

In the Matter Of:

*STATE OF MISSISSIPPI vs
STATE OF TENNESSEE*

143,

February 25, 2020



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1 IN THE SUPREME COURT OF THE
2 UNITED STATES

3 -----x

4 STATE OF MISSISSIPPI,

5 Plaintiff,

6 v.

No. 143, Original

7 STATE OF TENNESSEE, CITY OF
8 MEMPHIS, TENNESSEE, AND
9 MEMPHIS LIGHT, GAS & WATER
10 DIVISION,

11

12 Defendants.

13

14 -----x

15

16 February 25, 2020
17 9:01 A.M.

18

19

20 ON BILL OF COMPLAINT

21

22 Before:

23

24 HON. EUGENE SILER,

25

Special Master.

26

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28

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A P P E A R A N C E S (continued)

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EXHIBITS

1 THE COURT: I'm glad to see everybody
2 back here, and we'll try to get through this on
3 time.

4 One thing that we do -- of
5 course, as the one-time trial judge, I will
6 preside over closing arguments. This is kind
7 of like a closing argument and argument to the
8 Supreme Court at the same time.

9 But anyway, we'll try to keep
10 within the time limits. If you have anything
11 that you want to bring up, we'll suspend the
12 time limit. Ordinarily we'd just go right
13 through, and I guess I have the right to ask
14 questions while you're arguing. I probably
15 won't ask many at all. I'm not the Supreme
16 Court; I'm their agent. But we will proceed.
17 And if you have anything you want to go on the
18 record or on the screen, feel free to do so.

19 So when you start your argument,
20 just identify yourself by name. I remember
21 most of you, but some of you I don't, because
22 I haven't seen you for some period of time.

23 Is there anything we need to
24 take up before that? If not, we'll proceed.

25 Mississippi is the first to go.

1 MR. MOFFETT: Good morning, your
2 Honor. Larry Moffett on behalf of the State of
3 Mississippi. May it please the court.

4 First, Mississippi would like to
5 express our appreciation to your Honor and your
6 staff for providing us with this opportunity to
7 address the Court. We also appreciate the
8 assistance and courtesies your Honor and your staff
9 has shown us throughout this proceeding.

10 Your Honor, the briefs filed by the
11 parties are extensive, and it's not our
12 intention -- at least not my intention -- this
13 morning to cover all issues that are addressed in
14 that brief. But instead, I want to spend a little
15 time focusing on a handful of key legal points.

16 As you know, your Honor, this case is
17 one of first impression. The Supreme Court has
18 never decided a case involving a question of
19 whether citizens of a state may, through mechanized
20 pumping, intentionally take large volumes of
21 groundwater located in a neighboring state without
22 the neighboring state's permission. There's no
23 dispute, your Honor, in this case that MLGW has
24 placed three large wellfields within two to three
25 miles of the Mississippi border for this purpose

1 and has, through its massive pumping operation,
2 pulled into Tennessee from Mississippi billions of
3 gallons of groundwater for capture and sale by
4 MLGW.

5 Your Honor, of course MLGW and
6 Tennessee say there's nothing wrong with that;
7 that MLGW could take as much groundwater as it
8 can, and wants and may do so without
9 Mississippi's permission and over
10 Mississippi's objection; and that if
11 Mississippi doesn't like what MLGW is doing,
12 Mississippi's only judicial remedy is to
13 convince the United States Supreme Court to
14 equitably apportion all groundwater in the
15 Middle Claiborne Aquifer unit among the eight
16 states in which that unit is found, and
17 perhaps all water hydrologically connected to
18 the Middle Claiborne Aquifer unit, including
19 Mississippi Embayment.

20 Your Honor, the defendants'
21 arguments in this case contain a fundamental
22 flaw: They totally ignore the United States
23 Constitution. Defendants' actions are a
24 direct violation of the Constitution,
25 including exclusive sovereignty, authority and

1 control of Mississippi over its territory and
2 all water found in situ within its borders.
3 Your Honor, Mississippi filed this lawsuit to
4 protect and preserve this groundwater. And
5 that has been held by Mississippi in trust for
6 the benefit of its citizens since it became a
7 state.

8 On December 10, 1817,
9 Mississippi became the 20th state admitted to
10 the Union of the United States of America.
11 Under the Constitution, Mississippi is
12 sovereign over all matters not ceded to the
13 federal government. And when it was admitted
14 to the Union, Mississippi was vested with
15 exclusive authority, control and dominion over
16 all water within its territorial boundaries.
17 The authority of the state under the
18 Constitution to preserve, protect and control
19 water located within its boundaries has been
20 recognized by the Supreme Court as an
21 essential attribute of sovereignty. And this
22 authority is exclusive, subject only to
23 limitations imposed by the Constitution or
24 other federal law.

25 Courts have consistently recognized

1 that a state -- that the waters within a state are
2 held by -- in trust by the state for its citizens.
3 The public trust doctrine imposes on the state, as
4 trustee, the duty to preserve and protect that
5 water for the use and benefit of its citizens. For
6 example, the law professors filed to meet this
7 brief in this proceeding, and they observed,
8 correctly, that water is a public resource managed
9 by states as trustees.

10 They also recognize that
11 Mississippi holds the rights of a sovereign
12 trustee over the state's natural resources,
13 and that states have the power to preserve and
14 regulate these important natural resources.
15 Your Honor, it's a fundamental premise of law
16 that if the corpus of a trust or any part of
17 that corpus is taken by a third party, without
18 the trustee's permission, it's the trustee's
19 duty to act. The trustee must attempt to
20 recover the corpus in kind, if possible. And
21 if recovery in kind is not possible, the
22 trustee is obligated and entitled to recover
23 damages from the appropriator of the corpus.
24 That is what Mississippi seeks to do in this
25 case.

1 Your Honor, the water at issue in
2 this case is located hundreds of feet below the
3 Mississippi surface of northwest Mississippi --
4 subsurface of northwest Mississippi. The water is
5 not like, and it is not part of, an underground
6 lake. It's not an underground stream flowing in a
7 defined channel. Instead, it's part of a hidden
8 and very complex heterogeneous subsurface. The
9 water is found as very small amounts of water
10 located in tiny pore spaces that exist between and
11 around extremely small grains of unconsolidated
12 materials made up of sand of varying grain sizes
13 and irregular shapes, interspersed with varying
14 compositions of clay and silt.

15 THE COURT: You admit that the water
16 is moving all the time, although very slowly?

17 MR. MOFFETT: Yes, sir. We do. I
18 will address that more specifically.

19 But, your Honor, this water is,
20 again, because of these characteristics within this
21 unconsolidated material, this water is part of the
22 earth. It's moisture in the soil, if you will.
23 And again, we do not claim the water is stationary.
24 We don't. But its movement, which is dictated by
25 gravity and pressure, is extremely slow as the

1 water creeps and oozes through the earth westward
2 from eastern outcrops in Mississippi under natural
3 conditions.

4 But this groundwater does not
5 flow like an underground river. It doesn't
6 flow like a body of water and a river moving
7 downstream at velocities measured in feet per
8 second and miles per day. It moves, again,
9 between and around these extremely small
10 grains of material at an average rate of only
11 about one to two inches a day.

12 And you'll recall from the
13 hearing, your Honor, that at one inch a day, a
14 molecule of water moves only 30 -- about
15 30 feet in a year, one mile in 175 years. But
16 this groundwater, because of the
17 characteristics of its location and this very,
18 very slow movement, has been in Mississippi,
19 or the territory that became Mississippi, for
20 hundreds and thousands of years. And again,
21 your Honor, it's part of the earth. It's part
22 of this subterranean geological structure in
23 Mississippi, and it's part of Mississippi's
24 sovereign territory.

25 Now, your Honor, this water -- it's

1 undisputed that the water at issue, the water we're
2 talking about, is, under the Constitution, subject
3 to Mississippi's exclusive sovereignty and control.
4 Nevertheless, the defendants claim the water is
5 somehow shared by Mississippi and Tennessee, and
6 then MLGW has the right to capture the water
7 without Mississippi's permission by pulling the
8 water into Tennessee using modern wellfields
9 located just across the border in Tennessee.

10 Your Honor, defendants -- this
11 argument flies in the face of the
12 Constitution. State territorial sovereignty
13 is at the foundation of the federal union
14 created by the Constitution of the United
15 States. The Supreme Court has long held that
16 each state holds all sovereign authority of a
17 nation within its boundaries, save the portion
18 of that sovereignty it ceded to the federal
19 government.

20 In this context, states are as
21 foreign to each other as separate nations for
22 all but federal purposes. Your Honor, the
23 Court explained in *Rhode Island v.*
24 *Massachusetts* that as between two states,
25 neither state has any right -- has any

1 right -- beyond its territorial boundary,
2 which represents the true line of right and
3 power between them.

4 We have up on the slide here,
5 the screen, this quote from Rhode Island v.
6 Massachusetts, in which the Court said, "the
7 locality of the state boundary is matter of
8 fact, and when ascertained, separates the
9 territory of one from the other, for neither
10 state can have any right beyond its
11 territorial boundary. It follows that when a
12 place is within the boundary, it is part of
13 the territory of the state. Title,
14 jurisdiction and sovereignty are inseparable
15 incidents, and remain so until the state makes
16 some cession."

17 Mississippi has never, ever made
18 such a cession to Tennessee. And Mississippi
19 cannot do so without an interstate compact
20 approved by the legislatures of both states
21 and by the United States Congress. The
22 defendant's commercial pumping and intentional
23 cross-border capture of groundwater located in
24 the earth within Mississippi's borders is a
25 direct violation of the Constitution. It is a

1 flagrant violation of the Constitution. Under
2 the Constitution, the defendants have no
3 right, no right to water located in
4 Mississippi under natural conditions. And
5 they have no right to pull water from
6 Mississippi into Tennessee.

7 Your Honor, and this case is not just
8 about the volumes of groundwater MLGW has taken,
9 and continues to take, from Mississippi. MLGW's
10 pumping has also materially changed and adversely
11 affected hydrogeologic conditions in the northwest
12 Mississippi subsurface.

13 Under the Constitution, again,
14 MLGW has no right to make these physical
15 changes to Mississippi's sovereign territory.
16 And defendants have not cited to, and cannot
17 cite to, any law, anywhere, that provides them
18 with the right or authority to take water from
19 Mississippi or change Mississippi's
20 hydrogeologic conditions. Instead of
21 discussing the Constitution, the defendants
22 insist that the federal common law remedy of
23 equitable apportionment expressly and
24 exclusively governs the parties' respective
25 rights. That argument ignores the limitations

1 of the Supreme Court's prior equitable
2 apportionment cases, and more importantly,
3 ignores the Constitution. The Constitution
4 controls this case. And federal common law
5 cannot trump the Constitution. And federal
6 common law cannot support these intentional
7 cross-border extractions, which violate the
8 Constitution.

9 First, a couple things about
10 equitable apportionment. The equitable
11 apportionment rule, which arose out of *Kansas v.*
12 *Colorado*, has been limited to disputes between
13 states involving interstate rivers and streams and
14 has never been applied outside of that context.
15 Defendants' arguments that equitable apportionment
16 has been expansively applied to "interstate
17 resources" misstates the Supreme Court law which
18 has never gone beyond its original context.

