

**No. 143, Original**

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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.*

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

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

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## I. INTRODUCTION

Defendants' Motion to Exclude (Dkt. No. 81) begins by disregarding the express language of the Special Master's Order stating that "an evidentiary hearing should be held on the limited issue of whether *the water that is at issue in this case* is interstate in nature." Dkt. No. 56, 8/12/16 Case Management Order at 1 (emphasis added). Likewise, the Special Master's Memorandum of Decision emphasized the need to develop a full record including "the nature and extent of hydrological and geological connections between the groundwater in Memphis and that in Mississippi, the extent of historical flows in the Aquifer between Mississippi and Tennessee, and similar considerations." Dkt. No. 69, 8/12/19 Memorandum of Decision at 36.

The issue before the Court is not "the Aquifer," it is Defendants' taking of *the water that is at issue in this case* out of Mississippi; yet, Defendants assert that facts such as MLGW's intentional placement of wells along the Mississippi border, and Tennessee's lack of regulatory practices necessary to protect the groundwater resource, and to preclude MLGW's from pumping billions of gallons of groundwater out of Mississippi territory are irrelevant. This is a case of first impression in a dispute between two states, each asserting their retained territorial sovereignty under the Constitution of the United States. In determining their respective rights to the groundwater that is at issue under the Constitution of the United States, all facts

relating to that groundwater and its taking should be heard, and accepted, rejected, or given such weight as the Special Master determines.

## **II. ARGUMENT**

### **A. The Evidence To Which Defendants Object Is Clearly Within The Scope Of The Issue Identified For Hearing By The Special Master**

To be clear, Rule 17.2 of the Supreme Court of the United States reads as follows: “The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence *may* be taken as guides.” (emphasis added). *See United States v. State of Texas*, 339 U.S. 707, 715 (1950) (“The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts.”); Dkt. No. 55 (Special Masters “have been advised to err on the side of over-inclusiveness in the record for the purpose of assisting the Court in making its ultimate determination.”)

This is not just an important case involving sovereigns. This is a dispute between states addressing fundamental issues of each state’s sovereignty under the United States Constitution. It is Mississippi’s position that Tennessee is violating the fundamental principle that one state must use its own resources so as not to destroy the legal rights of another state. And it is no minor technical violation unwittingly committed by Defendants, but a knowing and intentional decision by MLGW to

place wellfields within a few miles of the Mississippi border and take billions of gallons of groundwater naturally residing within Mississippi's sovereign territory into Tennessee for the use and benefit of Tennessee.

The suggestion that technical arguments of materiality and relevance should be employed to limit the evidence on the grave questions of far-reaching importance at issue in this case finds no support in similar cases. In cases with this type of Constitutional ramifications, nothing short of full development of all facts having any bearing on the Court's determination is appropriate. *See Kansas v. Colorado*, 185 U.S. 125, 145 (1902). This is also important because the resolution of disputes between states over their separate sovereign authority may be resolved by the Court's application of federal law, state law, and international law "as the exigencies of the particular case may demand." *Id.* at 146-47. A full record in this context must address all complexities of the actual geological and hydrological science, Defendants' groundwater policies and practices, and the actual impacts in Mississippi of MLGW pumping before the determination on the merits of each state's positions on the legal nature of groundwater at issue.

None of Defendants' legal citations support any different result. The Supreme Court has already decided that this is a case of sufficient seriousness and magnitude to justify exercise of its original and exclusive jurisdiction. Fundamental state sovereignty issues under the Constitution are serious, not "novel" as described by

Defendants, and the pleading standards of *Bell Atlantic Corp. v. Twombly*, have absolutely nothing to do with the issues raised by this Motion. The three Supreme Court cases cited by Defendants, *Alabama v. North Carolina*, 560 U.S. 330 (2010), and *Montana v. Wyoming*, 136 S. Ct. 1034 (2016), and *New Jersey v. New York*, 511 U.S. 1080 (1994) (leave to file Complaint), are equally inapplicable. All three cases involved construction of interstate compacts, not the determination of retained sovereign rights under the United States Constitution. The issues now challenged by Defendants are no surprise to them,<sup>1</sup> and clearly fall within the scope of evidence necessary to a full development of the record on the nature of the groundwater at issue under the Constitution.

**B. Evidence of MLGW’s Groundwater Management Practices Directly Relates To The Legal Nature of the Groundwater At Issue Under *Kansas v. Colorado*, 206 U.S. 46 (1907).**

Again, Defendants take license with the Special Master’s language regarding the scope of the upcoming hearing which reads: “the nature and extent of hydrological and geological connections between the groundwater in Memphis and that in Mississippi, the extent of historical flows in the Aquifer between Mississippi in Tennessee, and similar considerations.” Dkt. No. 69, 8/12/19 Memorandum of Decision at 36.

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<sup>1</sup> As clear from Defendants’ own motion, the issues covered by this Motion were raised in reports and during depositions in discovery.

