

LAW

States' feud delivers Supreme Court's first groundwater test

Pamela King, E&E News reporter • Published: Thursday, June 17, 2021



The Supreme Court as photographed July 31, 2019. Francis Chung/E&E News

The Supreme Court may hear its first groundwater battle later this year — and the case could force the justices to consider an unusual claim.

Unlike other interstate water wars that reach the high court, Mississippi has argued that it has sole legal rights to groundwater in an aquifer that straddles the Tennessee border.

The claim is a novel departure from the Supreme Court's traditional approach of dividing water supplies equitably and has set off alarm bells for other states that share water with their neighbors.

Mississippi's argument: For decades, Memphis Light, Gas and Water Division has unlawfully sucked up billions of gallons of groundwater in a sub-unit of the Middle Claiborne Aquifer that is exclusively owned by the Magnolia State.

The result is a massive drawdown in the aquifer — known as a "cone of depression" — that makes it so Mississippi has to dig deeper and more expensive wells to bring the water it needs to the surface. Because the resource has already been unfairly developed, Mississippi argues, the remainder of the aquifer's water can't now be fairly divided. The state is seeking more than \$600 million in damages.

"What Tennessee has done is robbed the ability of the people of Mississippi to fully develop the aquifer," said Richard Spruill, principal hydrogeologist and president of Groundwater Management Associates Inc. in North Carolina. Spruill has worked as an expert for Mississippi in the case.

The fight is one of a slew of interstate water wars that have reached the nation's highest bench in recent months. The disputes invoke the Supreme Court's original jurisdiction to resolve legal battles between states.

During the 2020 term, which ends this summer, the justices reviewed fights between Texas and New Mexico over stored floodwaters on the Pecos River and between Florida and Georgia over flows through the Apalachicola-Chattahoochee-Flint (ACF) River Basin.

Many more such cases are expected to come up as the planet warms and water supplies dry up ([Greenwire](#), May 6, 2020).

Mississippi v. Tennessee is the first groundwater case to reach the Supreme Court.

Mississippi's novel argument is unlikely to fly with the justices, who use the legal doctrine of equitable apportionment — or fair distribution — to divvy up water between states, said Robin Kundis Craig, an incoming law professor at the University of Southern California.

"Pretty much everyone is lined up against Mississippi to say: 'You're making a stupid argument,'" she said.

The Biden administration, a group of law professors and a bipartisan coalition of eight states are backing Tennessee in the aquifer battle.

No one has gotten involved on behalf of Mississippi.

Because equitable apportionment is a forward-looking remedy, it makes sense that Mississippi wouldn't root its arguments in that doctrine if the state wants to be paid for past withdrawals from the aquifer, said Dave Owen, a professor at the University of California, Hastings College of the Law.

But it has a long, uphill battle if it wants to convince the Supreme Court to deviate from that approach, he said.

"This is a court that wants to rule on grand constitutional questions," Owen said. "It doesn't want to be a water rights court."

Special master's view



[+] Mississippi claims Tennessee unlawfully withdrew groundwater owned exclusively by the Magnolia State in the Middle Claiborne Aquifer. Claudine Hellmuth/E&E News

Tennessee has one other key expert in its corner — the "special master" the Supreme Court has assigned to decide how the groundwater in the aquifer should be shared.

In a November 2020 [report](#), Senior Judge Eugene Siler Jr. for the 6th U.S. Circuit Court of Appeals found that the aquifer is in fact a continuous interstate resource and that equitable apportionment is the appropriate mechanism to divide it.

"When states fight over interstate water resources, equitable apportionment is the remedy," wrote Siler, who was appointed during the George H.W. Bush administration. "Mississippi presents no compelling reason to chart a new path for groundwater resources."

He gave Mississippi a shot at amending its complaint. For more than a decade, the state has held firm in its argument that it is the sole owner of the aquifer and that Tennessee has stolen its water.

Mississippi declined to change its position. The water, the state says, moves through the ground so slowly that it was never naturally available to Tennessee and is now forever lost to Mississippi.

Earlier this year, the state filed [exceptions](#) to Siler's report, a step that is expected to prompt the Supreme Court to take a closer look at the dispute.

