

IN THE
Supreme Court of the United States

STATE OF MISSISSIPPI,
Plaintiff,

v.

STATE OF TENNESSEE, CITY OF MEMPHIS, TENNESSEE,
AND MEMPHIS LIGHT, GAS & WATER DIVISION,
Defendants.

On Bill of Complaint
Before the Special Master, Hon. Eugene E. Siler, Jr.

**REPLY OF DEFENDANTS STATE OF TENNESSEE, CITY OF MEMPHIS,
AND MEMPHIS LIGHT, GAS & WATER DIVISION
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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Defs. Ex.	Exhibits to Motion of Defendants State of Tennessee, City of Memphis, and Memphis Light, Gas & Water Division for Summary Judgment and Memorandum of Law in Support Thereof, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed June 1, 2018) (Dkt. No. 70 (Exhibits))
Defs. Mot.	Motion of Defendants State of Tennessee, City of Memphis, and Memphis Light, Gas & Water Division for Summary Judgment and Memorandum of Law in Support Thereof, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed June 1, 2018) (Dkt. No. 70)
Joint Statement	Plaintiff’s and Defendants’ Joint Statement of Stipulated and Contested Facts, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed Feb. 28, 2018) (Dkt. No. 64)
Miss. Br.	Plaintiff’s Response to Defendants’ Motion for Summary Judgment, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed July 6, 2018) (Dkt. No. 71)
Miss. Ex.	Exhibits to Plaintiff’s Response to Defendants’ Motion for Summary Judgment, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed July 6, 2018) (Dkt. No. 71 (Exhibits))
MLGW	Memphis Light, Gas & Water Division
Op.	Memorandum of Decision on Tennessee’s Motion to Dismiss, Memphis and Memphis Light, Gas & Water Division’s Motion to Dismiss, and Mississippi’s Motion to Exclude, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. Aug. 12, 2016) (opinion of Special Master) (Dkt. No. 55)

Resp. to D__	In the Joint Statement, D__ refers to the facts submitted by Defendants that Mississippi purports to dispute. Resp. to D__ refers to Mississippi's response to Defendants' fact, which often indicates Mississippi's agreement with a portion of the fact, and is therefore cited in the Motion and the Reply.
Spruill Rep.	Expert Report of Richard K. Spruill, Ph.D., P.G. (June 30, 2017)
Wiley Dep.	Deposition of David Wiley (Sept. 26, 2017)
Wiley Rep.	Update Report on Diversion and Withdrawal of Groundwater from Northern Mississippi Into the State of Tennessee (prepared by Leggette, Brashears & Graham, Inc.) (June 30, 2017) (expert report of David Wiley)
Wiley Rebuttal Rep.	David Wiley Rebuttal Expert Report Addendum #1 (July 31, 2017)

I. INTRODUCTION

Mississippi's Response to Defendants' Motion for Summary Judgment ("Response") confirms that an evidentiary hearing is not necessary to decide the threshold issue of whether the Aquifer is an interstate resource. Mississippi's Response is most notable for what it omits. For example, Mississippi ignores that the facts supporting Defendants' Motion are based on the testimony of Mississippi's own experts and Mississippi's own Rule 30(b)(6) witnesses. Mississippi does not even attempt to dispute the dispositive facts: that (1) the effects of pumping from the Aquifer cross state borders; (2) under pre-development conditions, some groundwater in the Aquifer flowed from Mississippi to Tennessee; and (3) the groundwater in the Aquifer is connected to interstate surface waters. Nor does Mississippi genuinely dispute that the Aquifer underlies Tennessee, Mississippi, and six other States, when the "facts" upon which it purports to rely contradict its own binding admission as well as its own experts' testimony. Instead, Mississippi attempts to revive legal arguments that the Special Master has already rejected and to cloud the record with immaterial facts. *See infra* Part III. An evidentiary hearing is not required to address Mississippi's recycled legal arguments or its immaterial factual assertions. The Special Master should find as a matter of law that the Aquifer is an interstate resource and grant Defendants' Motion for Summary Judgment.

II. DISCOVERY HAS CONFIRMED THAT THE AQUIFER AND THE WATER IN IT IS INTERSTATE

A. The Aquifer Is Interstate Because Pumping Water In One State Affects Water In Other States

Mississippi's Response does not dispute the cross-border effects of pumping groundwater from the Aquifer. Mississippi has conceded that pumping from wells located entirely in Shelby County, Tennessee, can and does affect groundwater in Mississippi, *see* Resp. to D65, and that the cross-border effect of pumping goes both ways, with pumping in Mississippi affecting the flow of groundwater into Tennessee, *see* Resp. to D77.¹ Thus, the discovery record conclusively establishes that "the removal of water within a State's borders can have a direct effect on the availability of water in another State." Op. 31; *see also* Miss. Br. 12-13. This fact alone confirms that the Aquifer is interstate because it demonstrates "the action of one State reach[ing] through the agency of natural laws into the territory of another State.'" Op. 30-31 (quoting *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907)).²

¹ Mississippi also does not dispute that pumping in Mississippi affects groundwater in Arkansas and Louisiana, pumping in Arkansas affects groundwater in Mississippi and Louisiana, and pumping in Louisiana affects groundwater in Arkansas. *See* Defs. Mot. 9. These facts further support a finding that the Aquifer is interstate.