One of the foundational principles of the Constitution is that no “state can legislate for or impose its own policy upon another.” *Kansas v. Colorado*, 206 U.S. 46, 95 (1907). The evidence in this hearing will show that the State of Tennessee has essentially ceded its responsibility to manage groundwater pumping to the City of Memphis, Shelby County, Tennessee, and MLGW. Defendants stipulated that “Defendant City of Memphis, Tennessee (“Memphis”) is a municipal corporation and, as such, a political subdivision of Tennessee with respect to governmental functions, but not with respect to proprietary functions.” Joint Stipulation S3.

The absence of enforcement of good practices and meaningful control of groundwater pumping by MLGW is directly related to the claims made by Defendants to groundwater in Mississippi. Defendants essentially assert that groundwater production in Tennessee inevitably and unavoidably takes groundwater from Mississippi. But the facts regarding “the nature and extent of hydrological and geological connections between the groundwater in Memphis and that in Mississippi” (Dkt. No. 69 at 36), should include, *inter alia*, (a) proof of MLGW’s actual practices and the effect of these practices on Mississippi, and (b) proof that the groundwater produced by Defendants could have been produced from the Memphis Sand without material impact on Mississippi by following proper groundwater development policies and practices, but that Defendants intentionally

chose to develop and operate MLGW's well fields in a way that would materially and adversely impact Mississippi.

That MLGW groundwater management and practices is an issue is no surprise to Defendants. As Defendants acknowledge, Motion at 5, Dr. Spruill raised the issue, and Defendants could have developed proof to rebut it, either through their own experts, or through MLGW employees. Knowing that this argument is not likely to succeed, they state in their motion "Defendants deny that they have engaged in any improper practices, and they would be prepared to defend their actions if the issue became relevant." (Motion at 5, n. 2). If this is true, addressing this issue should not have any material impact on the proceedings; and Defendants' claim that they "have not engaged in the kind of extensive discovery that would be necessary to build a complete record about the proprietary of MLGW's groundwater management policies," *id*, rings hollow as Defendants could have fully addressed this issue through their own employees, without the aid of any discovery.

This is not an "ancillary issue," but an actual dispute that must be developed to have a complete record. The State of Tennessee has taken the position that this dispute originally filed by Mississippi against the City of Memphis and MLGW implicates Tennessee's sovereign interest under the Constitution. By ceding authority to Memphis and MLGW to develop groundwater in an irresponsible way that both takes groundwater from Mississippi, and puts the groundwater resource at



risk in both states, Tennessee is imposing its policy on the State of Mississippi. *See Southern Motor Carriers Rate Conference, Inc. v. U.S.*, 471 U.S. 48, 59-60 (1985) (state policy can be found in state inaction as well as compulsory action). From the standpoint of any sovereign claim by Tennessee to groundwater naturally residing within Mississippi's borders, Defendants' policies, practices, and knowledge of the impacts of those policies and practices on the State of Mississippi through hydrological connections are a legitimate area of inquiry for a complete record on the issue defined by the Special Master.

**C. Mississippi's Evidence Concerning MLGW's Pumping Volumes And Diversion Of Groundwater From Mississippi Into Tennessee Relates Directly To The Nature Of The Groundwater At Issue**

Defendants' argument on this point simply defies logic, and is little more than a hodgepodge of irrelevant and facially inconsistent assertions.<sup>2</sup> Rather than attempting to address every quote stripped from its content, Defendants' argument can be summarized as follows: Defendants deny MLGW's pumping diverts groundwater residing in Mississippi across the Mississippi/Tennessee border into Tennessee (i.e., "volumes of water that MLGW *has supposedly* diverted," Motion at 7, 8); Defendants argue that "any supposed consequences such as alleged diversion

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<sup>2</sup> Defendants cite Dr. Spruill's testimony about the maximum reach of one well pumping at a maximum rate for *one year* to imply that MLGW's pumping will not have any impact on the size of a cone of depression extending into Mississippi. Motion at 10. Of course, MLGW's logic breaks down when one considers that MLGW has been pumping from over 160 wells *for decades*.

of groundwater, are irrelevant because an entity's pumping actions cannot change the fundamental hydrological and geological characteristics that determine whether a water resource is interstate." *Id.*; and Defendants argue that Mr. Wiley's failure to offer a legal opinion as to whether the "Memphis Sparta Aquifer ... is an interstate or intrastate resource" supports their position. *Id.* at 9. Defendants then effectively concede this testimony meets the relevance requirements of the Federal Rules of Evidence on the issue of the cross-border effects of MLGW pumping, but insist such relevance is marginal, and that Mississippi is attempting to make MLGW look like a "bad actor that is irresponsibly withdrawing too much groundwater." *Id.* at 11.

In response to these arguments, this testimony also pertains to MLGW's groundwater practices, and the effect of those practices on Mississippi, and is clearly relevant to the hydrological connection between the states and the determination of Mississippi's claims regarding the intrastate nature of the groundwater at issue. The Supreme Court does not allow a filing, and does not consider, every dispute between states. Defendants deny that MLGW's pumping has, or can, change the natural hydrological characteristics and flow patterns in Mississippi as alleged by Mississippi. Mississippi has the burden to prove that MLGW's massive commercial groundwater pumping has in fact materially changed those natural hydrological characteristics and flow patterns. This falls under the category of "the nature and extent of hydrological and geological connections between the groundwater in

Memphis and that in Mississippi, the extent of historical flows in the Aquifer between Mississippi in Tennessee, and similar considerations.” The historical natural pre-pumping groundwater flow path in Mississippi, and the disruption of those historical flows is shown by the impact of MLGW’s pumping volumes.