Drawdown by the Memphis utility, under Tennessee's supervision, means that the aquifer must recharge using younger — and potentially contaminated — water, Mississippi wrote. It has also reduced the amount of groundwater a well in Mississippi can recover, the state said.

The reduction, Mississippi wrote, "means that more wells and more pumps — at great expense — are required to recover the water needs of Mississippi's producers; and the power costs of those producers have also been increased."

Tennessee filed its own [reply](#), urging the justices to reject Mississippi's claims.

"This is the third attempt by Mississippi to seek more than \$600 million in alleged damages concerning groundwater in the Memphis Sands Aquifer, which is an underground water resource that underlies parts of both Mississippi and Tennessee," wrote lawyers for the Volunteer State.

"Mississippi, however, still cannot plead or prove that a single Mississippi resident has suffered a water shortage from Memphis's use of the Aquifer," Tennessee continued.

'Dangerous uncertainty'

Other states that share water with their neighbors are pleading with the Supreme Court not to side with Mississippi's unusual claim to exclusive rights over the aquifer.

Eight states led by both Democratic and Republican attorneys general joined forces earlier this year to argue that penalizing Tennessee for pumping without first establishing terms for use of the aquifer would create "dangerous uncertainty" for other water-sharing states ([Greenwire](#), May 3).



States like Colorado say Mississippi's claim could harm water-sharing agreements in other states. Colorado's Rocky Mountains serve as the headwaters for several interstate river systems. National Park Service

"If states can be liable for damages even without a known duty to another state, then they cannot plan for the future or effectively regulate natural resources use within their borders," the states wrote in their "friend-of-the-court" [brief](#).

"The Court should not create a new way for states to resolve their disputes over natural resource use that addresses past violations of unknown duties and does not solve the problem of how states can share a natural resource going forward," they continued.

Colorado, whose Rocky Mountains serve as the starting point for several major river systems, led the multistate brief. Idaho, Nebraska, North Carolina, North Dakota, Oregon, South Dakota and Wyoming also joined.

A ruling for Mississippi would leave municipalities and farmers in other parts of the country vulnerable to sudden water claims by neighboring states, the state coalition wrote. Such an outcome would suppress investment and increase the cost of any business venture that depends on water for its operations.

The Justice Department and a group of law professors also submitted amicus briefs in favor of Tennessee in the case.

The International Law Committee of the New York City Bar Association wrote a brief in support of neither party but noted that the court could use international groundwater law as a framework for deciding whether equitable apportionment applies in *Mississippi v. Tennessee*.

"Consider that, under international law, if the Middle Claiborne Aquifer crossed an international boundary, it would be subject to the principle of 'equitable and reasonable utilization,'" the committee wrote in its [brief](#).

The principle, the brief continued, "is fundamentally similar to the Court's doctrine of equitable apportionment."

What next?

The Supreme Court could hear arguments in *Mississippi v. Tennessee* as early as this fall, and legal experts say the justices could come to a quick — and potentially unanimous — conclusion in the case.

Interstate water disputes don't tend to divide the justices along ideological lines, and the court handed back swift and unanimous opinions in the *Texas v. New Mexico* and *Florida v. Georgia* water cases this term.

Mississippi's fight could also bounce back and forth between the Supreme Court and the special master for years to come, as did Florida and Georgia's battle over the ACF River Basin. This term's ruling in favor of upstream Georgia in the case was the high court's second in the yearslong legal war ([Greenwire](#), April 1).

And while Mississippi's groundwater fight may be the first to reach the Supreme Court, said Craig of USC, it won't be the last.

Just as the high court is expected to take up an increasing number of surface water disputes as the planet warms, groundwater battles will also become more heated and more frequent, she said.

One potential battleground is the massive Ogallala Aquifer underlying eight states in the middle of the United States. The aquifer sits beneath states such as Colorado, New Mexico and Texas that are already gripped by drought and competing for increasingly scarce river flows.



The Ogallala Aquifer. U.S. Geological Survey

"When people can't get to surface water," Craig said, "they turn to groundwater."

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