² Mississippi's contention that equitable apportionment does not apply because Tennessee's pumping is an "unnatural force," Miss. Br. 13, rather than an "agency of natural laws," misses the mark. The question is not whether a State's *action* is "natural." Every equitable-apportionment case involves an "unnatural" action by the defendant State – such as pumping water or capturing fish. Instead, the "agency of natural laws" refers to the *cross-border impact* of a State's "unnatural" actions.

B. The Aquifer Is Interstate Because Water Naturally Flowed Across State Lines Prior To The Start Of Pumping

Discovery has confirmed that, under pre-development conditions, groundwater in the Aquifer undisputedly flowed across state borders, including from Mississippi into Tennessee. Mississippi explicitly concedes the point. *See* Miss. Br. 7 n.8, 14; *see also* Defs. Ex. 5 (Wiley Rep. 11 & Figure 9); Defs. Ex. 6 (Spruill Rep. 36, Figure 17). Further, Mississippi’s Response does not dispute that, prior to pumping, groundwater in the Aquifer naturally flowed across the Mississippi-Arkansas and Tennessee-Arkansas borders and that all of the groundwater in the Aquifer would eventually leave Mississippi. *See* Defs. Ex. 6 (Spruill Rep. 36, Figure 17); Defs. Ex. 7 (Wiley Dep. 73:3-19, 96:19-23); Resp. to D40, D52. Accordingly, “the extent of historical flows in the Aquifer between Mississippi and Tennessee” (Op. 36) also confirms that the Aquifer and its groundwater is interstate.

C. The Aquifer Is Interstate Because The Water Is Hydrologically Connected With Interstate Surface Water

The Special Master has observed that the Supreme Court applies “equitable apportionment principles [to] disputes between States over a body of interstate surface water with a groundwater component.” Op. 20 (citing *Texas v. New Mexico*,

In this case, the “agency of natural laws” is the cone of depression that forms according to the laws of physics when groundwater is extracted from a well. Because Mississippi alleges that the cone of depression here extends across state lines, this case falls squarely within the Court’s equitable-apportionment jurisprudence.

462 U.S. 554, 556-58 & n.2 (1983)). Mississippi's Response does not dispute that the Aquifer's groundwater is hydrologically connected to at least two interstate rivers: the Wolf and the Mississippi. *See* Defs. Mot. 11-12; Miss. Br. 14-15. These undisputed hydrologic connections further confirm that the Aquifer and groundwater at issue is interstate.

D. The Aquifer Is Interstate Because It Underlies Mississippi, Tennessee, And Six Other States

Based on the testimony of Mississippi's experts, it is undisputed that the Aquifer at issue underlies eight States, including Mississippi and Tennessee. It is further undisputed that the various names used locally and by the experts in this case – *i.e.*, Sparta, Memphis, Middle Claiborne, etc. – all refer to the same Aquifer. *See, e.g.*, Defs. Ex. 7 (Wiley Dep. 11:5-8, 12:4-13:12). Mississippi's attempt to contest this point lacks credibility and cannot defeat summary judgment. First, Mississippi is bound by its response to MLGW's Request for Admission No. 1 in which it admits that the Aquifer underlies Mississippi, Tennessee, and Arkansas. *See* Defs. Mot. 13. Second, Mississippi does not even attempt to explain how it now advances a position that squarely conflicts with its own experts, both of whom testified the Aquifer underlies eight States.³ Notably, the authority cited by Mississippi actually confirms

³ *See* Defs. Ex. 7 (Wiley Dep. 12:4-13:12); Defs. Ex. 6 (Spruill Rep. 2).

that the Aquifer exists beneath eight States⁴ or at most indicates that there are local variations within a single formation.⁵ The Aquifer’s existence underlying multiple States is not genuinely disputed and, therefore, confirms that the Aquifer is interstate.

III. MISSISSIPPI’S ARGUMENTS CONFIRM THAT THERE ARE NO FACTUAL DISPUTES REQUIRING AN EVIDENTIARY HEARING

A. Mississippi Attempts To Relitigate Legal Arguments The Special Master Has Already Considered And Rejected

The Special Master should reject the significant portion of Mississippi’s Response that re-asserts legal arguments that the Special Master considered and rejected at the pleading stage, which only emphasizes the lack of any material *factual* dispute.

