

A Dynamic Legal Case Study: Mississippi v. Tennessee - The Interstate Dispute Over Groundwater Resources

Janasie, C.

Water is one of the most essential natural resources globally, nationally, and locally. In the United States, access to and management of water resources are becoming more deliberated, and often contested, as states strive for stakes in this shared natural resource. As the legal framework looks to respond to evolving water issues, interstate disputes are in the forefront as pending United States Supreme Court cases. This talk will discuss existing water laws and policies throughout the continental United States and distinguish between regulation of surface water and groundwater. When people think of water, images of surface water like the Mississippi River come to mind, but a large amount of the water we use on a day-to-day basis is groundwater. The role of states in managing water resources, and especially groundwater, is heating up as consumption and science advance. While states can, and do, work together to share interstate water resources, the Supreme Court of the United States must preside over cases where states disagree. This talk will provide a general overview of water law and the interstate water disputes currently before the Supreme Court, notably Mississippi v. Tennessee. While interstate water disputes are common, Mississippi v. Tennessee is a significant legal case because the Supreme Court has never before decided a state dispute over groundwater. This talk will provide an overview of each state's argument and how interstate water disputes have traditionally been treated by the Supreme Court. In conclusion, the talk will discuss the relevance of pending litigation, as well as thoughts on the future of water law.

Water Law provides the framework that guides our decisions about who gets to use freshwater. Water Law is generally state law - states get to determine their own rules on how to allocate the water within their borders. It is also a system that focuses on use, not conservation. What matters under the law is who is using water for what purpose, and some uses are more protected than others. For instance, domestic uses are more protected than industrial or agricultural uses.

Water Law is also an area of law that is split in a couple of fundamental ways, as surface water and groundwater are governed by two separate sets of legal principles. For groundwater, the rules vary by state under a handful of different legal doctrines. However, surface water has a stark regional difference, with the eastern and western United States following different doctrines. The West has always had water supply issues, and a legal doctrine known as prior appropriation developed to deal with this scarcity. In the prior appropriation system, the state issues water rights to users on a time-based priority basis as certain amounts

of each waterway are doled out to individual users. You can think of those users in line with a bucket of water at a stream. Each person gets to fill up their bucket with the amount of water the state has given them, then the next person gets to fill up their bucket, and on and on, until everyone the state has given a right to gets their turn. But, if the stream dries up before your turn, you are out of luck. Your right is completely contingent on whether there is any water left in the stream to use.

In comparison, the East has always been viewed as water rich, and the law recognizes this. Those who live on waterways are considered riparians, and they can use the water abutting their property however they like so long as the use is reasonable and doesn't affect other riparians. This means until there is a problem, there is very little monitoring or control over how much water a riparian owner is using. But, as the eastern United States starts to face water scarcity issues, problems with the riparian system are emerging.

Groundwater has its own set of rules that are distinct from

A Dynamic Legal Case Study: Mississippi v. Tennessee - The Interstate Dispute Over Groundwater Resources Janasie, C.

the rules governing surface water use. Here in Mississippi, a lot of the water we use comes from groundwater. However, most water policy has developed around surface water. Surface water is easier to manage - we know how much water there is and when it will run out. It is easy to see overuse because the river or stream runs dry. Since we historically could not see groundwater resources or understand their dynamics, we have allowed them to be used at a rate that exceeds their natural replenishment rate. Add this to the fact that many places have enough groundwater to supply desired uses for long periods of time, which created the illusion that the resource is limitless. But, when we over pump groundwater, there are serious consequences, such as the need for deeper wells to access the water, subsidence, environmental impacts, and saltwater intrusion.

Finally, disputes over interstate water bodies are treated differently under the law. While Water Law is mostly a matter of state law, when two or more states disagree on how to share water resources between them, federal rules apply. Interstate water disputes are common, and sometimes states can negotiate agreements as to how to share water resources that cross state borders. But when states can't reach an agreement among themselves, the disputes can only be resolved by the Supreme Court of the United States (SCOTUS), as the Court has original jurisdiction in all cases in which a state is a party. In suits between states, SCOTUS serves as a trial court and appoints a special master to run a trial-like process. The special master hears the parties' initial motions and evaluates the evidence. The special master then makes findings of fact, conclusions of law, and recommends a decision for the Court. SCOTUS then decides whether or not to follow the special master's recommendation.

Currently, Mississippi and Tennessee are in a dispute concerning groundwater from the Memphis Sands Aquifer, which underlies several states including Mississippi and Tennessee. Mississippi and Tennessee both pump water from this aquifer. The City of Memphis pumps its water very close to the Mississippi-Tennessee border. Mississippi has challenged this use before by suing the City of Memphis for monetary damages. In 2009, the 5th Circuit Court of Appeals dismissed Mississippi's lawsuit ruling that Mississippi had framed its case incorrectly. The court determined that

the aquifer was an interstate resource, so Tennessee, which was not named in the suit, was a necessary party. Further, since it was an interstate dispute, original and exclusive jurisdiction belonged to SCOTUS.

