court's Section 1251(a) jurisdiction is not implicated by Tennessee's authorization to pump ground water naturally residing within Tennessee's boundaries. When Respondents took it upon themselves to reach beyond those boundaries into Mississippi with their pumping, Respondents, not Tennessee, violated Mississippi's sovereign rights. This dispute should be resolved in an available alternative forum, the United States District Court.

The Court has never "apportioned an aquifer," or the water in one, between states. Mississippi is not asserting that the Court could not apportion ground water which does, in fact, naturally reside within two states during some relevant time. Nevertheless, to

date, the Court’s discussion of ground water issues within equitable apportionment cases has been limited to pumping from a ground water source with a direct hydrological connection to interstate surface water being apportioned between sovereign states. Even in this context, the Court has acknowledged that state law controls the appropriation and use of ground water. *Washington v. Oregon*, 297 U.S. 517, 525 (1936) (pointing out that ground water pumped by farmers for use on their lands did not materially impact surface water being apportioned, but that a different question would arise if the water extracted “had been sold or otherwise employed for use on distant lands,” which “is unlawful according to the rule in many [state] courts.”)

B. Reply to Respondents’ Assertion That Mississippi’s Description of Its Ground Water is False

These facts support Mississippi’s sovereign territorial claim to the ground water being mechanically appropriated by Respondents:

- The ground water at issue resides in a confined (not unconfined) aquifer and is “naturally entrapped” and “essentially static.” It moves imperceptibly about an inch a day beneath Mississippi. See Supplemental Appendix annexed hereto (“Supp. App.”), 69a-71a. This movement is about 30 feet per year in a predominantly east to west direction. Petition for Writ of Certiorari (“Pet.”), 3-4 & 18-19. Tennessee’s ground water does not, and cannot, move naturally into Mississippi; and Mississippi’s water would never have moved into Tennessee absent the massive commercial

pumping operation of Memphis and MLGW. As between the states, the aquifer ground water is defined and confined in a finite quantity which has resided¹ within, and was apportioned to, each state as part of its sovereign territory since it was admitted to the Union. It is Respondents' dogmatic assertion that the ground water at issue in this case is "dynamic" and "flowing" which is misleading.

- The fact that the ground water at issue -- the water stored in the isolated sand formation underlying Desoto County, Mississippi -- is contained within larger interconnected aquifer systems known as the Mississippi Embayment has been acknowledged by Respondents' experts as irrelevant to Respondents' pumping-induced diversions of Mississippi's ground water.² The

¹ Ground water movement under the surface is exceedingly slow. "Surface water may move tens of kilometers per day, but water below the land surface may move at *meters per year* or even less. The time required to replace the water in the ground (to replenish or recharge aquifers) is often measured in decades or centuries." Joseph L. Sax, *et al.*, *Legal Control of Water Resources*, 397 (4th ed. 2006). "Moreover, some aquifers are 'recharged,' or replenished very slowly or not at all. Pumping water from these aquifers may amount to mining a non-renewable resource, much as petroleum or gold is mined." *Id.* at 395.

² This suit involves a segregated sub-area of an interstate aquifer isolated to and confined (or residing) in north Mississippi. Defendants' own experts acknowledge that they could demonstrate no impact of pumping in other states within the Mississippi Embayment on the water levels in the Memphis/Desoto County, Mississippi area. Supp. App., 80a-81a, 89a-92a, 94a-98a.

interstate geology of the aquifer which allows Respondents to mechanically appropriate Mississippi's sovereign ground water is only relevant to the existence of federal question jurisdiction.³ The geology is interstate, but the ground water at issue naturally resides only in Mississippi.

- In painting their picture of the aquifer as a naturally flowing stream running through Tennessee, Respondents simply ignore the scientifically verified regional cone of depression created by Respondents' well field pumping by which it diverts Mississippi ground water from its natural path and pulls it into Tennessee from Mississippi for sale and use by Memphis. *See Appendix to Mississippi's Motion for Leave to File Bill of Complaint in Original Action ("Mot. App."), 58a-61a, 63a-104a, 108a-117a, 198a-204a, 212a-214a; Supp. App., 71a-78a, 82a-83a, 87a-88a, 99a-102a.* Contrary to the "gross misrepresentation" and "false insinuation" claim by Respondents, the confined aquifer's water level in Mississippi is being drawn down by Respondents' pumping faster than the ground water can be replenished or "recharged." Mot. App. 59a-61a, 74a. Respondents' pumping has forever altered the aquifer ground water budget, diverting water

³ The interstate or transboundary nature of the dispute provides the basis for federal question jurisdiction as the Fifth Circuit recognized, thus calling for application of federal common law the rule of which may be provided by reference to state law. Pet., 21 n. 9. The trial court also has supplemental or pendant jurisdiction over Mississippi's state law claims under 28 U.S.C. §1337.

from centuries old storage in Mississippi into storage beneath Memphis. *Id.* Their pumping operations have disturbed the aquifer's steady-state equilibrium and changed the flow path and rate of the aquifer, redirecting the water so that it flows at an accelerated unnatural rate and northward path directly into MLGW's well fields. *Id.*, 57a-61a, 70a-74a, 91a, 106a-114a; Supp. App., 68a-82a.