19 For example, on the screen we
20 have a comparison here of what Tennessee has
21 described in its brief and what the Supreme
22 Court actually said in the case that they cite
23 to. On page two of its initial posthearing
24 brief, Tennessee states that equitable
25 apportionment is the doctrine of federal

1 common law that governs disputes between
2 states concerning an interstate water
3 resource. The language that was used by
4 Tennessee in its brief distorts the Court's
5 sentence in Colorado vs. New Mexico, which
6 reads in its entirety as follows: "Equitable
7 apportionment is the doctrine of federal
8 common law that governs disputes between
9 states concerning their rights to use the
10 water of an interstate stream."

11 So that blue language up there,
12 Tennessee omits that blue language shown on the
13 screen there, which limits the scope of the
14 statement of law by the Supreme Court and
15 undermines the major premise of Tennessee's
16 argument. Tennessee just simply replaces that
17 limiting language it deleted regarding "interstate
18 stream" with the expansive phrase "interstate water
19 resource." But that expansive phrase, "interstate
20 water resource," has never appeared in any Supreme
21 Court opinion, to our knowledge.

22 Tennessee also asserts on pages two
23 and three of its posthearing brief, the Supreme
24 Court has applied the doctrine of equitable
25 apportionment to a wide array of interstate

1 resources. That's the language, "wide array of
2 interstate resources." But again, that phrase
3 "interstate resources" has never appeared in a
4 Supreme Court case, referring to natural resources
5 of the type at issue in this case.

6 And the so-called wide array of
7 cases cited by Tennessee all involved
8 interstate rivers or streams. None of those
9 cases cited by Tennessee expand the federal
10 common law doctrine of equitable apportionment
11 beyond interstate rivers and streams and the
12 surface water or migrating fish within those
13 streams. Contrary to defendants'
14 implications, the Supreme Court has never
15 decided a single case involving a groundwater
16 dispute between two states in which one state
17 was pumping groundwater across state borders
18 out of its neighboring sovereign territory.

19 Your Honor, in all of the Court's
20 interstate river apportionment cases, those cases
21 were rooted in an upstream state taking water from
22 a river while the surface water was located within
23 that upstream state. And the Supreme Court
24 balanced the equities between the upstream states
25 and the downstream states and imposed limits on the

1 amount of water that the upstream state could take
2 while the water was within its borders. But none
3 of those cases, your Honor, addressed or sanctioned
4 the cross-border extraction of water physically
5 located in another state.

6 Unlike the equitable apportionment
7 cases, where a downstream state is complaining that
8 an upstream state has taken too much water or an
9 unfair share of water in an interstate river or
10 stream, Mississippi's claim is not -- Mississippi's
11 claim is not that MLGW is taking too much water
12 from underneath the Mississippi, or from the
13 aquifer, whatever that may be -- defined that to
14 be.

15 Instead, our claim is that all
16 groundwater in Mississippi is held by Mississippi
17 in public trust for the use and benefit of its
18 citizens. And it's controlled exclusively by
19 Mississippi; and that MLGW's intentional
20 cross-border extractions of Mississippi
21 groundwater, without Mississippi's permission, is a
22 violation of Mississippi's sovereignty under the
23 Constitution. None of the cases that have been
24 cited by the defendant address or condone that type
25 of conduct.

1 A second point, your Honor,
2 about equitable apportionment I want to make
3 is this: Defendants are essentially arguing
4 that the federal common law doctrine of
5 equitable apportionment somehow bestows legal
6 rights upon the defendants. But equitable
7 apportionment doesn't bestow legal rights. It
8 doesn't create legal rights. In any legal
9 proceeding, the Court makes a legal
10 determination of the parties' rights, the
11 parties' substantive rights, followed by an
12 award of appropriate remedies.

13 In this case the defendants have
14 reversed the analysis. They assert that the
15 remedy of equitable apportionment controls the
16 parties' substantive rights. But the federal
17 common law doctrine of equitable apportionment
18 does not establish substantive rights of
19 general abdication. It is a remedy. Remedies
20 do not create rights. Remedies follow rights,
21 not the other way around.

22 Your Honor, equitable apportionment
23 also, because it is a federal common law doctrine,
24 is limited by the Constitution. A federal common
25 law cannot, as I said earlier, trump the

1 Constitution. Equitable apportionment simply does
2 not, and cannot, as defendants suggest, create or
3 bestow upon the defendant any legal rights or
4 interest to groundwater that is located within
5 Mississippi's boundaries. And it simply does not,
6 and cannot, create cross-border rights claimed by
7 the defendants, because those rights are in direct
8 conflict with the Constitution.

9 Your Honor, the question presented in
10 your Honor's August 12, 2016, order is whether the
11 water at issue in this case is interstate in
12 nature. In answering that question, I want to
13 prefatorily point out several fundamental
14 considerations.

15 First of all, the phrase "interstate
16 resource" is not a phrase found in the
17 Constitution. What we find in the Constitution
18 instead is the recognition that the United States
19 of America is a federation of separate states.
20 Each state is a sovereign entity. And the
21 Constitution -- there is no territory, no
22 subsurface geology, no subsurface resources that
23 are shared by the states. Nor do states share
24 their sovereignty with each other. The states, as
25 I said earlier, are separate nations, if you will.

1 Each state's sovereignty and authority is exclusive
2 vis-a-vis all other states. And the sovereign --
3 sovereignty and rights of each state end at its
4 borders.

5 Second point, your Honor, there is
6 obviously significant disagreement in this case
7 about what the word "interstate" even means.
8 Interstate is a word that has multiple dimensions.
9 In its simplest sense, it is simply a geographic
10 description, sort of like the word or phrase
11 "multistate." It's devoid of any legal import.

12 The Rocky Mountains, for
13 example, are located in multiple states, so
14 they may be considered, in terms of geography,
15 to be an interstate mountain range. But the
16 word "interstate" standing alone tells you
17 nothing about legal rights. For example, the
18 fact that the Rocky Mountains are an
19 interstate mountain range does not mean that
20 the states in which those mountains are
21 located share the Rocky Mountains. Instead,
22 the portion of the Rocky Mountains that is in,
23 say, Colorado is part of the sovereign
24 territory of Colorado. And Colorado exercises
25 exclusive jurisdiction and authority over

1 those Colorado mountains to the exclusion of
2 all other states in which the Rocky Mountains
3 are located.

4 So any conclusion, your Honor, that
5 the aquifer in this case, whatever that may be, is
6 a, quote, "interstate," closed quote, aquifer has
7 no particular legal significance. Now, with that
8 background, let's take a closer look at the
9 defendant's proposed answer to your Honor's
10 specific question.

11 Now, defendants claim that the
12 aquifer at issue is a shared interstate resource
13 because the aquifer exists in multiple states. The
14 hydrogeologic characteristics of the aquifer are
15 not affected or governed by the location of state
16 boundaries. Some water in the aquifer flows across
17 state lines under natural conditions. And water
18 can be captured across state lines through pumping.
19 These are all facts, your Honor, relating to
20 geography.

21 What is completely missing from
22 the defendants' analysis is the legal part of
23 the equation. The fact that one state can
24 take water from another state through pumping
25 does not mean they may lawfully do so under

1 the Constitution. The question of the legal
2 rights to the water located within the aquifer
3 is a separate issue from the geographic
4 location and hydrogeologic characteristics of
5 the aquifer.

6 The defendants essentially want
7 this Court to hold that when it comes to
8 groundwater, state borders do not mean
9 anything; there is a borderless common for
10 groundwater. In other words, the defendants
11 have a right to water in Mississippi, if they
12 can capture it through pumping.

13 But where, your Honor, does the
14 Constitution say such a thing? Nowhere.
15 Nowhere. Contrary to defendants' arguments in
16 this case, state borders mean something.
17 State sovereignty means something. As I
18 mentioned previously in the Rhode Island v.
19 Massachusetts case, the locality of the state
20 border is a matter of fact and, when
21 ascertained, separates the territory of one
22 from the other, for neither state can have any
23 right beyond its territorial boundary.

24 So in answering your question,
25 your Honor, we submit that the dispositive

1 question is a legal one. What legal right, if
2 any, does a state have to capture groundwater
3 located outside of its territorial borders?

4 The answer to that is none. None. Again, the
5 Court in Rhode Island, neither state can have
6 any right beyond its territorial boundary.

7 And the defendants have not
8 identified, and cannot identify, any constitutional
9 provision or other law which vested them with the
10 legal right to capture groundwater, Mississippi
11 groundwater, for pumping.

12 Water that is located in Tennessee
13 under natural conditions is water that is within
14 the exclusive authority and control of Tennessee.
15 That water is part of Tennessee's sovereign
16 territory. It is not shared with Mississippi as a
17 matter of constitutional law. And water that's
18 located in Mississippi under natural conditions is
19 not part of Tennessee's sovereign territory; it is
20 part of Mississippi's sovereign territory and is
21 within the exclusive control and authority of
22 Mississippi. It is not shared with Tennessee as a
23 matter of constitutional law.

24 And labeling the aquifer at
25 issue as an interstate resource cannot create

1 rights that do not exist. Nor can you, just
2 labeling an aquifer an interstate resource,
3 diminish Mississippi's rights as a sovereign
4 under the Constitution.

5 The Court, of course, is bound to
6 follow the Constitution. Under the Constitution
7 Tennessee has no rights, none, beyond its territory
8 borders. Therefore, Tennessee and MLGW have no
9 right to groundwater located beyond Tennessee's
10 territorial borders, including groundwater located
11 in Mississippi.

12 The water at issue in this case is
13 not a shared resource, as a matter of law. It is
14 under Mississippi's exclusive dominion and control,
15 and defendants have no lawful right to capture it,
16 absent Mississippi's permission. And because
17 states have no rights beyond their territory
18 boundaries under the Constitution, and because the
19 Constitution must be followed, Mississippi submits
20 that the only proper answer to your Honor's
21 question in this proceeding is no. As a matter of
22 law under the Constitution, the water at issue is
23 not a shared interstate resource. And, your Honor,
24 we submit this is the only conclusion that can be
25 reached by this Court that is consistent with the

1 Constitution.

2 Now, this conclusion that's mandated
3 by the Constitution is validated by legislative
4 pronouncements of both Mississippi and Tennessee
5 that have been made outside of this proceeding. Do
6 Mississippi and Tennessee view their groundwater in
7 their state to be a natural resource shared with
8 other states? Clearly not.

9 Let's first look at Mississippi.
10 On the screen, your Honor, is Mississippi
11 code, Section 51-3-1. Exercising its
12 authority under the Constitution to regulate,
13 protect, preserve and control groundwater,
14 this statute was codified by Mississippi, and
15 this codified Mississippi's public trust
16 obligation of overall waters of Mississippi.
17 This is part of what was called the Omnibus
18 Water Rights Act. And this statute rejects
19 the notion that groundwater in Mississippi is
20 a shared interstate resource. This statute
21 proclaims that all water in Mississippi --
22 that would include the water at issue in this
23 case -- is among the basic resources of this
24 state to therefore belong to the people of
25 this state. And the statute further proclaims

1 that the control and development and use of
2 water for all beneficial purposes shall be in
3 the state which, in the exercise of its police
4 power, shall take such measures to effectively
5 and efficiently manage, protect and utilize
6 the water resources of Mississippi. That's
7 what Mississippi says.

