

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.

**REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION TO EXCLUDE
EVIDENCE IRRELEVANT TO THE LIMITED EVIDENTIARY HEARING**

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GLOSSARY

Aug. 2016 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)
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’ Joint Motion to Exclude Mississippi’s Designated Deposition Testimony (Nov. 20, 2018) (Dkt. No. 87)
MLGW	Memphis Light, Gas & Water Division
Nov. 2018 Op.	Memorandum of Decision on Defendant’s Motion for Summary Judgment, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. Nov. 29, 2018) (opinion of Special Master) (Dkt. No. 93)
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.
Waldron June Rep.	Expert report of Brian Waldron, Ph.D. (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 2007) (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

Mississippi's opposition brief to Defendants' motion to exclude irrelevant evidence confirms beyond doubt that it intends to disregard the Special Master's August 2016 order for a *limited* hearing, which, as the Special Master recently reaffirmed, "will focus solely on whether this case involves an interstate resource." Nov. 2018 Op. 20.

Mississippi explains at length that it intends to present substantial amounts of evidence relevant only to legal theories that the Special Master twice has rejected. Mississippi intends to put at issue "Defendants' *taking*," Miss. Br. 3 (emphasis added), reopening the ownership and tort theories that the Special Master has repeatedly set aside, *see* Nov. 2018 Op. 20-26; Aug. 2016 Op. 20-24. The evidence Mississippi proposes to put on includes "MLGW's intentional placement of wells," "Tennessee's lack of regulatory practices," and "MLGW's from [sic] pumping billions of gallons of groundwater." Miss. Br. 3. Under any reasonable reading of the Special Master's decisions, these issues are irrelevant to this limited hearing.

Notably absent from Mississippi's brief is any substantive discussion of the "limited issue of whether the Aquifer and the water constitutes an interstate resource." Aug. 2016 Op. 36. In other words, Mississippi's brief lacks any explanation of how groundwater management practices and pumping volumes are relevant to the "interstate character of the water." Nov. 2018 Op. 10. Mississippi

fails to connect its proposed evidence to the sole issue before the Special Master because it cannot do so.

Indeed, Mississippi's brief reveals that it will not even try to limit its evidence to the issue before the Special Master; in a moment of candor, Mississippi dismisses "materiality" and "relevance" as "technical arguments," Miss. Br. 5, that apparently require no substantive response. Instead, Mississippi intends to provide "full development of all facts" and make a "full record" on all of its various tort theories. *Id.* A *full* hearing on those theories is what the Special Master rejected in favor of a limited hearing on a threshold and likely dispositive issue. The parties already have devoted substantial public resources to this litigation. Permitting Mississippi to expand this hearing to include its twice-rejected alternative theories would nullify the efficiencies the Special Master sought to achieve and only waste more public resources.

Further, admitting such evidence would prejudice Defendants, which have not developed evidence on issues like MLGW's groundwater management. Mississippi's argument that Defendants "could have fully addressed this issue," *id.* at 8, is misguided. Defendants could have engaged in discovery on MLGW's groundwater management practices, for example, only by violating the Special Master's Case Management Plan, which restricted the scope of discovery to the threshold issue. *See* Case Management Plan ¶ 4(a) (Dkt. No. 57). Having declined

to do so, Defendants will be unable to respond fully if Mississippi now is permitted to expand the scope of the evidentiary hearing to include issues beyond the single issue identified in the Special Master’s August 2016 opinion. Allowing such evidence needlessly would extend the hearing, and the Special Master would not benefit from a one-sided presentation of Mississippi’s evidence on irrelevant issues. The Special Master should enforce his August 2016 and November 2018 decisions and exclude Mississippi’s proffered evidence on groundwater management practices and pumping volumes.