The fact that water resources, albeit diminishing, still remain present within Mississippi's territorial borders is not relevant to Respondents' past taking of over 400 billion gallons of ground water which is now permanently lost to Mississippi and its citizens. Mot. App., 58a-59a, 71a. Memphis' unlawful diversions continue at a rate of 24 million gallons per day, or 8.76 billion gallons per year. *Id.*, 58a, 71a. There is no return flow; rather, the diverted water has been permanently converted into storage under Memphis, *id.*, 60a-61a, forever depriving Mississippi of a sovereign natural resource critical to life, agriculture and economic development. This wrongful appropriation of ground water will continue unabated without compensation to Mississippi indefinitely for the life of the aquifer unless Mississippi's claims are adjudicated.

**REPLY TO RESPONDENTS'
BRIEF IN OPPOSITION**

REASONS FOR GRANTING CERTIORARI

Kansas v. Colorado, 206 U.S. 46 (1907) fully affirmed the territorial sovereignty of each state under the Constitution over all “lands *within its borders*, including the beds of streams and other waters,” and that within this sovereignty each state retained the authority to establish the controlling property law. The Court expressly observed the force of *Martin v. Waddell's Lessee* and its progeny establishing state sovereignty in this area. *Id.* at 93-95. In *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988) the Court once again recognized this state sovereignty. Nevertheless, the opinions of the trial court and of the court of appeals clearly accepted Respondents’ reading of *Hinderlider v. La Plata River & Cherry Ditch Co.*, 304 U.S. 92 (1938) as requiring the allocation or apportionment of *any* ground water residing in the aquifer (geological formation) without regard to the natural flow or availability of such water. Mississippi’s Petition affords the Court an opportunity to clarify the Constitutional reach of the equitable apportionment cases and to resolve conflicts regarding its original jurisdiction among the federal circuit courts of appeal.

I. Reply to Respondents' Brief Part I: Equitable Apportionment Does Not Apply to Mississippi's Ground Water Diversion Claims Against Respondents.

Mississippi’s case is not an action between competing sovereigns, and *Hinderlider* and its progeny

do not apply.⁴ See Pet., 9-15. Mississippi's complaint does not involve interstate ground water shared by Mississippi and Tennessee under the Constitution of the United States; rather it seeks damages for ground water apportioned to Mississippi at statehood by virtue of its sovereign authority retained over its lands and the waters naturally residing within its boundaries.

The ground water at issue is being mechanically diverted and converted by non-state Respondents, Memphis and MLGW, not Tennessee. Accordingly, there is no "actual existing controversy" between states regarding apportionment or allocation. *Id.*, 26-27. Under *Waddell's Lessee* and related cases, state law governs use and allocation of the ground water owned separately by Mississippi and Tennessee. There is no basis for intervention by this Court or any federal court to allocate ground water already allocated at statehood. *Id.*, 9-12.

Respondents' argument that Mississippi does not "own" a specific quantity of ground water disregards 160 years of this Court's precedent. *Id.* Under this precedent, every state in the United States exercises some degree of sovereign dominion, control and legal ownership and regulatory management of the surface and ground water within its territory. App., 54a-62a. *Hinderlider* and the other cases cited by Respondents in support of their claim to Mississippi ground water are all distinguishable in that these cases uniformly

⁴ Contrary to Respondents' assertion, the acknowledgment that federal common law may apply does not automatically convert this case into a dispute between sovereigns.

arise in disputes between sovereign states over surface water freely and naturally flowing across the contesting states' borders and territory.

The Mississippi ground water being converted by Respondents does not fall within these confines. It is intrastate ground water which naturally creeps within Mississippi, in a predominantly east to west direction, at an imperceptible rate, deep below the surface in dense sand, rock and sediment formations confined between clay layers. Respondents claim is not one resting in Tennessee's sovereignty, it is one resting in their power to artificially appropriate that which would never naturally reside in Tennessee. Only Mississippi's water is at stake. There is no basis for Respondents' argument that this is a "shared" resource.