8 So what does Tennessee say about the
9 groundwater in Tennessee? In this case, of course,
10 defendants are taking the position that the
11 valuable, high-quality groundwater under Shelby
12 County, Tennessee, is a shared interstate resource.
13 But what does Tennessee law say about that?

14 Here is Tennessee code, Section
15 68-221-702. It says, "Recognizing that the waters
16 of the state are the property of the state and held
17 in public trust for the benefit of its citizens, it
18 is declared that the people of the state are
19 beneficiaries of this trust and have a right to
20 both an adequate quantity and quality of drinking
21 water."

22 Now, this sounds like an argument
23 Mississippi is making in this case, but that's not
24 Mississippi's argument. That's the State of
25 Tennessee's own pronouncement by its legislature.

1 This is Tennessee's binding recognition that the
2 groundwater located underneath Shelby County in the
3 Memphis Sand is not a shared interstate resource
4 but is the property of Tennessee and is held by the
5 state in trust with the benefit of its citizens.

6 Again, the defendants state a
7 position in this case that the groundwater
8 underneath Shelby County is not the property of the
9 State of Tennessee, and that that groundwater is
10 not held by the State of Tennessee in trust for the
11 benefit of its citizens but is instead an
12 interstate resource shared with Mississippi, and a
13 number of other states who can have it if they can
14 capture it through pumping.

15 Your Honor, the positions taken
16 by Tennessee and MLGW in this case have been
17 disavowed by the State of Tennessee through
18 the statute. And this statute is critically
19 important, we believe, to the Court's
20 resolution of this proceeding.

21 So what do the defendants have
22 to say about that statute? Nothing. Nothing
23 at all. They completely ignored it in the
24 briefs. Why? It's devastating to their
25 argument. They can't get around it. They

1 cannot square their arguments with this
2 statute, so they ignore it.

3 Now, the amicus parties didn't ignore
4 it, but the amicus party's discussion of the
5 statute really only serves to emphasize how
6 detrimental the statute is to the defendants'
7 positions in this case.

8 Here's what the amicus parties
9 told the Court on page 21 of the brief. After
10 discussing Mississippi's pronouncement of the
11 public trust of groundwater, in Mississippi
12 Code, Section 51-3-1, the amicus parties told
13 the Court, "Tennessee similarly declared that
14 the waters of the state are" -- there's an
15 ellipsis there -- "are held in public trust
16 for the benefit of its citizens." And they
17 cite to 68-221-702. The amicus parties then
18 say, "Conspicuously missing in all this is any
19 mention of water ownership or title."

20 The amicus parties have just flatout
21 misrepresented the actual substance of this
22 critical statute, which states that the waters of
23 Tennessee, quote, "are the property of the state
24 and held in public trust for the benefit of its
25 citizens."

1 So on page 21 of their brief they
2 intentionally deleted "the property of the state,"
3 and then asserted, based on their misstatement of
4 the statute, that "conspicuously missing in all
5 this is any mention of 'water ownership of title.'"

6 In fact, the Tennessee statute claims
7 ownership and title when it pronounces
8 unequivocally that the waters of Tennessee are the
9 property of the state.

10 Regardless, your Honor, the
11 defendants simply should not be allowed to come
12 into this court and argue that the Memphis Sand
13 groundwater underlying Shelby County is a shared
14 interstate resource when their own statute says it
15 is not. And the defendants should be estopped from
16 making arguments that are contrary to Section
17 68-221-702.

18 So the conclusion, your Honor,
19 mandated by the Constitution and the respective
20 legislatures of Mississippi and Tennessee is clear:
21 The water at issue in this case is not a shared
22 interstate resource as a matter of law.

23 Your Honor, I want to now turn to
24 just a couple of things I think that the Court
25 should consider related to groundwater policy. And

1 we suggest the Court should be mindful of a
2 resolution in this case that would, consistent with
3 the Constitution, best promote the management,
4 preservation and protection of groundwater.

5 And a fundamental question
6 related to that is: Who is in charge of our
7 nation's groundwater? The defendants would
8 have this Court believe that the ultimate
9 regulator of the nation's groundwater is the
10 United States Supreme Court. But that's not
11 the Court's job. Congress has not stepped in
12 to exert federal control over the withdrawal
13 and use of groundwater. So the power to
14 preserve and protect groundwater is vested in
15 each state as a sovereignty.

16 Defendants would have this Court
17 believe, as I mentioned earlier, when it comes
18 to groundwater, states don't actually possess
19 those powers; that one state can take as much
20 water from an adjoining state as it desires,
21 even over that other state's protestations.
22 In other words, groundwater is shared by all
23 states, and it's free for the taking by any
24 state, as long as the state keeps its wells
25 within its own borders.

1 Your Honor, I think we need to think
2 for a moment about the potential implications of
3 that outcome. The outcome advocated by the
4 defendants will incentivize, encourage, embolden,
5 give the green light to water purveyors and land
6 owners in one state to place water wells right next
7 to another state's border and withdraw massive
8 amounts of groundwater located in that neighboring
9 state. For example, Texas could install a massive
10 pumping operation right along its borders with
11 Arkansas and Louisiana, pull water from Arkansas or
12 Louisiana into Texas, and then transport and
13 distribute that water throughout Texas or inject it
14 into the Texas interior subsurface for future use
15 and capturing.

16 And that's the outcome. That is
17 where we're headed, if this is -- things are as
18 defendants say they are. And under that scenario,
19 your Honor, a state's prudent groundwater
20 management and conservation practices could be
21 easily nullified by neighboring states' intentional
22 cross-border extractions. The affected state would
23 have no judicial recourse to protect their
24 resources, at least until the affected aquifer is
25 substantially harmed, which may be irreversible,

1 and the aquifer is equitably apportioned by the
2 Supreme Court; which we believe, by the way, is a
3 practical impossibility, due to the geographic
4 scope and geologic complexity of the nation's
5 groundwaters.

6 And a possible practical solution for
7 the affected neighboring states would, we suppose,
8 be to engage in a water war. The affected state
9 could sink a bunch of wells in their state to try
10 to capture their water fast, before their neighbor
11 gets it. But states shouldn't be forced to engage
12 in wasteful water wars.

13 But there's a legal framework already
14 in place to prevent the scenarios I've described.
15 It's called the United States Constitution. Under
16 the Constitution, each state is sovereign over all
17 land and water located within its boundaries. This
18 Court must uphold and protect the public trust
19 doctrine and each state's power to conserve and
20 protect the groundwater located within its
21 boundaries, including the power to preserve and
22 protect its waters from cross-border extractions by
23 neighboring states.

24 Your Honor, this kind of outcome
25 would incentivize states to better control

1 groundwater production by its citizens and
2 governmental subdivisions, and it would also
3 encourage and really mandate comity between
4 neighboring states. Your Honor, the Court at
5 several times has expressed a preference for states
6 to resolve their disagreements by mutual
7 accommodation and agreement. But why should a
8 state enter an interstate compact when it's free to
9 take all the water it desires from a neighboring
10 state, absent apportionment?

11 On the other hand, states will
12 have an incentive to negotiate and enter
13 agreements relating to cross-border
14 extractions if their respective rights to
15 protect and preserve groundwater that is
16 located within their boundaries are upheld by
17 the Court in this proceeding.

18 So, your Honor, rather than dismiss
19 Mississippi's claim with prejudice, as defendants
20 urge, we respectfully request that the Special
21 Master recommend that the Court enter a judgment
22 for Mississippi on the limited issue identified for
23 evidentiary hearing. And as we move forward,
24 Mississippi is going to seek all relief that may be
25 appropriate, including an award of damages and/or

1 injunctive relief.

2 The Court certainly possesses
3 all necessary authority to grant any relief it
4 determines to be appropriate. In the 2015
5 opinion in *Kansas v. Nebraska*, the Court
6 recognized that proceedings under the Court's
7 original jurisdiction to hear suits between
8 states are basically equitable in nature. And
9 the Court said, quote, "When the Court
10 exercises its original jurisdiction over a
11 controversy between two states, it serves as a
12 substitute for the diplomatic settlement of
13 controversies between sovereigns and a
14 possible resort to force."

15 The Court also held that in
16 exercising its original jurisdiction, the Court may
17 mold each decree to the necessities of the
18 particular case and accord full justice to all
19 parties. We submit, your Honor, that in the next
20 phase, the Court should mold a decree in this case
21 that recognizes these past violations and preserves
22 the sovereign rights of Mississippi, as required by
23 the Constitution. And by doing so, the Court would
24 correspondingly create a deterrent to other states
25 that would follow Tennessee's lead, and the Court

1 would establish meaningful incentives for states to
2 resolve, by agreement, potential cross-border
3 extraction disputes and avoidable damage to the
4 nation's groundwater resources.

5 Based on Mississippi's request for an
6 award of damages, the defendants have proffered the
7 floodgates argument, asserting that protecting
8 Mississippi's sovereigns would lead to so-called
9 ruinous liability. But that agreement is just
10 nonsense, your Honor, with all due respect to
11 counsel. The windfall has already taken place by
12 defendants, when they made an economic decision to
13 appropriate Mississippi groundwater rather than
14 develop Tennessee's groundwater. Mississippi's
15 sovereign rights cannot be ignored simply because
16 the defendants may incur monetary liability for
17 violating them.

18 And in addition, as I said, your
19 Honor, the Court has extremely broad and
20 flexible powers. And the Court's going to
21 take all this into consideration in fashioning
22 relief it awards Mississippi, and the Court
23 may very well decide to grant relief through
24 the issuance of injunctive relief. It may
25 require the defendants to compensate

1 Mississippi through damages or by the return
2 of groundwater, through the payments over time
3 or some combination of remedies. But that's
4 for another day.

5 That's all we have for now, your
6 Honor, though we're, of course, available to answer
7 any questions you may have, and may have some
8 further observations to provide on rebuttal.

9 THE COURT: Would your position be
10 the same if Memphis had sunk these wells, say,
11 100 miles to the north of the border, or is that a
12 matter of proof to show that what happens --
13 because one of the issues that I saw in the case
14 was you were concerned about them sinking these
15 wells so close to the border, within two miles or
16 four miles or something like that.

17 MR. MOFFETT: Yes, your Honor.

18 THE COURT: So if it's farther to the
19 north, would that be the same issue?

20 MR. MOFFETT: The underlying issue is
21 still the same. There's a lot of groundwater in
22 Tennessee; I think 7,400 square miles of Memphis
23 sand up there, very thick Memphis sand. And
24 Memphis is free to develop that groundwater
25 resource in Tennessee, and they can do it, your

1 Honor, in a way that would result in the capture of
2 no water from Mississippi. It's a matter of
3 planning your wellfields. It's a matter of
4 operations. It's a matter of location.

5 After all, your Honor, this is
6 not an unusual situation. Very often, almost
7 always, water well operators have to be
8 cognizant of the effects that their operations
9 will have on their neighbors, have on
10 adjoining properties. They have to be
11 cognizant of how far they're going to be
12 pulling that water from because of issues like
13 contamination. They certainly don't want to
14 have that cone of influence extending out to
15 such a point that it pulls into that well
16 water contaminants that would harm that
17 drinking water.

