



SCOTT M. DORAN

WILLIAM J. LEVENDUSKY

DO STATES OWN THEIR GROUNDWATER?

The U.S. Supreme Court is going to decide.

The Supreme Court of the United States will consider a remarkable groundwater dispute between the states of Mississippi and Tennessee.

At the center of the controversy is the Sparta-Memphis aquifer which, according to the U.S. Geological Survey, stretches from the southern tip of Illinois, west into Texas, and east across northern Louisiana and central Mississippi toward the Florida panhandle.

This case is interesting because it is an original action between two sovereign states, making it a part of the Supreme Court's original jurisdiction. That means the case is first considered in the Supreme Court rather than coming to it on appeal from a lower federal court or a state supreme court.

To file a case with original jurisdiction, the law required Mississippi request leave to file its complaint against the state of Tennessee; the city of Memphis, Tennessee; and the Memphis Light, Gas and Water Division.

The Supreme Court granted leave on June 29, 2015, and the parties will now try the facts before the Supreme Court.

Depriving of the Resource

Memphis authorities began pumping water out of the Sparta-Memphis aquifer more than a century ago. Mississippi claims as a result of the pumping in Tennessee, groundwater levels of the aquifer underlying portions of Mississippi have been lowered—and in effect, Mississippians have been deprived of the resource.

Mississippi refers to the water within the portion of the located aquifer underneath the territorial boundaries of the state as “Mississippi’s groundwater.” The state argues because the water is naturally trapped beneath the surface and does not flow long distances without unnatural intervention (contrary to a river which relatively rapidly flows through state territory), the water can be considered a part of the state of Mississippi.

Additionally, the state of Mississippi argues the aquifer is primarily fed by sand outcroppings located within its borders, so rainfall in Mississippi is directly responsible for the continued viability of the Sparta-Memphis aquifer.

Right now there is no law recognizing the groundwater as belonging to Mississippi. The state of Mississippi is arguing the taking of its groundwater is a violation of the state's sovereignty under the U.S. Constitution.

The state of Tennessee, the city of Memphis, and the Memphis Light, Gas and Water Division—all three the defendants in this case—argue the Sparta-Memphis aquifer is an inter-

state resource, ownership of which has not been attributed to one state.

The Tennessee parties also feel the aquifer is not legally distinguished from a river and any movement of the water happens as a result of nature. They further argue if the Court should find Mississippi does not own its aquifer, the groundwater rights should be apportioned between the parties.

As of the filing, the Sparta-Memphis aquifer has not been apportioned by judicial decree, agreement between states, or legislation. The various Tennessee parties argue equitable apportionment is the correct and only way to divide the ownership of the aquifer. Equitable apportionment is a long-established doctrine of federal law focusing on equality of right rather than equality of outcome.

The value of groundwater continues to increase and the Supreme Court is taking a first step toward resolving what may be the first of multiple disputes.

Mississippi claims the Tennessee parties have illegally pumped more than 400 billion gallons of its territorial resource out from under Mississippi since 1985. Mississippi contends Tennessee pumps and sells nearly 20 million to 27 million gallons of water out of Mississippi each day.

However, the Tennessee parties argue, under the doctrine of equitable apportionment, there is no taking because: (1) the resource does not belong to any one state's sovereign territory, and (2) the Memphis authorities' pumping of the aquifer using facilities located within Tennessee does not limit or reduce Mississippi's right of access to similarly pump water from the aquifer. They feel any migration of water from Mississippi to Tennessee happens as a function of the natural laws.

Mississippi, though, claims equitable apportionment is not the correct remedy. Mississippi is seeking a declaratory judgment by the Supreme Court confirming a part of the Sparta-Memphis aquifer is a sovereign part of Mississippi.

In addition, Mississippi would like compensatory damages for converted resources they claim amount to \$197 million plus interest. Although the Court is not required to accept Mississippi's damages claim, one can certainly imagine damages climbing high if the Court agrees Tennessee has been taking Mississippi's valuable groundwater resource.

Awaiting the Decision

Now that the Supreme Court has agreed to hear the case, we anxiously await a ruling that could have a marked impact on groundwater deposits throughout the country.

Although the Court can potentially decide this case without siding with either state's arguments, it seems unlikely they would allow Mississippi to file the complaint, only to dodge substantively ruling on the matter.

If the Tennessee parties win the day, perhaps the rule of equitable apportionment is conclusively applied to interstate groundwater deposits throughout the country not otherwise allocated by agreement or order. The Court, though, has the opportunity to limit the ruling to only this groundwater deposit or only this particular dispute.

If the Court would side with Mississippi, it could set off a wide range of consequences. Perhaps the Court decides unmoving or little-moving underwater deposits are indeed part and parcel of the state's sovereign territory.

If that is the case, what is the state owed if you pump water out of its territory? To what extent must other states and operators conduct geological surveys to determine the ownership of a groundwater deposit attributable to each state in a multi-state area?

Will the Court be convinced by Mississippi's argument saying ownership stems from the sand outcroppings located within Mississippi's borders that supply a great deal of the water in the Sparta-Memphis aquifer?

If so, a state with large outcroppings of a particular deposit but relatively little of that deposit underground could poten-

tially have claim to a portion of resources underlying a neighboring state.

The Supreme Court denied Mississippi's attempt to file a similar complaint in 2010. In that case, the federal government objected to the hearing of the case and urged the Court to deny Mississippi's motion to file.

Yet, despite the precedent and opposition from the U.S. Department of Justice, the Court allowed Mississippi to file this claim and the outcome is relatively unpredictable.

We may reasonably assume any ruling on this case will limit its application to sovereign states, municipalities, and their various traditional government function divisions.

This ruling may not reach private operators to any particular extent, but we don't know. The value of groundwater continues to increase and the Supreme Court is taking a first step toward resolving what may be the first of multiple disputes.

We will watch this case carefully and update the groundwater industry when the Court reaches its decision. A decision is not expected before early 2017. [WWJ](#)


Scott M. Doran, Esq., is chair of the Kegler, Brown, Hill + Ritter energy and environmental practice group in Columbus, Ohio, and represents clients with respect to environmental and natural resource issues. He can be reached at (614) 462-5400.

William J. Levendusky, Esq. is an associate attorney at Kegler, Brown, Hill + Ritter and represents clients with respect to mineral, energy, and environmental issues. He can be reached at (614) 462-5400 or at wlevendusky@keglerbrown.com. Kegler, Brown, Hill + Ritter serves as general counsel for the National Ground Water Association.



FOREMOST DRILLS
have the
POWER

CRUSH THROUGH OVERBURDEN



Foremost DR drills have been proven repeatedly in some of the toughest unconsolidated overburden formations, including sand, gravel, glacial till, and boulders.

DRILLS THE STRAIGHTEST HOLES



The rotation of the casing by the lower drive results in a very straight hole making it ideal for shaft holes and foundation piles. This also minimizes stress on casing and casing welds, and eases the task of installing screens and pumps in water well applications.

TRUSTED WORLDWIDE SINCE 1979



Foremost's Dual Rotary drills continue to make significant contributions to the productivity and profitability of operators worldwide. For a growing number of contractors, there's simply no better way to drill.

To learn more, visit foremost.ca
or call **1.800.661.9190** (Canada/U.S.A.) **1.403.295.5800** (Worldwide)

FOREMOST
DRdrills 