Mississippi does not seek creation of an "exception" to the doctrine of equitable apportionment. Once again Respondents go much further with the Court's opinions than the Court has ever gone. The ground water issues addressed in *Nebraska v. Wyoming*, 515 U.S. 1 (1995) were limited to ground water pumping from wells in Wyoming (upstream state) which were hydrologically connected and supplied North Platte River water which the Court had already apportioned. See, *Nebraska v. Wyoming*, 534 U.S. 40 (2001). If anything, the *Nebraska* case supports Mississippi's position that Respondents may not take water by pumping which belongs to Mississippi as sovereign. *Washington v. Oregon*, 297 U.S. 517 (1936) is no more helpful to Respondents. In rejecting a claim that farmers using well water were decreasing river flow, the Court affirmed that ground water is regulated by state law and its appropriation and use is much more

restricted. *Id.* at 524-526. Neither of these cases apportion an aquifer or address the water in one independent of apportioned interstate surface water.

II. Reply to Respondents' Brief Part II: The Fifth Circuit Ignored this Court's State Sovereignty Decisions in Its Misapplication of Section 1251(a).

There is no dispute concerning the separate sovereign ownership of territorial waters as between Mississippi and Tennessee. The states of Tennessee and Mississippi respect each other's sovereign ownership and control of their underground waters residing within their state. In contrast, as between Mississippi and Respondents, there is no "equality of right" to water which belongs to and is subject exclusively to the control of Mississippi for use by its citizens.

Despite the clear limitations of Mississippi's claims, Respondents argue that the claims necessarily implicate the sovereign interests of states on equal footing with each other and that, despite the lack of any claim by Mississippi against Tennessee, Tennessee is nevertheless a Rule 19 party. Respondents' summarily conclude that Tennessee's unasserted claim of sovereignty automatically makes Mississippi's case a dispute between states within this Court's original and exclusive jurisdiction. As previously addressed, jurisdiction is not established absent claims between competing states or in the presence of an alternative forum. Pet., 26-28. Respondents fail to meet these strict criteria under Section 1251(a) and Tennessee is not a necessary party.

III. Reply to Respondents' Brief Part III: The Fifth Circuit's Decision Conflicts with Other Circuits.

Respondents' argument concerning application of Section 1251(a) may be distilled to its assertion that “[t]he Corp. lawsuits all have in common a critical factor that is absent here -- the presence of the U.S. Army Corps of Engineers (“The Corps”).” Respondents summarily argue that, because the state’s claims in each of the Corps lawsuits were against the Corps, and not against each other, the Eighth and Eleventh Circuits held that the Court’s original and exclusive jurisdiction was not triggered.

It is not clear how this argument aids Respondents. Mississippi’s action is only against non-state entities, Memphis and MLGW. Mississippi has no claims against Tennessee or any other state. Section 1251(a) precludes exercise of the Court’s original and exclusive jurisdiction unless (a) there is an actual controversy between two states in which one state seeks redress of direct injuries caused by another and (b) there exists no alternative forum. Here, the element of “actual controversy between states” is missing and there is an alternative forum, the United States District Court for the Northern District of Mississippi. The Court’s original and exclusive jurisdiction is simply not invoked.

IV. Reply to Respondents' Brief Part IV: The Fifth Circuit's Erroneous Rule 19 Analysis Stems from Its Conflict with Decisions of

This Court and the Eleventh and Eighth Circuits.

The District Court's Rule 19 analysis, as affirmed by the Fifth Circuit, was based upon the unfounded *assumption* that Tennessee's interests are somehow vaguely affected by Mississippi's claims against Respondents. Tennessee's ground waters and its sovereign control over them are not an issue. That the District Court decision (affirmed by the Fifth Circuit) does not raise an important or unsettled question regarding Rule 19 is of no moment. This Petition is not simply aimed at the Fifth Circuit's blanket affirmation of the District Court's misapprehension of the requirements of Rule 19. Mississippi's Petition should be granted because the Fifth Circuit's decision conflicts with the decisions of this Court regarding the state's sovereign authority over natural resources within its boundaries, Pet., 9-12, and with Mississippi's decisional and statutory law applicable to ownership and preservation of its natural resources. *Id.*, 15-20. Further, the Fifth Circuit's judgment conflicts with the decisions of this Court and the Eleventh and Eighth Circuits regarding Section 1251(a) jurisdiction, *id.*, 20-28, and presents questions of national importance regarding sovereign rights of Mississippi and all other states of the Union to ownership and control of water resources. *Id.*, 28-31; App., 54a-62a.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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