

No. 143, Original

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.**

**DEFENDANTS' JOINT MOTION TO EXCLUDE EVIDENCE
IRRELEVANT TO THE LIMITED EVIDENTIARY HEARING**

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GLOSSARY

Brahana Dep.	Deposition of John van Brahana, <i>Hood ex rel. Mississippi v. City of Memphis, et al.</i> , No. 2:05CV32D-B (Nov. 5, 2007)
Branch Dep.	Deposition of Charles Thomas Branch, <i>Hood ex rel. Mississippi v. City of Memphis, et al.</i> , No. 2:05CV32D-B (Oct. 1, 2007)
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)
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 Dep.	Deposition of Richard Spruill, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (Sept. 28, 2017)
Spruill July Rep.	Expert Report Addendum #1 of Richard K. Spruill, Ph.D., P.G. (July 31, 2017)
Spruill June Rep.	Expert Report of Richard K. Spruill, Ph.D., P.G. (June 30, 2017)

Wiley Dep.	Deposition of David Wiley, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (Sept. 26, 2017)
Wiley May 2007 Rep.	Report on Diversion of Ground Water from Northern Mississippi Due to Memphis Area Well Fields (prepared by Leggette, Brashears & Graham, Inc.) (May 2017) (expert report of David A. Wiley)
Wiley July Rep.	Update Report on Diversion and Withdrawal of Groundwater from Northern Mississippi Into the State of Tennessee Addendum #1 (prepared by Leggette, Brashears & Graham, Inc.) (July 31, 2017) (amended expert report of David A. Wiley)
Wiley June 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 A. Wiley)

I. INTRODUCTION

The Special Master has restricted the upcoming evidentiary hearing to the “limited issue of whether the Aquifer is an interstate resource.” Op. 36. Much of the evidence Mississippi intends to introduce at the hearing strays far beyond that limited issue. Indeed, Mississippi has designated large amounts of evidence having virtually nothing to do with the threshold issue that the parties are supposed to be litigating: it seeks to offer evidence about MLGW’s alleged “groundwater management practices”; the volume of groundwater MLGW has pumped from the Aquifer; and the amount of water MLGW has supposedly diverted across the state boundary. Such evidence might be admissible (as one of many factors) in an equitable-apportionment case. But because it is irrelevant to the limited question whether the Aquifer constitutes an interstate water resource, the Special Master should exclude it from this proceeding.

Admitting such evidence would not only defeat the efficiencies that the Special Master sought to achieve through his August 2016 opinion; it would prejudice Defendants. In discovery, Defendants relied on the Special Master’s order restricting the scope of the evidentiary hearing and so did not fully develop evidence on irrelevant issues. Mississippi’s evidence would thus lead to an unbalanced presentation by Mississippi, intended to paint Defendants as bad actors rather than to offer proof on the “limited issue of whether the Aquifer is an interstate resource.”

Op. 36. Allowing such evidence would distort the factual record at trial, waste time, and drive up the expense of this already-costly proceeding. For those reasons, the Special Master should enforce his August 2016 opinion and exclude all of Mississippi's evidence that exceeds its limits.

II. ARGUMENT

A. The Special Master Should Exclude Irrelevant Evidence To Effectuate His Decision To Hold A Narrowly Focused Hearing

Although the Federal Rules of Evidence are non-binding in original-jurisdiction cases, they provide useful guidance. *See* Sup. Ct. R. 17.2. Under those Rules, evidence is relevant only if it makes some material fact – a fact “of consequence in determining the action” – “more or less probable.” Fed. R. Evid. 401(a), (b). Irrelevant evidence is not admissible. *See* Fed. R. Evid. 402.

Even if evidence is relevant, it may be excluded “if its probative value is substantially outweighed by a danger of,” among other things, “undue delay[] [or] wasting time.” Fed. R. Evid. 403. Evidence that has “marginal probative value” should be excluded where it would unduly “complicate[] the proceedings.” *In re Air Crash Disaster*, 86 F.3d 498, 531 (6th Cir. 1996); *see also, e.g., United States v. Della Rose*, 403 F.3d 891, 905 (7th Cir. 2005) (“whatever marginal probative value extrinsic evidence on this subject might have was substantially outweighed by the prospect of a sideshow”).

Concerns addressed by Rules 402 and 403 are particularly acute in this case. If this were a typical civil lawsuit, dismissal of Mississippi's claims already would have been "warranted under Rule 12." Op. 1. Defendants thus already have spent substantial public resources defending against claims that do not even pass muster under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In recognition of those concerns and the obligation to "mov[e] the case along in a timely and efficient manner," the Special Master limited the initial hearing in this case to the threshold question "whether the Aquifer is an interstate resource." Op. 36. Allowing Mississippi to introduce evidence extraneous to that limited issue would defeat the efficiencies that the Special Master sought to achieve.