18 So through wellfield planning and
19 good operations practices, the capture zone, if you
20 will, for a well can be controlled. It can be
21 predicted and can be controlled. So there is a way
22 for Memphis to get all of the groundwater that they
23 could ever need, and do so without taking
24 groundwater from Mississippi. That of course is
25 not what they've chosen to do; they've chosen to

1 put those wellfields within two to three miles of
2 the Mississippi border, knowing, based on what the
3 USGS told them, they were going to be pulling
4 millions of gallons of water a day into Tennessee
5 for capture by MLGW, and withdrawing that water
6 from Mississippi.

7 THE COURT: All right. Thank you.

8 MR. MOFFETT: Thank you, your Honor.

9 THE COURT: That concludes your
10 closing argument?

11 MR. MOFFETT: Yes, your Honor,
12 subject to rebuttal. Yes, sir.

13 THE COURT: Okay. Thank you.

14 As we planned, we'll have a
15 short recess. So you'll have a 15-minute
16 recess and come back, and defendants may
17 proceed.

18 (Recess)

19 THE COURT: You may proceed on behalf
20 of the defendants.

21 MR. FREDERICK: Thank you, Judge
22 Siler. David Frederick on behalf of the State of
23 Tennessee.

24 We'd also like to thank you for
25 the time and attention that you devoted to

1 this important case on behalf of Tennessee.
2 We appreciate that very much.

3 Of course we acknowledge that
4 the Supreme Court is the final arbiter of the
5 meaning of the US Constitution, but it is held
6 that if there is an interstate water resource,
7 then there are only two remedies that a
8 complaining state may bring against another
9 state. One is a violation of an interstate
10 compact. Of course we have no compact here.

11 And the second is to prove that there
12 is a need for an equitable apportionment. Your
13 preliminary decisions, Judge Siler, have already
14 recognized the legal framework, but your most
15 recent opinion on summary judgment made clear that
16 you thought that an evidentiary hearing was going
17 to be helpful for determining what the facts of the
18 situation were with respect to the aquifer.

19 And with all respect to our
20 friends from Mississippi, it was as though we
21 had no five-day hearing in this courtroom last
22 May, because they did not show you a single
23 piece of evidence, a single fact. And what
24 they did instead was to regurgitate
25 allegations in their complaint that were

1 disproved at that evidentiary hearing.

2 I'd like to go through and begin by
3 talking about the four theories that you posited in
4 the 2016 opinion for why the Middle Claiborne
5 Aquifer is an interstate water resource: There's
6 single aquifer theory; the pumping effects theory;
7 the natural flow theory; and the surface connection
8 theory. We proved all four of those theories at
9 the hearing last May.

10 As the evidence came in, this
11 figure from Schrader and the US Geological
12 Survey confirms that this aquifer, which is
13 the dark and gray shadow, encompasses eight
14 states: The two states at issue here,
15 Tennessee and Mississippi; plus six other
16 states.

17 Indeed, even Mississippi's witnesses
18 confirmed that those theories are correct. The
19 Middle Claiborne Aquifer at issue in this case
20 indisputably is an interstate resource. And I'd
21 like to start this morning by highlighting some of
22 the key evidence that supports that inclusion, and
23 then I'd like to address Mississippi's alternate
24 theory for liability, because the evidence
25 demonstrates why the Court should not depart from

1 the equitable apportionment principle for
2 interstate water disputes in this instance.

3 And I'll just remind the Court
4 that at an earlier phase of these proceedings,
5 the Solicitor General filed a brief on behalf
6 of the United States disagreeing with
7 Mississippi's sovereignty theory that somehow
8 Mississippi owned the water and, therefore,
9 there should be some special solicitude for
10 groundwater in Mississippi, and rejecting the
11 arguments that were made by Mississippi
12 counsel today.

13 Ultimately what's clear is that in
14 the posttrial briefing, Mississippi's ignored the
15 evidence it deduced at the hearing that it fought
16 so hard to get. This argument made this morning
17 could have been made four years ago. And instead,
18 we went through a very laborious exercise of doing
19 discovery limited to the interstate nature of the
20 resource.

21 We had a five-day trial. For
22 what? Because Mississippi wants to ignore the
23 evidence. And as I'll try to demonstrate this
24 morning and just highlight for them, the
25 reason is because it cannot show Tennessee did

1 anything to injure Mississippi. There cannot
2 be a violation of another state sovereignty
3 unless one state actually causes injury to
4 another state. And Mississippi cannot
5 demonstrate that on the basis of the factual
6 record presented before you.

7 Now, you asked for a hearing, Judge
8 Siler, four years ago about the limited and
9 potentially dispositive issue of whether the
10 aquifer is indeed an interstate resource. And the
11 reason why you asked for that hearing, we believe,
12 is because if the aquifer is an interstate water
13 resource, the only legal remedy available to
14 Mississippi is by equitable apportionment. And
15 Mississippi disclaimed that remedy. I'll explain a
16 little bit later what the ramifications and
17 implications of that disclaimer are.

18 But I thought that counsel was
19 very clear today that what Mississippi's
20 objective here is, plain and simple, money
21 damages. They want to enrich the Mississippi
22 treasury by getting Tennessee to pay for water
23 that we will show in the natural condition was
24 flowing naturally into Tennessee anyway. And
25 Mississippi's own witnesses confirm the

1 testimony of the defendants' witnesses as to
2 all four theories for why the aquifer is an
3 interstate water resource.

4 As Tennessee's expert Steven Larson
5 testified -- and this is at page 589 of the hearing
6 transcript -- an interstate aquifer is a single
7 continuous hydrogeologic unit extending beneath
8 multiple states, and which an action in one state
9 can affect water in another state. And that basic
10 theory and definition confirms the first theory,
11 the single aquifer theory.

12 And we also showed you this slide
13 from Clark & Hart, the USGS in 2009, Figure 14,
14 which is at joint appendix -- or Joint Exhibits
15 18 -- I'll call it J-18 -- at PDF 37. All five
16 experts confirm that there was a single
17 hydrogeological unit. It's known by a variety of
18 names, but it extends beneath multiple states,
19 including Mississippi, Tennessee, and six other
20 states. In this graph we superimposed the state
21 boundaries so that you can more easily see which
22 states are on top of, if you will, the aquifer.

23 Hydrogeological realities, not naming
24 conventions, are controlling in this interstate
25 water dispute. And I would pause for a moment to

1 say that Mississippi this morning acknowledged the
2 aquifer at issue is called the Middle Claiborne
3 Aquifer. Counsel didn't use any other name.
4 That's the name that the US Geological Survey's
5 given to it. That's the name that all five of the
6 experts acknowledge was what this aquifer is
7 called. So I hope that we can put to rest any of
8 the other alternative names that, for geographic
9 simplicity, are used. We're talking about the
10 Middle Claiborne Aquifer.

11 We heard testimony, including from
12 our expert, Mr. Larson, and Mississippi's expert,
13 Dr. Spruill, that there are no barriers at the
14 state lines preventing the flow of water, and that
15 the variation in properties of sand composition
16 throughout the unit are normal for a single
17 hydrogeological unit. This is Larson's testimony
18 at page 589 -- 598 to 99 of the transcript, and
19 Dr. Spruill at page 298.

20 And, your Honor, just for the
21 Court's convenience, at the end of my
22 presentation I'll provide the slides to the
23 Court and to counsel, and we'll mark it as a
24 separate exhibit so that you have that.

25 At the trial there was some testimony

1 about the existence of a facies change. And you'll
2 recall the famous Brahana and Broshears 2001 figure
3 that showed the Middle Claiborne Aquifer in a kind
4 of a fork formation, with the confining layer in
5 between. And this represented Mississippi's only
6 effort to challenge the undisputed evidence of the
7 Middle Claiborne being a single continuous aquifer,
8 which is to suggest that a facies change meant that
9 somehow the groundwater could be analyzed
10 separately.

11 Notably they do not make that
12 argument anymore at this hearing, and they
13 have not suggested it. Somehow we're talking
14 about several different aquifers. And I think
15 in our brief, in our posttrial briefs, we've
16 demonstrated why the facies change argument is
17 wrong as a matter of fact, but it's also wrong
18 as a matter of law, because the water changes
19 that would occur, the evidence showed, would
20 be the pumping effects theory; and the single
21 continuous flow theory would operate
22 throughout the Middle Claiborne Aquifer, as
23 depicted on the Brahana and Broshears Figure 3
24 here, which is at J-15, PDF page 5. So the
25 single continuous aquifer theory, I think, is

1 now undisputed and uncontested. The Middle
2 Claiborne is an interstate aquifer.

3 The second theory was the pumping
4 effects theory. And the basic idea behind this
5 theory is that all five experts agreed that the
6 effects of pumping that occurs entirely within one
7 state can and are felt across the
8 Mississippi/Tennessee border. In fact, that's the
9 entire premise behind Mississippi's lawsuit.

10 As Dr. Spruill testified at page
11 300, however, that works both ways. Pumping
12 on Mississippi's side also affects groundwater
13 flow in Tennessee. Their theory is that
14 Tennessee's pumping should be viewed in
15 isolation, and that because Tennessee has
16 pumped longer than Mississippi, that that has
17 somehow created sovereign ownership rights in
18 water. But what the evidence showed was that
19 Mississippi's own pumping can, in fact, draw
20 water across the boundary from Tennessee into
21 Mississippi.

22 Your Honor heard extensive
23 evidence about the formation of cones of
24 depression from pumping within the Middle
25 Claiborne Aquifer. Now, this figure from

1 Clark and the US Geological Survey, 2011,
2 Figure 14B, which is at J-19, PDF page 34,
3 makes very clear that there are three other
4 more significant cones of depression in the
5 Middle Claiborne Aquifer than the one
6 underneath Memphis. And I want to underscore
7 this point, because this figure helps to
8 demonstrate just how problematic Mississippi's
9 theory is. Because if we were in an equitable
10 apportionment, which Mississippi disclaimed,
11 these multiple cones of depression would
12 present substantial complexities in
13 determining multiple states' cross-border
14 rights.

15 For example, the Court would be
16 charged with balancing Mississippi's very
17 heavy pumping near Jackson, Mississippi. And
18 that's the cone of depression that is roughly
19 equidistant between the 32nd and 33rd parallel
20 in the middle of the Mississippi graph.

21 It would also need to balance
22 the substantial pumping that's caused this
23 massive cone of depression between Louisiana
24 and Arkansas. And the darkness of the brown
25 in this figure, Judge Siler, indicates how

1 much the water level has changed from
2 predevelopment to 2007. The darker the brown,
3 the greater the change in the water.

4 Now, note that in three other --
5 three cones of depression, the water level has
6 dropped more than under Memphis. And I'll explain
7 to you what that should tell us, but fundamentally
8 what it tells us is that this is clearly an
9 interstate water resource, because the pumping in
10 these different states does cause drawdown in
11 adjoining states' water levels, and the cones of
12 depression cross state boundaries.