Beyond this basic proposition, there is never any evidentiary concern that a Special Master sitting without a jury will be prejudiced as that concept is recognized in Federal Rule of Evidence 403. This is done all of the time by Chancellors and other judges trying cases without a jury. In the end a record is made and the Special Master will reject or assign such testimony as much weight as considered appropriate.

## **CONCLUSION**

It is important to note that Defendants’ Motion concludes with a very broadly-worded assertion and request for relief. But the Motion itself only addresses the issues discussed above.

It is difficult to fully express the great void between the authorities cited by Defendants and this case which involves a scientifically complex issue that has never been specifically addressed by the Court. In many regards it is a much more difficult case than *Kansas v. Colorado* because the path of the water in a river is easily seen. In contrast, the groundwater at issue disappeared beneath the ground in Mississippi long before the European settlement of North America and would still be there were

it not for Defendants’ actions. The evidence shows that under natural conditions the water at issue resides in Mississippi for 4,000 to 22,000 years. Ex. 1 (excerpts from July 31, 2017, Report of David Wiley) at 4-5. All of the evidence bearing on this dispute between sovereign states in this serious matter of first impression should be considered for review under the law as briefed by the parties.

Dated: November 20, 2018

Respectfully submitted,

**THE STATE OF MISSISSIPPI**

/s/ C. Michael Ellingburg  
C. Michael Ellingburg

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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 the 20th day of November, 2018.

/s/ C. Michael Ellingburg  
C. Michael Ellingburg

*Counsel for Plaintiff*

**UPDATE REPORT ON DIVERSION AND WITHDRAWAL  
OF GROUNDWATER FROM NORTHERN MISSISSIPPI  
INTO THE STATE OF TENNESSEE  
ADDENDUM # 1**

Prepared For:

Jim Hood, Attorney General of the State of Mississippi

July 31, 2017

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# SUMMARY OF EVALUATION OF GRADIENT REPORT

## Section 1 Introduction

### 1.2 Opinion Summary:

**1. The Memphis Sand/Sparta Aquifer (MSSA) lies beneath several states and is a shared resource among all the states that overlie it, including Mississippi and Tennessee.**

MLGW is not sharing water. They pump the amounts that they want without approval/permission from Mississippi for the amount diverted from Mississippi due to the cone of depression created.

**4. In pre-development times (before pumping began), groundwater in the MSSA naturally flowed across multiple state lines, including the Mississippi-Tennessee border.**

Only some water flows slowly from Mississippi to Tennessee.

**6. Pumping from the MSSA in one state can impact the flow direction and potentiometric head in another state.**

Agreed that pumping by MLGW impacts flow direction and potentiometric head in Mississippi.

**8. Water flow patterns in the MSSA were not influenced by state lines under pre-development conditions and are not influenced by state lines under current conditions.**

Agreed, however pumping by MLGW has altered flow patterns in Mississippi by diverting groundwater flow to Tennessee.

**9. Under pre-development conditions, all groundwater that entered the MSSA in Mississippi would eventually leave Mississippi.**

Under pre-development conditions Sparta aquifer water resides in Mississippi for approximately 4,000 years to 22,000 years (**Figure 1**) and moves at a rate of approximately 13 to 53 feet per year based on USGS model used by Gradient. From the

same model, in 2007, water velocity was increased due to MLGW pumpage to a rate of approximately 8 to 214 feet/year.

## **Section 2 Scientific Principles and Physical Setting**

### **2.2 MSSA and Mississippi Embayment Overview:**

Page 9, last paragraph – “Other interstate aquifers” is referred to by Gradient. The phrase “interstate aquifer” has no known technical reference in USGS literature or from other scientific professional organizations.

### **2.3 The Sparta Sand Aquifer in Mississippi and the upper Memphis Sand Aquifer in Tennessee are different names for the same aquifer:**

Page 10, 1<sup>st</sup> sentence - There is no known historical and recent scientific literature that calls the MSSA an interstate aquifer. Also, the MSSA is not a shared resource. MLGW pumps the amounts that they want without approval from Mississippi.

Page 12, 5<sup>th</sup> bullet, Reed (1972) – Gradient refers to “interstate significance in such places as Memphis.” This significance is the result of the cone of depression created by MLGW and the resulting groundwater flow diversions.

Page 12, 8<sup>th</sup> bullet, Arthur and Taylor (1990) – Arthur and Taylor do not refer to MSSA as being interstate.

Page 13, 2<sup>nd</sup> bullet, Arthur and Taylor (1998) – Gradient states that Arthur and Taylor describe the “historical shared nature of MSSA.” Arthur and Taylor do not state that and just because one entity in one state pumps from an aquifer and another entity in another state pumps from the same aquifer does not mean they are not sharing. MLGW pumps the amount of water that they want with no permission from Mississippi for the amount being diverted.