The Supreme Court has expressly approved a process in which "full factual discovery" on "novel and challenging" issues is "deferred," allowing the Special Master to resolve threshold issues and "facilitate the efficient disposition of the case." *Alabama v. North Carolina*, 560 U.S. 330, 353-54 (2010). In *Montana v. Wyoming*, for example, the Special Master granted a number of motions *in limine* before the first hearing in a bifurcated process, including motions to exclude evidence that was irrelevant in light of prior decisions limiting the scope of the hearing. See Tr. of Final Pretrial Hr'g at 32-35, *Montana v. Wyoming*, No. 137, Orig. (U.S. Oct. 15, 2013); see also *Montana v. Wyoming*, 136 S. Ct. 1034 (2016) (entering order proposed by Special Master). A similar approach is warranted here.

Mississippi itself requested “phased litigation,” Op. 36,¹ rather than a full-blown trial, and it should be held to that position. The admission of irrelevant evidence would contradict that position, negate the Special Master’s careful narrowing of the issues, make the hearing take longer than necessary, and waste public resources. The Special Master therefore should limit Mississippi’s evidence at the hearing to the narrow threshold question at issue.

B. Evidence Of MLGW’s Groundwater Management Practices Is Irrelevant To Whether The Aquifer Is An Interstate Water Resource

Based on its proposed exhibit list and factual assertions, Mississippi does not intend to limit its presentation to evidence concerning whether the Aquifer is an interstate resource – such as evidence regarding the hydrological or geological characteristics of the Aquifer. Instead, it intends to offer voluminous evidence on an array of ancillary issues, including MLGW’s groundwater management practices. The Special Master should exclude all such evidence because the water management practices of any entity in Mississippi or Tennessee has no bearing on the inherent character of the resource being interstate or intrastate.

¹ This phased-litigation posture stands in contrast to a full evidentiary hearing. In a full hearing before a special master, “a generous view of the admission of evidence” may be appropriate, so that there is “a complete picture for this Court to evaluate.” Report by Special Master Paul R. Verkuil at 30, *New Jersey v. New York*, No. 120, Orig. (U.S. Mar. 31, 1997), https://www.supremecourt.gov/SpecMastRpt/Orig120_033197.pdf. A limited hearing, by design, allows the Special Master, the parties, and ultimately the Court to focus fully on threshold legal issues before the case proceeds to more complex and involved factual questions.

Mississippi intends to introduce several types of evidence that appear directed at demonstrating that MLGW has engaged in improper groundwater management practices.² First, one of Mississippi's experts, Dr. Richard Spruill, offered a conclusory opinion in his report that "[t]he intensity of pumping that has been, and continues to be, conducted by MLGW is not consistent with good groundwater management practices" and that "[t]he best management strategy for sustainability of groundwater resources involves withdrawing groundwater at a rate that is equal to or less than the recharge rate of the aquifer being developed." Ex. 1 (Spruill June Rep. 3).³ Mississippi also has proffered excerpts from depositions taken in the *Hood* litigation that appear to relate solely to MLGW's groundwater management

² Defendants deny this allegation entirely and would contest it if the issue became relevant. Because the Special Master limited the scope of this evidentiary hearing, however, Defendants have not engaged in the kind of extensive discovery that would be necessary to build a complete record about the propriety of MLGW's groundwater management practices.

³ Dr. Spruill provided no explanation or basis for this opinion in his reports. At his deposition, he testified that although he believed the best groundwater management strategy involved withdrawing water at a rate less than or equal to the recharge rate, and that "[y]ou can't have a best-management practice unless you know that recharge rate," in this case "we don't know the recharge rate" for the Aquifer, Ex. 3 (Spruill Dep. 139:16-19), and he therefore "didn't make the statement here that MLG&W is withdrawing groundwater at a rate different from the recharge rate," *id.* at 140:2-4. Other evidence suggested that, in fact, MLGW is now pumping water at a rate less than the recharge rate, *see* Ex. 9 (Wiley Dep. 62:24-63:16), and is therefore engaged in best groundwater management practices by Dr. Spruill's definition.

practices. *See, e.g.*, Ex. 11 (Brahana Dep. 68:14-71:12, 212:5-213:10, 214:13-215:20).

Mississippi also has included on its exhibit list a variety of MLGW documents concerning the utility and its practices. These include internal memos exchanged between MLGW employees, strategic planning documents from the 1990s and 2000s, a variety of correspondence, at least one MLGW contract, and maps of certain well fields. *See, e.g.*, Ex. 18 (State of Mississippi’s Exhibit List, P-54 to P-57, P-95 to P-100, P-106 to P-108).⁴ None of that evidence about MLGW’s pumping practices tends to prove any fact about the fundamental hydrological or geological characteristics of the Aquifer. It is therefore irrelevant and inadmissible in the limited evidentiary hearing ordered by the Special Master.