II. ARGUMENT

A. The Special Master Has Made Clear That This Hearing Concerns A Narrow Threshold Question

The rule that evidence must be relevant, *see* Sup. Ct. R. 17.2; Fed. R. Evid. 402, has special weight where a court specifically has carved out a single issue for a limited hearing. Here, the Special Master has made abundantly clear that this first hearing involves only the “limited – and potentially dispositive – issue of whether the Aquifer is, indeed, an interstate resource.” Aug. 2016 Op. 1.¹

¹ Mississippi quibbles with the Special Master’s phrasing and argues strenuously that the issue is whether the *groundwater*, not the Aquifer, is interstate. *E.g.*, Miss. Br. 3. The Special Master has already rejected this “line-drawing,” Nov. 2018 Op. 14, but, if there is any distinction, it does not matter to this motion because MLGW’s groundwater management practices and pumping volumes are equally irrelevant no matter how the issue is framed.

The August 2016 decision balanced the seriousness of this forum with the need to “mov[e] the case along in a timely and efficient manner,” *id.* at 36, consistent with the Supreme Court’s approval of a procedure that may “facilitate the efficient disposition of the case,” *Alabama v. North Carolina*, 560 U.S. 330, 353-54 (2010). Phased litigation is efficient precisely because it allows the parties, and the Special Master, to defer “full factual discovery,” especially on “novel and challenging” legal issues, until needed. *Id.*² Deferring full discovery makes particular sense here because the Special Master already has observed that “Defendants present a strong case” and that, “by rejecting equitable apportionment, Mississippi might have abandoned the only mechanism for relief,” Nov. 2018 Op. 3, 27, in which case further proceedings will be unnecessary.

Mississippi’s arguments in favor of full development of *all* facts are misplaced. The Supreme Court generally favors liberal admission of evidence, but allowing States to offer evidence without limitation would vitiate the kind of phased litigation that the Court has approved in cases like *Montana v. Wyoming*, 136 S. Ct. 1034 (2016) (entering order proposed by Special Master), and *Alabama v. North Carolina*, 560 U.S. 330 (2010). Mississippi quotes (at 4) *United States v. Texas*, 339 U.S. 707 (1950), for the proposition that “[t]he Court in original actions . . . has

² Mississippi oddly asserts that the issues here are “not ‘novel,’” Miss. Br. 5-6, despite noting that “[t]his is a case of first impression,” *id.* at 3, involving a “complex issue that has never been specifically addressed by the Court,” *id.* at 11.

always been liberal in allowing full development of the facts,” but that very case also demonstrates that the principle is not unlimited, as the Court concluded “that no such hearing is required in this case.” *Id.* at 715.

Phased litigation (which Mississippi itself requested, *see* Aug. 2016 Op. 36) by definition means that not all issues are relevant at each stage. Mississippi proposes (at 3-4) to offer evidence on “all facts relating to th[e] groundwater and its taking” – in other words, all of the evidence it would have offered at a full trial had the Special Master not narrowed the issues. But the Special Master has made clear that this hearing is limited to “the interstate character of the water.” Nov. 2018 Op. 10. Allowing Mississippi to put in evidence regardless of its materiality or relevance to that issue runs contrary to both of the Special Master’s decisions.

It also would be prejudicial to Defendants. Defendants have “engaged in *discovery on the limited issue* identified by the Special Master: whether this case involves an interstate resource.” *Id.* at 7 (emphasis added). That was not merely a strategic choice; Defendants were complying with the Special Master’s Case Management Plan, which restricted the scope of discovery to that issue. *See* Case Management Plan ¶ 4(a) (Dkt. No. 57). Allowing Mississippi to present a one-sided picture of, for example, MLGW’s groundwater management practices, or groundwater pumping volumes in Tennessee but not those in Mississippi, would disadvantage Defendants, which reasonably relied on the Special Master’s orders. It

also would hinder the judicial fact-finding process, which depends on a full adversarial presentation to develop an accurate record. The Special Master should enforce his prior orders and exclude all evidence that does not bear on the limited threshold issue.

