Mississippi v. Tennessee: Are Changes Coming to Interstate Water Rights Jurisprudence?

Industrial South Photo by Bill Dickinson, Sky Noir Photography.

by Emily Russell

"Like all cases within the [Supreme] Court's original jurisdiction, a dispute between States over rights to water is a serious matter — so serious, in fact, that it might be grounds for war if the States were truly sovereign." — Memorandum Decision of Special Master, the Hon. Eugene E. Siler Jr., dated August 26, 2016 (internal quotes omitted).

For more than 100 years, the United States Supreme Court has settled interstate water disputes in one of two ways: (1) by reference to, and interpretation of, an existing interstate compact or (2) by apportioning the water equitably between the two states ("equitable apportionment") and deciding when a state has violated that apportionment by taking more than its fair share.[1] Under Article III, Section 2, Clause 2 of the US Constitution and 28 U.S.C §1251(a), interstate water disputes fall within the original jurisdiction of the Court. The premise of such cases is that a river, lake, or other water resource is interstate in nature because it is not confined to one state's borders. But what if the parties fail to agree even on that fundamental issue? In 2015, the Court agreed to hear *Mississippi v. Tennessee*,[1] an interstate water dispute of first impression where the central factual conflict is whether an aquifer is an interstate resource. For water law attorneys, *Mississippi v. Tennessee* is intriguing because it presents questions of law that will turn on the science of ground water and a factual understanding of the aquifer. For Virginia decision makers, the case exemplifies the importance of accounting for interstate users, not just intrastate users, at a time when the commonwealth is planning for future management of its ground water.

Procedural Background

Although *Mississippi v. Tennessee* arises under the Court's original jurisdiction, the action did not begin as an interstate water dispute. Mississippi originally filed suit against the city of Memphis and its water utility in federal district court in Mississippi.[2] The district court dismissed the case without prejudice on grounds that Tennessee was a necessary party to the action and further stated that it was not empowered to join Tennessee because "original and exclusive jurisdiction of disputes between states resides with the United States Supreme Court."[3] The Fifth Circuit Court of Appeals affirmed the district court's judgment,[4] and Mississippi petitioned the Court for a writ of certiorari, which the Court denied.[5] Mississippi then decided to join Tennessee as a defendant and renewed its claims under the theory that the case was now an interstate dispute which could only be resolved by the Court. The Court, by majority vote, granted leave for Mississippi to file a bill of complaint, thereby permitting Mississippi to present the same argument it had already made to the district court and on appeal to the Fifth Circuit.[6]

The Interstate Water Dispute

Mississippi v. Tennessee is unlike preceding interstate water disputes because it is based in tort and relates solely to ground water. All similar, prior cases before the Court involved surface water (rivers, streams, etc.) or ground water that was hydrologically connected to surface water.[7] The Court's jurisprudence is clear that an interstate compact or equitable apportionment governs those types of disputes. In *Mississippi v. Tennessee*, the Court will decide whether the ground water at issue is interstate and whether its existing jurisprudence applies in a case where the interstate conflict pertains to ground water exclusively.

Mississippi claims that Tennessee, the city of Memphis, and the city's water utility are violating Mississippi's sovereign right to ground water found in a geological formation known as the Sparta Sand.[8] Mississippi alleges that, since 1985, the Memphis utility, with approval and oversight from the city and Tennessee, has knowingly drawn ground water from the Sparta Sand to provide the city's municipal water supply.[9] To do so, the utility uses wells located three miles from the Mississippi border.[10] The parties agree that the Sparta Sand extends beneath both states but do not agree on where the ground water itself is located – in other words, whether it is an interstate or intrastate resource.

The two states do not have an interstate compact governing use of the ground water, and Mississippi's complaint disclaims that it seeks equitable apportionment of the ground water supply.[11] Instead, Mississippi argues that the ground water contained in the Sparta Sand formation would naturally remain entirely within Mississippi's boundaries but for the Tennessee defendants' tortious mechanical pumping, which has caused the ground water to "unnaturally" cross over into Tennessee.[12] Under Mississippi's theory, the ground water at issue is an *intrastate* waterbody. The Tennessee defendants counter that Mississippi has failed to state a claim upon which relief can be granted, arguing that Mississippi conceded in its own complaint that the ground water is an interstate waterbody when it acknowledged that the geological formation underlies both states.[13] According to the Tennessee defendants, Mississippi's tort claims are simply an attempt to evade the Court's century-long equitable apportionment jurisprudence.[14]

The Court appointed a special master, the Honorable Eugene E. Siler Jr. of the Sixth Circuit Court of Appeals, and granted him "authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for."[15] The appointment of a special master is a unique characteristic of cases where the Court chooses to exercise its original jurisdiction.[16] Since the Court serves as the trial court in interstate water disputes, special masters assist in executing the Court's trial court functions by acting as fact-finder.[17] *Mississippi v. Tennessee* presents a factual scenario previously unconsidered by the Court, where ground water could naturally be located in one state but, through technological advances in pumping, is available for use by another state. In order to determine whether the factual scenario argued by Mississippi truly distinguishes this case from others that preceded it, Siler has distilled the case down to a single question, which he believes is dispositive — that is, is the ground water interstate in nature?