Defendants deny that they have engaged in any improper practices, and they would be prepared to defend their actions if the issue became relevant. For example, groundwater management practices might have been relevant if Mississippi had brought an equitable-apportionment action. *See, e.g., Florida v. Georgia*, 138 S. Ct. 2502, 2513 (2018) (discussing the guiding principle of “reasonable use” in equitable apportionments). Allowing Mississippi to present evidence about MLGW’s

⁴ The full list of deposition excerpts and exhibits that fall into this category is included in Appendix A to this motion. Most or all of this evidence also should be excluded for other reasons, including the fact that there is no apparent witness to lay foundation for many documents’ admission.

groundwater management practices in this hearing, however, would prejudice Defendants. Complying with the Special Master's order for a *limited* evidentiary hearing, Defendants have not engaged in full discovery on these issues. *See* Dkt. No. 57, at 1, 4 (¶ 4(a)) (“[t]he scope of discovery shall be restricted at this time in accordance with the introductory paragraph,” which sets forth procedures for discovery “on the limited issue as stated” by the Special Master). Admitting Mississippi's evidence would result in an insufficiently developed, one-sided picture of MLGW's practices, providing an inadequate basis for adjudication even if those practices were relevant. All of Mississippi's evidence on this issue should be excluded as irrelevant or, if the Special Master finds some marginal relevance, as far more prejudicial than probative of the Aquifer's interstate character.

C. Mississippi's Evidence Concerning MLGW's Pumping Volumes And Supposed “Diversions” Should Be Excluded

The Special Master likewise should exclude all evidence of the volumes of water MLGW has withdrawn from the Aquifer and the volumes of water that MLGW has supposedly diverted across the border from Mississippi into Tennessee. For largely the same reasons as the groundwater management practices discussed above, such evidence is irrelevant to the issue before the Special Master or is so marginally probative that its relevance is substantially outweighed by the fact that such evidence would be cumulative, waste time, and unfairly prejudice Defendants.

One of Mississippi's experts, David Wiley, has disclosed that he intends to offer extensive testimony about the volume of water that MLGW has withdrawn from the Aquifer over the last five decades. Among other things, Mr. Wiley's reports include tables describing the year-by-year withdrawals by MLGW since 1965. Ex. 7 (Wiley June Rep. tpls. 1 & 2); Ex. 5 (Wiley May 2007 Rep. tpls. 3& 4). He also has disclosed the results of a model that attempts to calculate the volume of water that has flowed into Tennessee because of MLGW's pumping.⁵ And Mississippi also appears to have offered a number of documents concerning MLGW's pumping volumes and testimony concerning the supposed diversion of water across the state border. *See, e.g.*, Ex. 18 (State of Mississippi's Exhibit List, P-105) (exhibit entitled "Water Pumpage Reports"); Ex. 12 (Branch Dep. 32:8-23) (discussing Charles Branch's supposed knowledge of diversion).⁶

MLGW's pumping volumes, and any supposed consequences such as the alleged diversion of groundwater, are irrelevant because an entity's pumping actions cannot change the fundamental hydrological and geological characteristics that

⁵ Mr. Wiley's model suffers from substantial errors that render it fundamentally unreliable, and it is unclear whether MLGW's pumping actually has caused any water to cross the state border, let alone the volumes suggested by Mr. Wiley. The Special Master should thus exclude Mr. Wiley's opinions as explained in Defendants' *Daubert* motion. But the Special Master need not consider whether his diversion calculations are reliable or correct if they are excluded as irrelevant.

⁶ The full list of deposition excerpts and exhibits that fall into this category is included in Appendix B. Again, much or all of this evidence is also inadmissible under the Federal Rules of Evidence for reasons other than relevance.

determine whether a water resource is interstate. *See* Op. 36 (describing types of relevant evidence). Mr. Wiley’s own testimony confirms that conclusion. His opening expert report is entitled “Update Report on Diversion and Withdrawal of Groundwater from Northern Mississippi into the State of Tennessee,” and his second report has the same title except that it is denominated “Addendum #1” – and, as indicated, those reports almost exclusively concern diversion calculations. *See* Ex. 7 (Wiley June Rep. 1); Ex. 8 (Wiley July Rep. 1). Yet Mr. Wiley testified that *nothing in those reports addresses whether the Aquifer is an interstate resource:*

Q. Is there anything in your initial report or rebuttal report, Exhibits 1 and 2, that address or might be a factor in determining whether the Memphis Sparta Aquifer or the groundwater in it is an interstate or intrastate resource?