13 The third theory is the natural flow
14 theory. Mr. Larson testified at page 642 of the
15 hearing transcript that water is continually
16 flowing out of the state of Mississippi within the
17 Middle Claiborne Aquifer. And this morning, your
18 Honor, your very first question to Mississippi
19 counsel was to ask for the concession that, in
20 fact, the water is constantly flowing. Yes. All
21 of the experts agreed that the water is not static;
22 it is constantly flowing, albeit it's moving
23 slowly. But it is flowing. And the only fact that
24 Mississippi adduced at trial that they actually
25 talked about today was how slow the rate of flow

1 is.

2 But it never developed any facts
3 for what portion of the slow-moving aquifer
4 water was affected by pumping before
5 Mississippi's own pumping slowed down the
6 natural flow from Mississippi into Tennessee.
7 And what the evidence is going to show, that I
8 will highlight for you, is that it's
9 Mississippi's own pumping that has slowed down
10 the natural flow from Mississippi into
11 Tennessee, which was occurring under natural
12 conditions.

13 The hearing established that all of
14 the predevelopment maps or models show significant
15 natural water flow from Mississippi into Tennessee,
16 and confirm the interstate nature of the aquifer.
17 This map is from Defense Exhibit 174 at PDF 17. It
18 was from the Waldron and Larson 2015 study,
19 Figure 4.

20 Tennessee presented unrebutted
21 evidence that its expert, Dr. Waldron, created the
22 single most reliable map of predevelopment
23 conditions. That map shows far more cross-border
24 flow than Mississippi previously has acknowledged.
25 This map, the red dots, show all the different data

1 points. And that's significantly more than any
2 other map, and the data points were closer in time
3 to the depicted period, the predevelopment period,
4 and thus has resulted in a more reliable map. And
5 as the green lines of this figure show, the water
6 in natural condition predevelopment was flowing out
7 of the state of Mississippi. Some of it was
8 flowing north into Tennessee. Some of it was
9 flowing west into Arkansas. But the water was
10 continuously flowing.

11 In fact, Dr. Waldron testified
12 at page 853 of the hearing transcript that
13 based on his intensive analysis of
14 predevelopment conditions, more water was
15 crossing the border from Mississippi into
16 Tennessee under natural conditions than under
17 current development conditions. Let me repeat
18 that: More water was flowing under natural
19 conditions than under postdevelopment present
20 conditions.

21 The pumping has not done what
22 Mississippi alleged in its complaint it would
23 try to prove, which is that Tennessee's
24 pumping has created flow of water, sucked
25 water out of Mississippi and into Tennessee.

1 The facts and the expert witnesses rebut that
2 theory. Mississippi did not impeach any of
3 that testimony. Mississippi did not put in a
4 rebuttal case. That was a strategic choice by
5 Mississippi. Because if they had had
6 Dr. Spruill try to rebut Dr. Waldron on those
7 points, they would have exposed him to another
8 cross-examination. And to avoid that,
9 Mississippi declined to elicit any testimony
10 from Dr. Spruill criticizing Dr. Waldron, and
11 it waived any rebuttal case.

12 Now, in its posttrial reply brief,
13 Mississippi tries to smuggle in deposition
14 testimony that criticizes Dr. Waldron that it
15 expressly omitted from putting into the trial
16 record. That testimony is not properly in the
17 record, and Mississippi should be held to its
18 choice at trial.

19 Regardless, Dr. Waldron refuted
20 all of the criticisms of his work, both in his
21 trial testimony at pages 876 to 890, and in
22 his surrebuttal report, which is defense
23 Exhibit 196. Notably, Dr. Spruill never
24 credibly rebutted Dr. Waldron's analysis of
25 pre versus post development flows into

1 Tennessee from Mississippi.

2 And you'll recall that there was
3 much testimony about the one map that the
4 Mississippi experts relied on from Criner and
5 Parks, but, in fact, when cross-examined,
6 Dr. Spruill couldn't verify the accuracy of
7 the Criner and Parks map. And he couldn't
8 validate the accuracy of the predevelopment
9 maps on which Mississippi's model and theory
10 depended. The hearing established that all of
11 Mississippi's modeling and analysis depended
12 on the Criner and Parks 1976 paper. But
13 Dr. Spruill admitted that he could not
14 validate the accuracy of that paper.

15 The implications of this are very
16 important, your Honor, because under the natural
17 flow theory, Mississippi loses even under its own
18 legal theory, because more water was flowing from
19 Mississippi into Tennessee under predevelopment
20 conditions than today.

21 THE COURT: Was it ever explained why
22 that happened?

23 MR. FREDERICK: Yes. And I'm going
24 to go to that right now.

25 Why? Why did that happen?

1 Among other reasons, Mississippi's
2 own pumping. Dr. Waldron testified here at page
3 853 of the transcript that Mississippi's pumping
4 was, quote, "intercepting that flow of water that
5 naturally would have left Mississippi and gone into
6 Tennessee." None of Mississippi's factual proof or
7 its legal argumentation account for that key fact.
8 Nor has Mississippi disputed that its own Southaven
9 wellfield, which is less than one mile south of the
10 Mississippi/Tennessee border, has more concentrated
11 wellfields than the MLGW's wellfields. All of the
12 evidence and facts for that are in our defendants'
13 proposed findings of fact, number 223.

14 So what was happening, your
15 Honor, just to depict this, is that under
16 natural conditions water is flowing into
17 Tennessee. Tennessee begins to drill. They
18 complain about the fact that the wellfields
19 are two to four miles north of the state
20 boundary, but Mississippi's response is to put
21 a more concentrated wellfield less than one
22 mile south of the Tennessee border. And so as
23 Dr. Waldron testified, as the water is
24 naturally flowing north, Mississippi is
25 intercepting that water and causing a change

1 to what the natural flow pattern would be.

2 And the implications of that I
3 think are very clear, because as Mississippi
4 is doing its Southaven drill pumping, it's
5 also taking water that is being drawn south
6 across the boundary from Tennessee into
7 Mississippi.

8 Now, Mississippi has also
9 acknowledged throughout the suit that water flowed
10 naturally throughout the aquifer from Mississippi
11 into Tennessee. And its original estimate of this
12 cross-border flow took the form of the so-called
13 yellow triangle. This was from the Wiley report,
14 Figure 9, at Defense Exhibit 112. And you'll
15 recall there was a lot of testimony about the
16 yellow triangle.

17 And Dr. Waldron explained at
18 length at pages 869 to 870 of the hearing
19 transcript why the yellow triangle was based
20 on an unreliable methodology. It was based on
21 the Brahana and Broshears recreation of the
22 flawed Criner and Parks map. That was the map
23 that we just talked about. Mississippi now
24 rebutted that testimony.

25 So the yellow triangle, even if you

1 accept it, does not help Mississippi's cause,
2 because it proves that under predevelopment
3 conditions, water was flowing into Tennessee. To
4 his credit, Mr. Wiley, Mississippi's expert,
5 admitted that the yellow triangle in his original
6 diagram substantially underestimated the area of
7 natural flow from Mississippi to Tennessee based on
8 predevelopment conditions.

9 And he agreed on
10 cross-examination that even under his own
11 flawed analysis, the area of cross-border flow
12 extended along the majority of the DeSoto
13 County/Shelby County border. That's the red
14 triangle in this figure. And it extended much
15 farther to the east as well. So a much more
16 significant natural flow was occurring in
17 predevelopment conditions from Mississippi
18 into Tennessee.

19 In fact, Mississippi's expert,
20 Mr. Wiley, testified that at least 37 million
21 gallons per day from the aquifer were moving from
22 Mississippi into other states in predevelopment
23 conditions. That's the hearing transcript at page
24 532 to 533. So under the natural flow theory here,
25 the Middle Claiborne is clearly an interstate

1 aquifer.

2 And I would just pause to note
3 that when the water is flowing in this
4 direction, Mississippi is functionally like an
5 upstream state in a river case. And the
6 Supreme Court has made very clear in equitable
7 apportionment cases that upstream states don't
8 get to hog all the water to itself. If the
9 water naturally would be flowing to a
10 downstream state, the downstream state has
11 rights in that water, too. And that's
12 essentially why we are here; that Tennessee
13 has every bit a right to the water as
14 Mississippi does, subject to the respective
15 needs of the states and their reliance in
16 pursuing the like.

17 Now, the fourth theory is the surface
18 connection theory. And the evidence demonstrated
19 that the aquifer is an interstate water resource
20 because it's hydrologically connected to other
21 interstate aquifers and rivers. Every expert
22 agreed about this. And this slide from J-19
23 illustrates the rivers that cross the surface on
24 top of the aquifer. Mr. Wiley confirmed at page
25 502 of the hearing transcript that the aquifer is

1 hydrologically connected to surface water.

2 The Supreme Court has made clear
3 that equitable apportionment principles govern
4 when there are disputes that have both a
5 surface water and a groundwater component.
6 You cited that from Texas v. New Mexico in
7 your 2016 opinion on page 20.

8 And you'll recall that the
9 testimony of Dr. Spruill and Mr. Larson, that
10 the water cycle creates this continuous flow
11 between atmospheric conditions which cause
12 rain and snow to melt, the seeping through the
13 cracks, flowage through rivers and lakes and
14 ultimately going down into aquifer and then
15 discharged at some other place after there is
16 internal flow of the aquifer. And this cycle
17 completely rebuts the idea, the analogy drawn
18 from counsel this morning. Water is not like
19 a mountain; water moves. Water is
20 continuously moving. And unlike mountains,
21 which are stationary, and you can assert
22 sovereign jurisdiction over them, the states
23 can assert stewardship over the water
24 resources that the Supreme Court has made
25 clear that when there are interstate

1 resources, one state cannot use its
2 sovereignty to claim control at the expense of
3 another state.

4 So the second major point I'd like to
5 make is that Mississippi didn't engage with the
6 question of whether the aquifer is interstate. And
7 its criticisms of the equitable apportionment
8 doctrine for groundwater have no factual merit.
9 Mississippi had every opportunity to present
10 evidence that the aquifer is not an interstate
11 resource, and it failed to do so. Both of
12 Mississippi's experts declined to offer an opinion
13 about whether the aquifer's interstate.

14 Here you see Dr. Spruill saying
15 he didn't know what the definition of an
16 interstate resource is -- that's at page
17 314 -- and Mr. Wiley on page 534 saying he
18 didn't have an opinion. So both expert
19 opinions from Mississippi simply punt him on
20 the question that you asked us to have the
21 evidentiary hearing to adduce evidence to
22 develop.

23 Dr. Spruill's own expert testimony,
24 in his report, presented a diagram that used the
25 very same definition in his report as we had

1 suggested at trial. The diagram on the left is
2 from Defendant's Exhibit 129. And there
3 Dr. Spruill conceded at trial that under the same
4 definition that he applied in his report, the
5 Middle Claiborne would be an interstate because it
6 underlies eight different states. That's hearing
7 transcript 318.

8 And again, the effects can go both
9 ways. But Mississippi's claim that commercial
10 turbine pumps are not natural is beside the point.
11 In all interstate bodies of water, the removal of
12 water occurs through manmade processes, but it's
13 the natural laws of physics and hydraulics that
14 allow the effects of action in one state to be felt
15 in another state.