In August 2016, Siler issued a Memorandum of Decision on the parties'

preliminary motions and observed that Mississippi's decision not to request equitable apportionment is likely grounds for dismissal, after which Mississippi would decide whether to seek leave to amend and request equitable apportionment.[18] Nonetheless, Siler concluded that an evidentiary hearing would be appropriate to resolve the question of whether the aquifer is an interstate resource.[19] Unlike previous interstate water disputes where the evidence consisted primarily of existing interstate compacts[20] or findings concerning use of the water by the parties for equitable apportionment,[21] *Mississippi v. Tennessee* hinges on factual findings that will be made on the basis of the scientific characteristics specific to the Sparta Sand aquifer. Siler has directed the parties in *Mississippi v. Tennessee* that "[e]vidence that would likely be relevant to this determination [of whether the ground water is an interstate resource] includes the nature and extent of hydrological and geological connections between the ground water in Memphis and that in Mississippi, the extent of historical flows in the [a]quifer between Mississippi and Tennessee, and similar considerations."[22]

This directive is another way that *Mississippi v. Tennessee* is distinguishable from previous cases. Siler designed the evidentiary hearing to lead to evidence and factual findings that focus more heavily on hydrogeology and earth sciences than on the water needed by the parties. The parties have until July 30, 2017, to complete discovery, and the evidentiary hearing will take place after August 31, 2017.[23] If Mississippi can demonstrate, scientifically, that the ground water is confined to an area within its boundaries, the case is in new legal territory where interstate compacts and equitable apportionment have not been applied. For this reason, the case is one for environmental attorneys and scientists to watch.

Virginia's Ground Water

During the pendency of this case, Virginia has been assessing its own ground water resources in light of growing concerns over dwindling supply and increasing demand. The General Assembly established an advisory committee to study ground water issues in eastern Virginia, which will meet through 2017.[24] Also, in October 2016, the Joint Legislative Audit and Review Commission (JLARC) released a report in response to concerns about the commonwealth's management of its water resources.[25] The JLARC report found that Virginia is not managing its ground water in a sustainable manner, particularly in the eastern portion of the commonwealth, and that this poor management will have impacts on future availability for municipal users and economic growth.[26]

The Coastal Plain aquifers that are the source of ground water in eastern Virginia are confined aquifers that extend across the border into North Carolina, like the Sparta Sand formation presently at issue in *Mississippi v. Tennessee*.[27] Seasoned environmental attorneys will know that Virginia and North Carolina are not strangers to protracted litigation over access to water.[28] Based on the commonalities between the shared use of the Sparta Sand and the Coastal Plain aquifers, the proceedings in *Mississippi v. Tennessee* should be of particular interest to Virginia legislators and policymakers, as well as scientific and legal stakeholders. If nothing else, the case demonstrates that ground water issues are a serious matter at local, regional, *and* interstate levels and that planning for future uses should include an awareness of each of these jurisdictional interests as well as a firm understanding of the hydrological characteristics of the water resource in question.

Endnotes:

1 135 S.Ct. 2916 (2016).
2 *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 533 F. Supp. 2d 646 (N.D. Miss. 2008), *aff'd*, 570 F.3d 625 (5th Cir. 2009).
3 *Id.* at 651.
4 *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625, 632 (5th Cir. 2009) ("Tennessee cannot be joined to this suit without depriving the district court of subject-matter jurisdiction because a suit between Mississippi and Tennessee for equitable apportionment of the Aquifer implicates the exclusive jurisdiction of the Supreme Court under 28 U.S.C. § 1251(a).").
5 *Mississippi v. City of Memphis, Tenn.*, 130 S. Ct. 1319 (2010).
6 *Supra*, note 2.
7 *See, e.g. Nebraska v. Wyoming*, *et. al*, 325 U.S. 589, 627 (1945) (apportioning the natural flow of the North Platte River among three States and the United States); *Kansas v. Nebraska*, 135 S. Ct. 1042, 1054 (2015) (evaluating allegations that groundwater pumping decreased stream flow in Republican River).
8 *See generally*, Mississippi Motion for Leave to File a Bill of Complaint in Original Action ("Miss. Motion"), http://www.ca6.uscourts.gov/sites/ca6/files/documents/special_master/DE%201%20Mississippi%20Motion%20for%20Leave%20to%20File%20Complaint.pdf.
9 *Id.*, ¶ 20.
10 *Id.*
11 *Id.*, ¶¶ 38, 41, 48, 49.
12 *Id.*, ¶ 54(c).
13 *See, e.g.* Memphis MGLW Opp. Br., ¶ 29, http://www.ca6.uscourts.gov/sites/ca6/files/documents/special_master/DE%203%20Memphis%20MGLW%20Brief%20in%20Opposition%20.pdf.
14 *Id.*
15 *Mississippi v. Tennessee*, 136 S.Ct. 499 (Mem) (Nov. 10, 2015).
16 For a thorough review of the history of Special Masters, *see generally* Carstens, Anne-Marie C. "Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction, 86 Minn. L. Rev. 625 (2002).
17 *Id.* at 644.
18 Mem. Dec. on Defs.'s Motions to Dismiss and Pl.'s Motion to Exclude ("Mem. Dec."), at 35, http://www.ca6.uscourts.gov/sites/ca6/files/documents/special_master/DE%2055%2C%20Memorandum%20of%20Decision.pdf
19 *Id.* at 36.
20 *See, e.g.*, *Tarrant Regional Water District v. Herrman*, 133 S.Ct. 2120, 2130 (2013) ("Interstate compacts are construed as contracts under the principles of contract law… So, as with any contract, we begin by examining the express terms of the Compact as the best indication of the intent of the parties.") (internal citations omitted).
21 *See, e.g., Colorado v. New Mexico*, 459 U.S. 176, 189-190 (1982) (remanding to the Special Master for additional findings regarding the existing uses of the water and the potential for decreasing use in the future).