A. No.

Ex. 9 (Wiley Dep. 21:21-22:3). Mr. Wiley’s testimony acknowledges what is clear from his report: his conclusions do not relate to the fundamental characteristics of the Aquifer and so have no bearing on the sole issue for the evidentiary hearing.⁷

Mr. Wiley’s calculations of alleged diversion should be excluded even though it *is* relevant that pumping in Tennessee generally can affect groundwater in

⁷ The history of Mr. Wiley’s expert opinions explains why his opinions on pumping volumes and diversion bear no relation to the limited issue before the Special Master. Mr. Wiley first submitted an expert report for Mississippi in 2007 during the *Hood* litigation seeking to establish damages under a variety of tort theories Mississippi was pursuing against MLGW and the City of Memphis. *See generally* Ex. 5 (Wiley May 2007 Rep.). Mr. Wiley’s opening report in this case is nearly identical, except that its calculations are extended to the present.

Mississippi, and vice-versa, a hydrological fact that shows that the Aquifer is an interstate resource. The cones of depression that form about pumping wells in Mississippi and Tennessee can and in some cases do extend across the States' border, demonstrating 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. But the actual volumes pumped at any given well are not relevant to whether there are cross-border effects. Indeed, the areal extent of a cone of depression – meaning how far away the effects of a single well are observed – is *independent* of the volume that well is pumping.

As Mississippi's expert Dr. Spruill testified, "the lateral extent of the cone of the depression of a pumping well, the lateral extent, is independent of the pumping rate. It doesn't matter if you pump a well at 1,000 gallons a minute or 500 gallons a minute." Ex. 3 (Spruill Dep. 103:22-104:3); *see id.* at 128:18-21 ("[A] pumping rate of 10 million, 50 million, 100 million gallons a day [a]ffects the cone of the depression *but not the lateral extent.*") (emphasis added). Thus, a cone of depression will not extend *further* across the States' border if a greater volume of groundwater is withdrawn, and the volume pumped does not affect the material fact that cones of depression do, in fact, cross the States' border. And Dr. Spruill further opined in his rebuttal report that "the definition of an intrastate groundwater resource must be based on the fate of water in the groundwater system *under natural conditions*" –

that is, before pumping began. Ex. 2 (Spruill July Rep. 37) (*italics added*).⁸ Accordingly, the amount of groundwater pumped or allegedly diverted across the state boundary is irrelevant under Mississippi's own expert's definition.

Even if the volume calculations had any relevance to the cross-border effects of pumping, they still should be excluded following Federal Rule of Evidence 403. The cross-border effects of pumping are undisputed. *See* Mississippi's Resp. to D72-D73, D77 (from the parties' Joint Statement of Stipulated and Contested Facts); Ex. 9 (Wiley Dep. 16:4-13). The parties' experts also can directly testify about the cross-border effects of pumping from wells in both States, so evidence about pumping or diversion volumes is cumulative at best and a waste of time. Moreover, any marginal probative value would be outweighed by the danger of unfair prejudice. Defendants have not developed evidence about pumping or diversion volumes because it is not relevant to the limited issue at hand; Mississippi's apparent purpose in offering evidence about MLGW's pumping volumes is to paint MLGW as a bad actor that is irresponsibly withdrawing too much groundwater.

Mississippi should not be permitted to ignore the Special Master's August 2016 opinion by pursuing the type of theories the Special Master rejected in that opinion. Allowing Mississippi to spend time at the hearing proving its alternative,

⁸ Dr. Spruill's testimony is unreliable and should be excluded for the reasons given in the *Daubert* motion filed contemporaneously with this Motion.

already-rejected state-law theories (instead of focusing on whether the Aquifer is an interstate resource) would nullify the Special Master's August 2016 opinion and needlessly drive up the cost and burden of the hearing.

CONCLUSION

The Special Master should exclude all evidence that falls outside the scope of his August 2016 opinion, including evidence concerning MLGW's groundwater management practices, the volumes of groundwater that MLGW has pumped, and the amount of water supposedly diverted.

Respectfully submitted this 1st day of November 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 1st day of November 2018.

/s/ David C. Frederick

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**APPENDIX A – Exhibits and Deposition Excerpts
Relating to MLGW’s Groundwater Management Practices**

State of Mississippi’s Exhibit List	P-54
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Deposition of David Wiley (Nov. 15, 2007) Vol. 1	130:6-18 131:12-132:2 132:15-24 135:25-136:23 139:6-15 140:2-24
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**APPENDIX B – Exhibits and Deposition Excerpts
Relating to Pumping Volumes and Purported Diversion Volumes**

State of Mississippi’s Exhibit List	P-59 P-60 P-61 P-62 P-63 P-64 P-65 P-66 P-67 P-68 P-69 P-70 P-97 P-98 P-100 P-102 P-103 P-104 P-105 P-111 P-140 P-157 P-158 P-159 P-181 P-190
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Deposition of Sam Mabry (July 30, 2007)	16:17-17:19 18:9-19:5
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