For example, the Special Master already rejected Mississippi’s arguments that equitable apportionment does not apply because groundwater should be treated differently than surface water. Op. 20-24 (raised in Miss. Br. 4-6, 12-13). The Special Master correctly explained that *Kansas v. Colorado* and its progeny hold

⁴ See, e.g., Miss. Br. 6 (citing Miss. Ex. 6 (Spruill Rep. 2), which states: “The Sparta-Memphis Sand, also known as the Middle Claiborne Aquifer or the Memphis Aquifer, is . . . within northwestern Mississippi and southwestern Tennessee.”); *id.* at 7 (citing Miss. Ex. 14 (Wiley Rebuttal Rep.), which shows (in Figures 2 and 3) the “Middle Claiborne Aquifer” extending beneath eight States).

⁵ See, e.g., Miss. Br. 11 (citing Defs. Ex. 1 (Schrader, USGS Scientific Investigations Map 3014), which states that the Sparta Sand and Memphis Sand are “considered to be one hydrologic unit” because water levels in the two “generally correlate”).

that equitable apportionment applies where “‘the action of one State reaches through the agency of natural laws into the territory of another State’” – such as where “a body of water is such that the removal of water within a State’s borders can have a direct effect on the availability of water in another State.” Op. 30-31 (quoting *Kansas v. Colorado*, 206 U.S. at 97-98); *see also, e.g., Florida v. Georgia*, 138 S. Ct. 2502, 2514, 2517 (2018) (citing *Kansas v. Colorado*, 206 U.S. at 109). The Special Master has also rejected Mississippi’s attempts to limit its claim to only *part* of the groundwater in the Aquifer (raised in Miss. Br. 12, 14), noting that “no Supreme Court decision appears to have endorsed” such a claim. Op. 32. And the Special Master has already held that the geological formation of the Aquifer should not be considered separately from the groundwater in it (raised in Miss. Br. 12-15). Op. 31.

Mississippi’s attempt to re-argue these same failed legal positions further confirms that there are no material facts in dispute and therefore that an evidentiary hearing is not necessary to decide the threshold issue.

B. Mississippi’s Factual Assertions Are Immaterial

Mississippi erroneously contends that summary judgment is not appropriate because Defendants failed to address the groundwater’s slow rate of flow and resulting long “residence time” in Mississippi. Miss. Br. 4, 14-15. These facts are neither disputed (for purposes of this Motion) nor material. Mississippi does not

explain why these facts are relevant to whether the resource is interstate. In fact, the Supreme Court's ruling in *Kansas v. Colorado* strongly indicates that they are immaterial; the Court found the river at issue to be interstate even though "at times the entire bed of the channel has been in places dry" – *i.e.*, the river was not flowing *at all*. 206 U.S. at 115. Nor does Mississippi explain why a long "residence time" is relevant – especially when it is undisputed that groundwater is, and always has been, continually flowing out of Mississippi each year. *E.g.*, Defs. Ex. 19 (Wiley Dep. 197:3-198:11). Accordingly, the fact that the Aquifer's groundwater flows slowly, or even very slowly, is of no consequence to the determination that the Aquifer is an interstate resource.

Mississippi also raises its recently crafted "two aquifer" theory, claiming that the Memphis-Sparta Aquifer is actually two separate but interconnected aquifers. Mississippi is estopped from asserting that position because it is bound by its admission in discovery that a single "formation known as the Sparta Sand underlies several states, including Mississippi, Tennessee, and Arkansas." Defs. Ex. 18. Moreover, whether there are one or two aquifers does not change the fact that pumping from the Aquifer in Tennessee affects the groundwater in the Aquifer across the state line in Mississippi, and vice-versa. Mississippi's admission, along with undisputed facts set forth above in Part II, conclusively prove that the Aquifer, including the groundwater in it, is, as a matter of law, an interstate resource.

Finally, Mississippi raises arguments about MLGW's groundwater-management practices, MLGW's supposedly ill-intentioned development of pumping operations near the Mississippi border, and the alleged impact of pumping in Tennessee on Mississippi's ability to use the Aquifer. Defendants need not address these issues here because they are not material to whether the Aquifer and the water in it is interstate.⁶ Arguably, these factors might be among the myriad the Court might consider if Mississippi were asking for an equitable apportionment. Here, however, Mississippi's reliance on such equitable-apportionment principles merely confirms that the Aquifer, including the groundwater in it, is an interstate resource and that Mississippi's exclusive judicial remedy for its allegations is an equitable-apportionment action.

IV. CONCLUSION

The Special Master should grant summary judgment to Defendants.

⁶ Defendants reserve their right to address these issues if they become material.

Respectfully submitted this 24th day of July, 2018,

s/ David C. Frederick

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CERTIFICATE OF SERVICE

Pursuant to Paragraph 3 of the Special Master's Case Management Plan (Dkt. No. 57), I hereby certify that all parties on the Special Master's approved service list (Dkt. No. 26) have been served by electronic mail, this 24th day of July 2018.

/s/ David C. Frederick

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