16 Now, Mississippi's criticisms of
17 equitable apportionment are unpersuasive, and your
18 Honor has already correctly rejected them. First,
19 Mississippi does not own any of the water within
20 the shared interstate resource. Mr. Larson
21 testified that all water in the aquifer will
22 eventually leave the aquifer and flow into other
23 states or the Gulf of Mexico. That was his
24 transcript page 621 and 626.

25 Mississippi never rebutted

1 Mr. Larson's testimony that the water in the
2 aquifer would eventually flow out of
3 Mississippi. Indeed, Mississippi's expert,
4 Dr. Spruill, agreed in his testimony -- it's
5 at page 307 of the hearing transcript. And he
6 said that the water was eventually going to
7 leave Mississippi. That's at lines 5 through
8 10, your Honor, on page 307.

9 Now, Mississippi cites the Rhode
10 Island case, but that case predated the Supreme
11 Court's significant development of equitable
12 apportionment. We know that for surface water, the
13 downstream states do not have superior -- the
14 downstream states do have rights vis-a-vis upstream
15 states. Mississippi's theory has long ago been
16 rejected for resources that combine surface and
17 groundwater, and we ask you to reject it again
18 today.

19 The trial evidence, in fact, showed
20 that significantly more aquifer water flowed
21 naturally into Tennessee than Mississippi initially
22 realized. This is not a de minimis amount. It
23 was, as Dr. Waldron explained at hearing page 857,
24 more substantial than Mississippi alleged in the
25 complaint. And indeed, even Mississippi's expert,

1 Mr. Wiley, estimated that 37 million gallons per
2 day were leaving the Middle Claiborne Aquifer out
3 of Mississippi and going into other states. Recall
4 the testimony at pages 532 to 533.

5 Now, the trial testimony illustrated
6 why an equitable apportionment is the only sensible
7 way to allocate waters' rights to an eight-state
8 regional aquifer like the Middle Claiborne. It's
9 not just Mississippi and Tennessee that use the
10 aquifer; so do Louisiana and Arkansas. There are
11 cross-border cones of depression, and that's why
12 the US Geological Survey and the EPA have
13 emphasized the importance of regional solutions.
14 That's why the Solicitor General of the United
15 States filed a brief on Tennessee's side at an
16 earlier stage. And Mississippi's theory would
17 impair Tennessee's sovereign rights to control the
18 water within its borders and require Tennessee to
19 make costly, costly changes to its water system.

20 Dr. Spruill admitted that to
21 adopt the suggestion of moving the wellfields
22 to the north, under Mississippi's theory of
23 the case, and construct pipelines would be,
24 quote, "enormous" on them; the cost would be
25 enormous. This is at page 332.

1 In his opening, Mr. Moffett said
2 that Mississippi's theory would be the same
3 even if MLGW's wellfields were moved 100 miles
4 north. That was in answer to your very last
5 question, Judge Siler. So now Mississippi is
6 asserting to itself the right to violate
7 Tennessee's sovereignty by forcing Tennessee
8 to move its wellfields a very far distance
9 away from the border, and all Tennessee is
10 trying to do is to get water itself.

11 Now, reliance is a critical factor in
12 an equitable apportionment. And the Supreme
13 Court's articulation of equitable apportionment
14 says denying damages to a state means that
15 Mississippi cannot get, in an equitable
16 apportionment, what it really wants, which is
17 really just cash money. It's not that there's any
18 claim that there is any harm that's being occurred
19 here. It's what's fair between the states and the
20 citizens of the states who rely on these wells to
21 provide drinking water for them.

22 And so the third point I'd like to
23 make, and the last point, is we ask you to make
24 findings that would forestall any attempt by
25 Mississippi to claim any injury from Mississippi's

1 pumping. Mississippi made a strategic error, and
2 the enormous costs that would be caused by this,
3 trying to change the entire water system of
4 Memphis, would be enormous, as their own experts
5 acknowledged. And it would prejudice Tennessee to
6 change their theory.

7 This is the hearing transcript
8 at page 648, where Mr. Larson testified that
9 Mississippi has increased its pumping. And
10 that means that Tennessee can't possibly have
11 hurt Mississippi's legitimate interests in the
12 aquifer. Mississippi accuses Tennessee of
13 violating Mississippi sovereignty in their
14 postfile brief, but they conceded that
15 Tennessee is pumping vertically. And
16 Tennessee proves that more water flowed from
17 Mississippi to Tennessee in predevelopment
18 conditions than today. And more importantly,
19 Mississippi presented no evidence that it has
20 had difficulty increasing its pumping. Go to
21 slide 28.

22 The water levels for the last 20
23 to 30 years have been relatively stable. This
24 was Mr. Larson's testimony at page 654 to 655.
25 And relative to the situation there has been a

1 balance between recharge and discharge,
2 because this has created a situation where the
3 potentiometric levels have become relatively
4 stable.

5 Now, the last thing I'd like to
6 say is the amicus brief largely supports us
7 because it doesn't give any legal support for
8 Mississippi's theory of ownership. And they
9 point to the examples of why this ownership
10 theory would unsettle water law. So to the
11 extent that the amicus brief should be
12 considered, it, in fact, supports Tennessee's
13 position more than Mississippi's.

14 Unless the Court has questions, we'll
15 rest on the brief for our remaining evidentiary
16 submissions. And we're going to ask that these
17 slides be admitted as Defendant's Exhibit 202. And
18 we have a hard copy for the Court and for counsel.

19 Thank you, your Honor.

20 THE COURT: Any objection to that
21 being put in the record?

22 MR. MOFFETT: No, your Honor.

23 (EXHIBIT NO. 202, slides used
24 during closing, was marked for
25 identification.)

1 THE COURT: I think the copies of
2 what we have -- all right. You want a recess
3 before we start?

4 MR. D. BEARMAN: Your Honor, all we
5 need to do, if we could have five minutes, that
6 would be helpful.

7 THE COURT: Take a five-minute
8 recess.

9 (Recess)

10 MR. D. BEARMAN: Good morning, your
11 Honor. My name is David Bearman on behalf of the
12 City of Memphis Light, Gas and Water Division. If
13 your Honor would indulge me to allow me to
14 introduce my team.

15 THE COURT: Okay.

16 MR. D. BEARMAN: My partner,
17 Christine Roberts; my partner and father, Leo
18 Bearman; our invaluable paralegal, Kathy Hughes, is
19 here. Charlotte Knight Griffin, who is the manager
20 of legal affairs at MLGW is here. And Jennifer
21 Singh, our new city attorney for the City of
22 Memphis, are here.

23 THE COURT: Great to have them all.

24 MR. D. BEARMAN: Thank you, your
25 Honor.

1 Mississippi's case should be
2 dismissed with prejudice because Mississippi's
3 claims, your Honor, fail on the facts and the law.
4 Further, the position that Mississippi urges should
5 be rejected by the Court because it is unworkable
6 and, respectfully, lacks credibility.

7 The Special Master identified the
8 threshold issue and potentially dispositive issue
9 for a hearing: Whether the aquifer is an
10 interstate resource. And as a refresher, let's put
11 up a slide of the aquifer. And your Honor will see
12 that outlined and shaded in blue.

13 Memphis and MLGW presented proof to
14 address this threshold issue through its expert,
15 Dr. David Langseth. And consistent with
16 Tennessee's experts, and with the factors
17 identified by your Honor, Dr. Langseth opined that
18 the aquifer at issue is an interstate resource for
19 four reasons: First, the aquifer extends beneath
20 portions of Mississippi, Tennessee and six other
21 states; second, before pumping began, groundwater
22 in the aquifer naturally flowed from Mississippi
23 into Tennessee; three, pumping groundwater from the
24 aquifer in both Tennessee and Mississippi impacts
25 the groundwater in the aquifer in the other state;

1 and fourth, in the Tennessee/Mississippi border
2 region, the groundwater in the aquifer is
3 hydrologically connected to interstate surface
4 water.

5 Now, why does Mississippi's case fail
6 on the facts? Well, the first question, your
7 Honor, is what evidence did Mississippi present at
8 the hearing that your Honor ordered to carry its
9 burden to show that the aquifer is not interstate?
10 And the answer is none.

11 As Mr. Frederick pointed out,
12 Mississippi's experts offered no opinion as to
13 whether the aquifer is or is not an interstate
14 aquifer during their case in chief. However,
15 on cross-examination, Mississippi's expert,
16 Dr. Spruill, admitted that he defined an
17 interstate aquifer the same way that
18 defendants' experts did; that is, an aquifer
19 that extends beneath two or more states. And
20 Dr. Spruill admitted that, based on his own
21 definition -- his own definition, your
22 Honor -- that the aquifer at issue in this
23 case is an interstate aquifer. And your Honor
24 can find that critical testimony on pages 316
25 to 318 of the transcript.

1 On cross-examination, Mississippi's
2 experts actually supported every factor that your
3 Honor identified as indicating, and being
4 consistent with, an interstate aquifer. For
5 example, Mississippi's experts conceded that the
6 aquifer underlies eight states, including Tennessee
7 and Mississippi. Mississippi's experts conceded
8 that the groundwater in the aquifer naturally
9 flowed across state lines, including from
10 Mississippi into Tennessee, before there was any
11 pumping. And Mr. Frederick showed this slide to
12 your Honor, but it's important to look at again.
13 This is Exhibit P-168. That's the plaintiff's
14 exhibit.

15 In this exhibit their expert,
16 Mr. David Wiley, concedes that there was interstate
17 flow from Mississippi into Tennessee in the area
18 that he identified by the yellow triangle. But, as
19 your Honor heard earlier, Mr. Wiley on
20 cross-examination conceded that the -- based on his
21 own calculations, your Honor, that the flow from
22 Mississippi to Tennessee during predevelopment
23 times was significantly more than just the yellow
24 triangle.

25 And let's take a look at the

1 next slide. This slide shows, your Honor, in
2 red, the area of interstate flow according to
3 Mississippi's expert, Mr. Wiley. He conceded
4 that in all of the areas in red, there was
5 flow from Mississippi into Tennessee before
6 pumping began. And your Honor can see
7 that that area is roughly five times the size
8 of the yellow triangle that Mr. Wiley
9 originally stated.

10 Mississippi also conceded that water
11 in the aquifer is hydrologically connected to
12 interstate surface waters, such as the Wolf River
13 and the Mississippi River. And Mississippi
14 conceded that pumping from the aquifer in one state
15 impacts groundwater in the aquifer in the other
16 state. And as Mr. Frederick pointed out, that is
17 the basis for Mississippi's claim in this case.
18 The undisputed and, frankly, unrefuted facts, your
19 Honor, show that the aquifer is and can only be an
20 interstate resource. Mississippi's contention to
21 the contrary is unsupported and unsupportable.

22 Mississippi's case also fails on the
23 law. Mississippi attempts to bring tort claims
24 based on what it asserts to be a sovereign
25 ownership theory that it owns a fixed portion of

1 the groundwater in an interstate aquifer. That
2 sovereign ownership theory proposed by Mississippi,
3 your Honor, fails. It is in direct conflict with
4 two important Supreme Court precedents.