B. Mississippi Fails To Explain How MLGW's Groundwater Management Practices Relate To The "Interstate Character" Of The Resource

Mississippi's voluminous evidence concerning MLGW's groundwater management practices has no bearing on the interstate character of the Aquifer or the water in it. The actions of those who use a water resource simply cannot affect the intrinsic hydrological, geological, and geographical characteristics that determine whether that resource is "interstate" or "intrastate." A utility's placement of wells to withdraw water from an aquifer cannot change the interstate character of groundwater, just as a farmer's placement of riverside pumps cannot change the interstate character of a river. There is no logical basis for the contention that groundwater management practices can cause groundwater to be interstate or intrastate.

Mississippi acknowledges that it intends to offer evidence concerning MLGW's groundwater management, including related topics like MLGW's intent or knowledge and Tennessee's water regulations. Among other things, Mississippi specifically contends that it should be able to offer evidence showing:

- “a knowing and intentional decision by MLGW to place wellfields within a few miles of the Mississippi border”
- “that the State of Tennessee has essentially ceded its responsibility to manage groundwater pumping to the City of Memphis, Shelby County, Tennessee, and MLGW”
- “The absence of enforcement of good practices and meaningful control of groundwater pumping by MLGW”
- “Defendants’ policies, practices, and knowledge of the impacts of those policies and practices on the State of Mississippi”

Miss. Br. 4-5, 7, 9. None of these facts – even assuming Mississippi could prove them – could make it any more or less probable that the resource at issue is interstate.

Mississippi explains that it is offering this type of evidence to support “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.” *Id.* at 4. As the Special Master has observed, however, arguing about the violation of rights is premature; at this stage, “the Special Master is tasked with determining the *extent* of those rights.” Nov. 2018 Op. 21. Thus, Mississippi first must prove, at *this* hearing, that it has rights other than the right to equitable apportionment. Only if Mississippi could establish such rights would the Special

Master need to consider whether those rights had been violated, and only then would evidence concerning groundwater management practices be relevant.

Evidence about Defendants' practices, policies, regulations, intent, and knowledge is irrelevant to the threshold question whether the resource at issue is interstate, and the Special Master should exclude it from this limited hearing.

C. Mississippi's Evidence Concerning MLGW's Pumping Volumes And Supposed "Diversion" Should Be Excluded

Mississippi's evidence about the volumes of water MLGW has withdrawn from the Aquifer and the volumes of water that MLGW supposedly has diverted across the border should be excluded for similar reasons to its groundwater management-related evidence. The actions of a groundwater user cannot change the fundamental, intrinsic characteristics that determine whether a resource is interstate. Mississippi's evidence about MLGW's pumping and supposed diversion is directed at proving MLGW's liability and damages under a tort or ownership theory. But, as the Special Master has made clear, the only issue at this hearing is the threshold issue of whether Mississippi has *any* rights other than the right to equitable apportionment (which it has disclaimed). Evidence about pumping and diversion volumes is irrelevant and improper at this initial hearing.³

³ As Defendants have explained in their Joint Motion To Exclude the Testimony and Opinions of Mississippi's Expert David A. Wiley ("Defs.' Mot. To Exclude Wiley"), Mr. Wiley's opinions on these issues also are unreliable and should be excluded for that independent reason.

Mississippi itself confirms that its pumping-volume evidence should be treated similarly to its irrelevant groundwater-management evidence. As it explains, “this testimony also pertains to MLGW’s groundwater practices, and the effect of those practices on Mississippi,” and is thus relevant to Mississippi’s “burden to prove that MLGW’s massive commercial groundwater pumping has in fact materially changed those natural hydrological characteristics and flow patterns.” Miss. Br. 10. No such burden exists here; under the Special Master’s decisions, Mississippi’s only burden in this hearing is to prove that this case does not involve an interstate resource. *See* Aug. 2016 Op. 1, 36; Nov. 2018 Op. 10. If evidence is not material to that issue, it has no place at this hearing.