The Supreme Court recently agreed to hear Mississippi's case against Tennessee, along with the City of Memphis and the Memphis Light, Gas, and Water Division, regarding the use of the aquifer. The states of Mississippi and Tennessee have very different theories for the case. Tennessee, referring to the previous 5th Circuit decision, is claiming the water is an interstate resource, and thus, the Court needs to determine how much each state is entitled to. However, Mississippi is claiming that Tennessee is actually pumping water from under Mississippi and that this water would never leave Mississippi but for Tennessee's pumping. Like its previous lawsuit, Mississippi is treating the water in the aquifer as Mississippi property, not as an interstate resource, and is asking for damages for the water Tennessee has taken.

Both the state of Tennessee and the Solicitor General asked the Court to not hear the case for a couple of reasons. First, they argued that the case was an interstate dispute, and thus, the groundwater needs to be apportioned by the Court between the two states. Therefore, Mississippi is not entitled to money damages. Second, there is no present injury to Mississippi because there is still enough water in the aquifer for both states to use.

In *Mississippi v. Tennessee*, the Court has appointed a special master, who is now running the trial-like process. The parties have submitted briefs on initial motions, and oral arguments have yet to be scheduled. A threshold issue will be whether the special master agrees with Tennessee's theory of the case and determines that this should be treated as an interstate water dispute or with Mississippi's, which would allow the state to collect monetary damages. Either decision would be groundbreaking law.

If the Court agrees with Tennessee, it would apply the law it has developed in previous interstate disputes. However, the Court has never decided a dispute between two states over groundwater. If the aquifer is determined to be an interstate resource, the Court will consider who has the right to use

the water. How would the Court do this? Think about the states being seated at a table, each with a glass, while the Court holds a pitcher of water. The Court then pours out the water telling each state how much they get. But the Court will not simply split the water equally - it takes certain factors into account. While the Court has never ruled on an interstate dispute over groundwater, we can look to previous cases to see what factors SCOTUS has used in the past in determining interstate disputes over water.

The Supreme Court has developed common law to resolve disputes over the allocation and pollution of interstate rivers through the doctrine of equitable apportionment. The Court created the doctrine in 1907 in *Kansas v. Colorado*, 206 U.S. 46 (1907). Through equitable apportionment, the Court can resolve the rights of disputing states to use an interstate water source, and in making this determination, the Court is not bound by the laws of the individual states.

The Court has stated that equitable apportionment is a flexible doctrine, and it will consider all relevant factors of case, as well as the harms and benefits to each state, so that a just result is reached. The doctrine's basis is that each state is entitled to "equality of right," not equal amounts of water. In previous cases, the Court has given factors that will inform its decision. These factors include:

1. Physical and climatic conditions;
2. Consumptive use of water in the several sections of the river;
3. Character and rate of return flows;
4. Extent of established uses and economies built on them;
5. Availability of storage water;
6. Practical effect of wasteful uses on downstream areas;
7. Damage to upstream areas compared to the benefits to downstream areas if upstream uses are curtailed.

Many of these factors deal with characteristics of surface water, not groundwater. It is therefore difficult to predict precisely how the Court will apply its prior decisions to the *Mississippi v. Tennessee* case. But equity will most likely be a major factor, along with which state needs the water the most now and for what purpose. The Court will also likely

consider whether giving the water to that state will hurt the other state too much. Thus, it could be that Memphis taking a lot of water from under northern Mississippi is ok if Memphis needs the water now. It would all depend on what the Court thought was fair.

As stated above, a threshold issue in the case will be whether the court accepts Tennessee's or Mississippi's theory of the case - that is whether the aquifer is an interstate water that needs to be apportioned or whether Mississippi owns the groundwater within its borders and is entitled to monetary damages. In February 2016, Tennessee submitted a motion for a Judgment on the Pleadings, arguing that the case should be terminated since Mississippi has not asked for an apportionment. Once this motion is decided, we will have a better understanding of how the case will or will not proceed.

References

1. Hood, ex rel. *Mississippi v. City of Memphis*, 570 F.3d 625 (5th Cir. 2009), cert. denied, *Mississippi v. City of Memphis*, 559 U.S. 904 (2010).
2. Answer of Defendant State of Tennessee, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. filed Sept. 14, 2015) (Dkt. No. 15), http://www.ca6.uscourts.gov/sites/ca6/files/documents/special_master/DE%204%20Tennessee%20Brief%20in%20Opposition.pdf.
3. State of Mississippi's Brief in Support of Motion for Leave To File Bill of Complaint in Original Action, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. filed June 6, 2014) (Dkt. No. 1), http://www.ca6.uscourts.gov/sites/ca6/files/documents/special_master/DE%201%20Mississippi%20Motion%20for%20Leave%20to%20File%20Complaint.pdf.
4. Brief for the United States as Amicus Curiae, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. filed May 12, 2015) (Dkt. No. 9), http://www.ca6.uscourts.gov/sites/ca6/files/documents/special_master/DE%209%20United%20States%20Brief.pdf.
5. Special Master- Docket Sheet, *Mississippi v. Tennessee*, <http://www.ca6.uscourts.gov/special-master>.
6. *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982).
7. See *Nebraska v. Wyoming*, 325 U.S. 589 (1945).
8. Motion of Tennessee for Judgment on the Pleadings (Feb. 25, 2016), <http://www.ca6.uscourts.gov/>

A Dynamic Legal Case Study: Mississippi v. Tennessee - The Interstate Dispute Over Groundwater Resources
Janasie, C.

sites/ca6/files/documents/special_master/DE%20
30%2C%20Tennessee%20Motion%20for%20Judg-
ment%20on%20the%20Pleadings.pdf.