5 First, the Supreme Court has
6 said that states do not own their natural
7 resources. And that when states talk about,
8 quote, "owning natural resources," it's a
9 legal fiction.

10 Second, Mississippi's position --
11 and, frankly, based on what Mr. Moffett said this
12 morning, it sounds like they're advocating for
13 overruling of the equitable apportionment doctrine
14 and the foundational concepts upon which that
15 doctrine is built; for example, the principle that
16 a state may not preserve, solely for its own
17 inhabitants, the natural resources within its
18 borders; and the principle that each state with an
19 interest in the interstate resource has a real and
20 substantial interest in that resource.

21 Now, Mississippi also contends that
22 equitable apportionment should not apply to
23 groundwater because of the speed of the water flow,
24 or the so-called residence time. The Supreme Court
25 has never used a speed limit or residence time to

1 decide whether a resource is interstate. In fact,
2 the interstate rivers that have been the subject of
3 the Court's equitable apportionment decisions have
4 enormous variations in flow. And your Honor knows
5 this. They go from mountain torrents to
6 unnavigable streams, and even to places in rivers
7 that dry up during certain parts of the year and,
8 therefore, don't flow at all. But they are still
9 the subject of equitable apportionment cases.

10 In Idaho v. Oregon, the Court
11 equitably apportioned migratory fish; contrary to
12 what counsel said earlier, not an interstate stream
13 but a natural resource. That is interstate
14 migratory fish.

15 Now, the Court noted in that opinion
16 that these fish as hatchlings spend six months to a
17 year in the headwaters, in that case, of the Snake
18 and Columbia Rivers. Then they migrate downstream,
19 and they spend several years in the ocean, and then
20 migrate back upstream against the current. The
21 so-called residence time of water and fish has
22 never been a litmus test to determine whether a
23 resource is interstate or whether equitable
24 apportionment applied, because it would be entirely
25 unworkable and illogical.

1 Mississippi's suggestion that
2 equitable apportionment not apply to groundwater is
3 also contrary, your Honor, to the Supreme Court's
4 broad application of that doctrine. Now, your
5 Honor heard earlier that that -- that the equitable
6 apportionment doctrine has been limited to
7 interstate streams. But as your Honor has pointed
8 out in your memoranda of law, it has also been
9 applied to interstate rivers with groundwater
10 components, and also to migratory fish. And your
11 Honor has twice rejected Mississippi's legal
12 theory, and we urge your Honor to reject it again.

13 Mississippi's case should also be
14 dismissed, your Honor, because it lacks
15 credibility. In the district court case from 2005
16 to 2010, Mississippi repeatedly and affirmatively
17 asserted the interstate character of the aquifer
18 and the groundwater as a basis for federal court
19 jurisdiction and the application of federal common
20 law; not what Mississippi asked your Honor for this
21 morning. But Mississippi has been advocating for
22 the application of federal common law. Let's look
23 at some examples of that.

24 These are all quotes, your Honor,
25 from Mississippi's pleadings. And as did

1 Tennessee, we will make these available to your
2 Honor afterwards:

3 Quote, "This is an interstate
4 groundwater action."

5 "Mississippi's claims against Memphis
6 arise in the context of a dispute involving an
7 interstate body of water."

8 "Mississippi's claims that Memphis
9 and MLGW have wrongfully diverted and
10 misappropriated groundwater owned by the state and
11 taken from within its territorial boundaries from
12 the Memphis Sand aquifer, an interstate underground
13 body of water."

14 "Federal common law applies to all of
15 Mississippi's claims by virtue of the fact that the
16 Sparta Aquifer is an interstate waterway."

17 "Of course, in the instant matter, it
18 is universally recognized that in the context of
19 disputes involving an interstate body of water,
20 such as the Sparta Aquifer, federal common law
21 applies."

22 Federal common law applies. That
23 federal common law, your Honor, is equitable
24 apportionment.

25 Now, Mississippi takes the polar

1 opposite position and says that the aquifer at
2 issue is neither a shared nor interstate resource.
3 Well, what about this idea of being shared?
4 Mississippi's 30(b)(6) deposition, Jamie
5 Crawford -- and your Honor has that as part of the
6 record -- this is myself questioning Mississippi's
7 30(b)(6) representative in depositions:

8 "Q You say the Memphis/Southaven area is
9 obviously of interest and concern to all the
10 various players involved, protecting
11 groundwater quality and availability, is
12 that -- did I read that accurately?

13 "A Yes.

14 "Q And you say that because you
15 recognize that everybody in that area, in West
16 Tennessee/Northern Mississippi, has an interest
17 in this shared resource, correct?

18 "A That's correct."

19 So does Mississippi consider this to be a
20 shared resource? Absolutely, it does.

21 And let's look at another
22 example. Not only is Mississippi taking a
23 position that was contrary to what it asserted
24 in the first place; it's taking a position,
25 your Honor, that conflicts with Mississippi's

1 own law. Let's look at Mississippi Code
2 Annotated 51-3-41.

3 "The Mississippi department of
4 environmental quality shall have the authority to
5 negotiate and recommend to the legislature compacts
6 and agreements concerning this state's share of
7 groundwater" -- that is Mississippi's share of
8 groundwater -- "and waters flowing in water courses
9 where a portion of those waters are contained
10 within the territorial limits of a neighboring
11 state." Just like the aquifer at issue.

12 By acknowledging the state's needs to
13 negotiate for a share of an interstate resource --
14 that is, a resource that lies in Mississippi and
15 another portion in another state -- the state of
16 Mississippi necessarily rejects the very idea that
17 Mississippi asserts in this case that it owns a
18 fixed portion of that interstate resource. If they
19 owned it, whether by virtue of the equal footing
20 doctrine, the public trust doctrine or any other
21 reason, your Honor, there would be no need to
22 negotiate for it.

23 Second, the statute, this statute, rejects
24 Mississippi's argument that this interstate aquifer
25 should be treated differently than interstate

1 surface water. Under this statute, under
2 Mississippi's statute, its need to negotiate for a
3 share of an interstate water resource applies to
4 both surface water and to groundwater. And this
5 statute, your Honor makes no distinction based on
6 how fast the water is moving or even if the water
7 is moving at all.

8 And finally, Mississippi has taken
9 conflicting positions in this case. For example,
10 Mississippi has spent a lot of time emphasizing how
11 complex the aquifer is. They've described it as
12 being virtually unknowable. And while they tout
13 the complexity on one hand, on the other hand, your
14 Honor, there are claims assumed that the hydrology
15 and geology of the aquifer is sufficiently certain
16 for its experts to agree that the geographic extent
17 of the aquifer underlies eight states; and
18 sufficiently certain for it to -- for its experts
19 to opine about the speed and the direction of the
20 groundwater flow; and sufficiently certain for
21 Mississippi to assert in its response to
22 defendants' motion for summary judgment on page ten
23 that the extent and material impact of a cone of
24 depression created by groundwater pumping is
25 predictable and measurable.

1 They can't have it both
2 ways, your Honor. Certainly some aspects of
3 groundwater hydrology can be complex. The
4 same is true of surface water hydrology. But
5 the facts material to this case, and the facts
6 demonstrating that this aquifer is an
7 interstate resource are undisputed, and they
8 are certain.

9 Mississippi's willingness, your Honor, to
10 flip-flop on the central issue of this
11 interstate -- I'm sorry, on this interstate
12 evidentiary hearing demonstrates a lack of
13 seriousness and dignity that a claim before the
14 Supreme Court should have.

15 Mississippi's position is also
16 bad policy. It will lead to an increase in
17 interstate litigation. And how do we know
18 that? I'm going to show your Honor Exhibit D
19 11. And this is a map of the principal
20 aquifers in the country. Virtually every
21 aquifer is an interstate resource, your Honor.
22 Mississippi's theory, if adopted, would make
23 it easier for states to sue one another by
24 eliminating the requirement that a state prove
25 real and substantial damages by clear and

1 convincing evidence, as is required in an
2 equitable apportionment case, and instead
3 require that a state merely allege that water
4 on its side of an interstate resource has
5 moved across the border to another state.

6 And I want to call your Honor's
7 attention to the reason Mississippi stated
8 that it wants so desperately to avoid
9 equitable apportionment. In its brief to the
10 Fifth Circuit in the first case, Mississippi
11 stated the following: "Most importantly,
12 however, equitable apportionment will not
13 redress Mississippi's injuries, because
14 Mississippi seeks money damages for
15 retroactive periods."

16 Money damages, as your Honor
17 knows, are not available in equitable
18 apportionment cases. Thus, Mississippi's
19 position would also encourage litigation and
20 harm the environment, I might add, because the
21 motivation for a state suing another state
22 will no longer be to find a just and equitable
23 way to share and sustain an interstate
24 resource. It will be money.

25 In conclusion, your Honor, the

1 City of Memphis and the Memphis Light, Gas &
2 Water Division join with the State of
3 Tennessee and urge your Honor to find and
4 recommend that the aquifer is an interstate
5 resource; that the doctrine of equitable
6 apportionment is the sole judicial remedy for
7 disputes like the one presently before the
8 Court, between states over their respective
9 rights to use an interstate aquifer, just as
10 it is for disputes between states over rights
11 to -- states' rights over their right to use
12 interstate surface water.

13 And having disavowed a claim for
14 equitable apportionment, Mississippi's
15 asserted causes of action and tort are not
16 viable. They fail to state a claim upon which
17 relief should be granted and should be
18 dismissed with prejudice.

19 We thank you, your Honor, for
20 your time and your attention, and your clerks
21 for their time and attention. I'm happy to
22 answer any questions.

23 THE COURT: I don't have any right
24 now.

25 MR. D. BEARMAN: And if your Honor

1 doesn't mind, we will also give you a collective
2 exhibit, which we will number, I think, D-203. And
3 that will be seven pages for your Honor.

4 THE COURT: All right. Thank you.

5 (EXHIBIT NO. D-203, seven-page
6 document, was marked for identification.)

7 MR. D. BEARMAN: Thank you, your
8 Honor.

9 THE COURT: Do you need a recess for
10 rebuttal?

11 MR. MOFFETT: Your Honor, if I may
12 have just a short recess, if you don't mind.

13 THE COURT: Will five minutes be
14 enough?

15 MR. MOFFETT: How about ten?

16 THE COURT: That's all right.
17 Whatever you need, it's okay. We'll have ten
18 minutes.

19 (Recess)

20 MR. MOFFETT: Your Honor, before I
21 proceed, Mr. Bearman would like to introduce
22 someone else.

23 THE COURT: Okay.

24 MR. D. BEARMAN: Your Honor, in my
25 introductions I neglected to introduce your Honor

1 to Cole Taylor, who is our litigation support
2 specialist. He's a big part of the team, and I
3 apologize.

4 THE COURT: I'm glad he's here.

5 MR. D. BEARMAN: Thank you,
6 Mr. Moffett.

7 MR. MOFFETT: Your Honor, I'll try to
8 be brief. I can't promise that I'll be very
9 organized, but I'll be brief. First of all, just a
10 couple of preliminary things.

11 Mr. Frederick said during his
12 argument that we apparently conceded this or
13 conceded that, and we haven't talked about
14 this and we haven't talked about that. As I
15 said at the beginning of my arguments, your
16 Honor, this is an oral argument. We have
17 addressed all of these issues in our briefs.
18 We still stand on those briefs, and we have
19 waived nothing.