Mississippi vaguely asserts that Mr. Wiley’s testimony on pumping volumes is relevant to the fundamental hydrological characteristics of the Aquifer. In particular, Mississippi’s brief asserts (at 10) that there is a dispute over whether “MLGW’s pumping has, or can, change the natural hydrological characteristics and flow patterns in Mississippi as alleged by Mississippi.” But the “natural hydrological characteristics and flow patterns” of the Aquifer are historical facts; neither MLGW nor anyone else can alter the historical fact that, under natural conditions, the Aquifer had particular characteristics and a particular flow pattern.

Mississippi attempts to confuse the issue by conflating natural flow patterns with subsequent *changes* to flow patterns. Thus, it asserts (at 11) that, because the

Special Master has requested evidence on “the extent of historical flows in the Aquifer,” it is entitled to offer evidence about “the *disruption* of those historical flows.” (emphasis added). That does not follow, however. The former is a natural hydrological characteristic that could be relevant to the interstate character of the resource; the latter is relevant only if Mississippi is allowed to pursue a *tort-based* theory predicated on interference with resources *owned* by Mississippi. Again, Mississippi is attempting to expand this limited hearing to include its alternative theories; the Special Master should reject this ploy.

Unlike with MLGW’s groundwater management practices, one could argue for an indirect connection between MLGW’s pumping and the natural characteristics of the Aquifer. MLGW’s pumping has affected flow patterns in Mississippi, which follows from the intrinsic hydrological fact that pumping in Tennessee *can* affect groundwater in Mississippi. That underlying fact is relevant to the interstate character of the resource. But evidence on this fact is entirely cumulative, because it already is undisputed that pumping in Tennessee can change groundwater flow in Mississippi, as well as vice-versa. *See* Resp. to D72-D73, D77; Ex. 9 (Wiley Dep. 16:4-13). Moreover, Mississippi does not appear to be offering its pumping-volume evidence based on this tenuous connection. Rather than articulating how evidence of pumping volumes and supposed diversion could relate to the interstate character of the water, Mississippi makes clear it offers this evidence to support its alternative

tort theories. That improper evidentiary purpose should lead to the exclusion of Mississippi's evidence concerning MLGW's pumping volumes and the supposed diversion of groundwater.

Further, although the Federal Rules of Evidence are not binding, the principles of Rule 403 strongly weigh toward exclusion. Even if Mr. Wiley's pumping-volume evidence has marginal probative value, it would waste substantial time. As discussed at length in Defendants' motion to exclude his testimony, Mr. Wiley's opinions about pumping volumes are riddled with inconsistencies and errors. *See* Defs.' Mot. To Exclude Wiley 3-9. Mississippi, in opposing that motion, has offered an affidavit in which Mr. Wiley attempts to explain the various inconsistencies between his 2007 report, his 2014 report, and his first 2017 report, as he failed to do during his deposition. *See* Pl.'s Response to Defs.' Mot. To Exclude Wiley, Ex. 3. Sorting out Mr. Wiley's current opinions from at least three reports over the course of 10 years – as well as cross-examining him on his recent affidavit, provided some 14 months after the close of discovery – will be a mini-trial in itself, with only the most tenuous connection to the actual issue before the Special Master. There is no reason to admit evidence to establish an already-undisputed proposition when its

“marginal probative value” is “substantially outweighed by the prospect of a sideshow.” *United States v. Della Rose*, 403 F.3d 891, 905 (7th Cir. 2005).⁴

Mississippi’s pumping-volume evidence, like its groundwater-management evidence, is intended to prove its alternative theories. The Special Master twice has rejected those alternative theories. Mississippi should not be permitted to ignore the Special Master’s decisions by offering evidence in support of those theories at the hearing, wasting time and public resources, and prejudicing Defendants, which reasonably relied on the Special Master’s orders during discovery.

CONCLUSION

The Special Master should exclude all evidence that falls outside the scope of his August 2016 and November 2018 decisions, including evidence concerning MLGW’s groundwater management practices, the volumes of groundwater that MLGW has pumped, and the amount of water supposedly diverted.

⁴ Mr. Wiley still could testify about pre-development flow patterns even if his testimony about pumping volumes is excluded.

Respectfully submitted this 7th day of December 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 7th day of December 2018.

/s/ David C. Frederick

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