22 Mem. Dec., *supra* note 19, at 36.
23 Case Management Plan at 6, 11, http://www.ca6.uscourts.gov/sites/ca6/files/documents/special_master/No.%20143%20Original%2C%20Case%20Management.pdf.
24 *See* Va. Code § 62.1-256.1.
25 JLARC, "Effectiveness of Virginia's Water Resource Planning and Management," Oct. 2016, http://jlarc.virginia.gov/pdfs/reports/Rpt486.pdf
26 JLARC, "Report to the Governor and the General Assembly of Virginia: Effectiveness of Virginia's Water Resource Planning and Management," jlarc.virginia.gov, http://jlarc.virginia.gov/landing-water.asp.
27 Stephenson, Kurt, et. al., "An Investigation of the Economic Impacts of Coastal Plan Aquifer Depletion and Actions That May Be Needed to Maintain Long-term Availability and Productivity," 5-6, (Aug. 2014), http://www.deq.virginia.gov/Portals/0/DEQ/Water/WaterSupplyPlanning/EVGWAC/VT_Abt%20Assoc%20Aquifer%20Study_Aug%202014.pdf.
28 *See e.g.*, Probst, Richard T., "The Virginia Beach Quest for Water: Drowning in a Sea of Litigation," 11 B.Y.U. J. Pub. L. 319 (1997).

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Flooding *continued from page 35*

16 *City Manager's Office of Resilience*, City of Norfolk, http://www.nfkresilientcity.org.
17 *Vision 2100*, City of Norfolk, http://www.norfolk.gov/vision2100.
18 "Live with water" and other variations of the same phrase were popularized following the release of the New Orleans Urban Water Plan and other similar initiatives that encouraged localities to develop plans for creatively incorporating flood waters into their communities and community plans instead of simply moving it off land as quickly as possible. *See e.g.* Waggoner and Ball Architects, "Greater New Orleans Urban Water Plan," available http://livingwithwater.com.
19 *Virginia Beach Wins National Grant to Plan for Sea-Level Rise*, Press Release, City of Virginia Beach, (Mar. 8, 2016) https://www.vbgov.com/news/Pages/selected.aspx?release=2858.
20 Emily E. Steinhilber, et al. *Hampton Roads Sea Level Rise Preparedness and Resilience Intergovernmental Pilot Project Phase 2 Report: Recommendations, Accomplishments, and Lessons Learned* (Oct. 2016), http://digitalcommons.odu.edu/hripp_reports/2/.
21 Virginia Chapter 440 of the 2016 Acts of Assembly (HB 903). *See generally* www.floodingresiliency.org.
22 The Plan was funded by the Virginia Coastal Zone Management Program at the Department of Environmental Quality through a U.S. Department of Commerce, National Oceanic and Atmospheric Administration grant, under the Coastal Zone Management Act of 1972.
23 SB 1203, Working waterfront development areas; establishment (to be codified at Virginia Code § 15.2-2306.1 (2017)).
24 SJ 281, Study; long-term economic viability of working waterfronts; report.
25 See George Van Houtven et al. RTI International "Costs of Doing Nothing: Economic Consequences of Not Adapting to Sea Level Rise in the Hampton Roads Region" (Nov. 2016). Prepared for the Virginia Coastal Policy Center, William & Mary Law School, available: http://law.wm.edu/news/stories/2016/documents/Summary%20Costs%20of%20Doing%20Nothing%20and%20Final%20Hampton%20Roads%20SLR%20Report.pdf.

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