20 THE COURT: I understand.

21 MR. MOFFETT: Yes, sir.

22 I also want to mention a couple of
23 things preliminarily that seem to be, at least in
24 my mind, a little confused. But make no mistake,
25 it is undisputed that MLGW's pumping is pulling and

1 has pulled billions of gallons of groundwater from
2 Mississippi into Tennessee.

3 And your Honor, in our briefs
4 there's some material that I'm not going to
5 really get into detail about this morning, but
6 MLGW, before they put these three wellfields
7 down just by the Mississippi border, knew,
8 because the USGS told them, that heavy pumping
9 in Shelby County as of 1960 was withdrawing
10 25 million gallons of groundwater a day, and
11 that USGS report said this, quote, "has been
12 diverted into Shelby County as underflow
13 through the 500-Foot Sand from Mississippi."

14 So make no mistake about it, those
15 wells have been placed there, and they are, in
16 fact, pulling water into Tennessee for capturing by
17 the state of Tennessee water that is subject to the
18 exclusive sovereignty and control of Mississippi.

19 Mr. Frederick also mentioned that we
20 have not shown any harm. That's just not correct,
21 your Honor. This violation of our sovereign
22 territory is harm. The taking of this water that
23 we are holding in trust is harm. Now, there are
24 other types of harm that have been suffered in
25 Mississippi.

1 As I mentioned in my opening
2 remarks about hydrogeologic conditions in
3 north Mississippi, we developed some proof on
4 that in the record. But the point at which we
5 are obligated to provide a full and complete
6 record relating to the damages and harm we've
7 suffered is not yet here. It will be another
8 day for that. So that is something that we
9 need to keep in mind, that we're not yet
10 there.

11 Now, also I wanted to mention
12 Mr. Frederick spent a lot of time talking about the
13 flow of groundwater in the aquifer and
14 predevelopment flow. And we apparently -- he
15 claims that we now have a definitive answer to
16 those flow direction questions.

17 But one thing that Tennessee
18 said in their brief was this. This is in
19 their posthearing brief: They said developing
20 an accurate picture of predevelopment flow
21 patterns is a complex and difficult
22 undertaking and, quote, "there is inherent
23 uncertainty in any attempt to reconstruct the
24 historical conditions based on limited data."

25 And Tennessee also said in their

1 posthearing brief, quote, "The Special Master
2 should not define an interstate aquifer in a way
3 that requires fine calculations based on such
4 conditions."

5 So again, your Honor, there's nothing
6 definitive that's been proved in this proceeding.
7 What we do know is that the hydrogeologic
8 conditions in Northwest Mississippi are extremely
9 complex. We do know that.

10 But, your Honor, more importantly,
11 what we know is that the natural resource that is
12 at issue here is groundwater. It's groundwater.
13 And what we do know is while that groundwater is
14 within Mississippi, Tennessee and Memphis have no
15 right to get it. They cannot forcibly capture that
16 water that we are holding in trust for the use and
17 benefit of our citizens through pumping. Cannot do
18 it.

19 We heard these fine gentlemen
20 present their argument, but I didn't hear a
21 single remark, a single citation to any case
22 or authority that would provide them with the
23 right to capture water that is within
24 Mississippi's territorial borders. That Rhode
25 Island v. Massachusetts case says "your

1 authority, Tennessee, does not extend beyond
2 your borders. It doesn't go beyond your
3 borders."

4 So they have no right to take
5 it. Now, can they get it? Yes, they can, but
6 may they? No. They may not do so under the
7 Constitution of the United States.

8 And this whole -- a lot of the time
9 was spent on the interstate resource definition.
10 Well, as I said in my opening remarks, what they're
11 talking about primarily is geography. What we did
12 not hear is the legal part of the equation: The
13 interstate resource, what does that mean? A term,
14 by the way, that is not found in the Constitution,
15 as I said. It's not found in any cases that we're
16 aware of. There's no definition of it.

17 The defendants are saying,
18 "well, here's what it is," but their
19 definition of interstate resource again does
20 not recognize the fact that there are laws --
21 the Constitution -- that define the state's
22 respective rights to these waters. And that
23 part of the equation cannot be ignored.

24 Your Honor, also I want to point out
25 just briefly, Mr. Bearman talked about a

1 Mississippi statute, Section 51-3-41, which he
2 claims is contrary to our claim here, when it's
3 not. And we address this in our brief, your Honor.
4 I referred your Honor to our brief for further
5 development of this, but that statute doesn't do
6 anything but empower the Mississippi Commission on
7 Environmental Quality to negotiate compacts or
8 agreements with other states. It does not nullify
9 the public trust doctrine that was enunciated by
10 Mississippi in Code Section 51-3-1 that attaches to
11 all water.

12 And, you know, Tarrant -- the
13 Supreme Court in the Tarrant case made it very
14 clear that states do not easily cede their
15 sovereign powers, including the control over
16 waters within their own territories, and that
17 any kind of ceding of such power must be
18 stated expressly and cannot be premised on
19 ambiguity or silence. There's nothing in that
20 code Section 51-3-41 which purports to waive
21 or limit Mississippi's sovereign powers, as
22 Mr. Bearman suggested.

23 Your Honor, also I want to I guess
24 defend myself, defend my clients. It's almost -- I
25 think we've been accused this morning of being

1 money grabbers and those kind of things.

2 This is a serious case that
3 Mississippi has filed under the Constitution
4 of the United States. Is money involved?
5 Potentially. Maybe. It just depends on what
6 the Supreme Court wants to do in terms of
7 awarding remedies to Mississippi.

8 But what we're here to do is to
9 protect Mississippi's sovereignty. We're here to
10 protect our rights under the Constitution. And the
11 Court, as I said, may or may not award damages. It
12 may very well be that the Court decides the most
13 appropriate relief is injunctive relief. And
14 we'll, again, save that for another day.

15 And this suggestion that we're
16 just money grabbing and these kind of things,
17 we've -- the record -- there's evidence in the
18 record that shows that Mississippi tried to
19 talk to Tennessee about these things but
20 didn't get anywhere. The response we got was
21 equitable apportionment.

22 And so, again, until this Court
23 enters an order that protects the sovereignty
24 of the states, states have no meaningful
25 incentive to sit down and work these things

1 out. And Mr. Frederick showed the slide of
2 some other cones of depression that exist in
3 this Gulf States region. Those issues
4 obviously need to be dealt with.

5 What's the best way to resolve
6 those issues, where there are these
7 cross-border extractions and these cones of
8 depression that extend to multiple states?
9 The states sit down and work through those and
10 make sure that their respective rights are
11 being protected, and that the activities that
12 are going on in another state are not
13 depriving those states of their rights. But
14 unless the sovereignty of the states is
15 recognized and protected, those kinds of
16 discussions will not take place.

17 And, your Honor, one last thing
18 I wanted to mention is, as I said in my
19 opening remarks, Tennessee and MLGW are taking
20 the position that the groundwater underneath
21 Shelby County is not Tennessee's property.
22 They are saying this is a shared interstate
23 resource. And I mentioned in my opening
24 remarks -- Charles, if you put that statute up
25 on the screen --

1 MR. BARRETT: They need to flip.
2 We're not connected. Do you mind?

3 MR. MOFFETT: Your Honor, this,
4 again, is not Mississippi's argument. This is
5 Tennessee's statute.

6 I mentioned in my opening
7 argument that up to this point in the
8 proceeding, Tennessee had never mentioned the
9 statute. We heard argument from
10 Mr. Frederick. We heard oral argument from
11 Mr. Bearman. They still have not even talked
12 about this statute.

13 It is critical, your Honor,
14 because it says in Tennessee that the waters
15 of the state are the property of the state and
16 held in public trust. Yet the defendants here
17 are coming before your Honor, before the
18 Supreme Court, and taking a position that is
19 totally contrary to that. They are saying,
20 no, the water underneath Shelby County is not
21 the property of the State of Tennessee. No,
22 the water underneath Shelby County and Memphis
23 Sand is not held in public trust by Tennessee
24 for the benefit of its citizens. No, that
25 water is shared with everybody. Mississippi

1 can come get as much of that water as they
2 want. Just put your wells in Mississippi.
3 Just take it, if you want it.

4 Your Honor, I submit to you that they
5 should be estopped from making arguments that are
6 contrary to this section. And, your Honor, a lot
7 of these issues, as I said, have been briefed fully
8 by the parties. We're not walking back on
9 anything. But what we wanted to do today, your
10 Honor, is try to bring a little focus to what we
11 believe are a couple of dispositive legal issues.

12 A lot of talk about
13 hydrogeology. A lot of talk about flow. A
14 lot of talk about groundwater movement and the
15 scope of this aquifer system and all those
16 kind of things. But the thing that really,
17 when you close this big circle in into the
18 bull's eye, what you've got to deal with is
19 the law. What you've got to deal with is the
20 Constitution.

21 There is nothing in the
22 Constitution that gives the defendants the
23 right to capture water from Mississippi
24 without Mississippi's permission. That's the
25 bottom line. And so to the extent there's

1 this question about interstate resource, your
2 Honor, I'll say again, I think this is a
3 matter of law. The only conclusion that could
4 be reached in this proceeding that is
5 consistent with the Constitution is that this
6 water that is issued is not an interstate
7 resource as a matter of law.

8 And we look forward to further
9 opportunities to appear before the Court, your
10 Honor, and we seek your direction as we move
11 forward.

12 Thank you for your time this
13 morning.

14 THE COURT: Thank you, Mr. Moffett.

15 If there's anything else to take
16 up, the Court will commend both sides for a
17 very professional job here. And I appreciate
18 it, and I was wanting all the help I could
19 get. And so we know that it's very important
20 to make our resolution on this and findings of
21 fact and conclusions of law. So we'll get on
22 to it as fast as we can and send it out to the
23 Supreme Court so you all have a copy.

24 If you need any other kind of
25 hearing, you let us know, but I don't see any

1 reason for it at this time.

2 So unless there's other items to
3 take up, then we will recess the Court.

4 (ADJOURNED AT 11:36 A.M.)

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COURT REPORTER'S CERTIFICATE

STATE OF TENNESSEE:

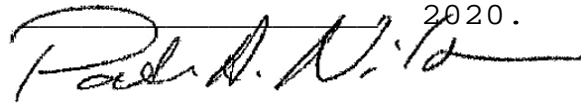
I, PATRICIA A. NILSEN, Licensed Reporter for the State of Tennessee, CERTIFY:

1. The foregoing deposition was taken before me at the time and place stated in the foregoing styled cause with the appearances as noted;

2. Being a Court Reporter, I then reported the deposition stenographically to the best of my skill and ability, and the foregoing pages contain a full, true and correct transcript of my said stenographic notes then and there taken;

3. I am not in the employ of and am not related to any of the parties or their counsel, and I have no interest in the matter involved.

WITNESS MY SIGNATURE, this, the _____ day of _____, 2020.



PATRICIA A. NILSEN, RMR, CRR, CRC
TN Licensed Court Reporter
LCR Number: 717
Expiration: 6/30/2020

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