

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 REPLY IN SUPPORT OF THEIR
MOTION IN LIMINE TO PRECLUDE MISSISSIPPI FROM ARGUING
THAT THERE ARE TWO AQUIFERS AT ISSUE**

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GLOSSARY

Aug. 2016 Op.	Memorandum of Decision on Tennessee’s Motion to Dismiss, Memphis and Memphis Light, Gas & Water Divison’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)
Def. Joint Mot.	Defendants’ Joint Motion in Limine To Preclude Mississippi from Arguing That There Are Two Aquifers at Issue, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed Nov. 1, 2018) (Dkt. No. 78)
Miss. Br.	Plaintiff’s Response to Defendants’ Motion in Limine To Preclude Mississippi from Arguing That There Are Two Aquifers at Issue, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed Nov. 20, 2018) (Dkt. No. 85)
MLGW	Memphis Light, Gas & Water Division
Nov. 2018 Op.	Memorandum of Decision on Defendants’ 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)
Pl. Resp. Request for Admission	Plaintiff’s Response to Defendants’ Request for Admission
Spruill Dep.	Deposition of Richard K. Spruill (Sept. 28, 2017)
Spruill June Rep.	Expert Report: Hydrogeologic Evaluation and Opinions for State of Mississippi versus State of Tennessee, City of Memphis, and Memphis Light, Gas & Water Division (June 30, 2017)
Wiley June Rep.	Update Report on Diversion and Withdrawal of Groundwater from Northern Mississippi into the State of Tennessee (June 30, 2017)

I. INTRODUCTION

The Special Master should preclude Mississippi from arguing or attempting to elicit testimony or introduce evidence to support its eleventh-hour theory that there are two aquifers at issue because it is a belated attempt by Mississippi to introduce new, irrelevant issues following the close of discovery. There is one Aquifer at issue, regardless of any dispute about naming conventions.¹

II. ARGUMENT

The alleged confusion surrounding the question whether there are one or two aquifers is of Mississippi's own creation. All parties have long agreed that there is a single Aquifer underlying both States with a variety of names. In fact, Mississippi stipulated that the Aquifer at issue underlies both Mississippi and Tennessee. But the Special Master twice has rejected Mississippi's contention that the groundwater could be considered separately from the geological formation of the Aquifer. *See* Nov. 2018 Op. 13-14; Aug. 2016 Op. 31-32. Thus, Mississippi now is engaged in a last-minute attempt to support its erroneous claim that the Aquifer, which includes the water in it, is not interstate by reversing its position that there is a single Aquifer.

¹ Further, whatever the resource is called, it does not change the fact that there is no law or legal precedent that supports Mississippi's position that it "owns" a portion of the resource and that disputes between States over their respective rights to use it can be resolved by tort claims.

Moreover, by asserting that the Memphis Sand and Sparta Sand aquifers are “two distinct” aquifers, Mississippi is urging the Special Master to disregard its prior statements, its discovery responses,² and its experts’ opinions³ in the interest of what Mississippi now erroneously claims to be “genuine scientific evidence.” Miss. Br. 9. Contrary to Mississippi’s claim (*id.* at 3), Defendants are not seeking to limit *legitimate* scientific evidence at the hearing. Defendants do not object to Mississippi’s submission of evidence about relevant hydrogeological features of the Middle Claiborne Aquifer, including the existence of the “facies change in the

² Mississippi admitted in discovery that “the Aquifer” is a geologic formation that underlies Mississippi and Tennessee. Pl. Resp. Request for Admission No. 1. To the extent Mississippi seeks to discount its response because it was served “early in the discovery” in this proceeding (Miss. Br. 9), it has no basis for doing so under Federal Rule of Civil Procedure 36 – and, of course, Mississippi had been litigating these issues for 12 years before it served its response. Pursuant to Rule 36, Mississippi’s admission that the “Sparta Sand underlies several states, including Mississippi, Tennessee, and Arkansas,” is “conclusively established.” Fed. R. Civ. P. 36(b).

³ Mississippi’s expert David Wiley describes the Aquifer at issue as the “Sparta Sand formation beneath northwest Mississippi and southwest Tennessee,” which is “a discrete geological formation” that “underlies both states.” Ex. 7 (Wiley June Rep. 5). Mr. Wiley acknowledges that the “Sparta Sand formation” is “[t]he primary source of fresh water supply for most of northwest Mississippi and the Memphis, Tennessee areas” and that it is “referred to as the Memphis Sand in Tennessee within the Claiborne Geological Group.” *Id.* Mississippi’s other expert, Dr. Richard Spruill, uses the term “Sparta-Memphis Sand” but notes that it is also known as “the Sparta Sand, Memphis Sand, Memphis Aquifer, and other variations.” Ex. 21 (Spruill June Rep. 1). While Dr. Spruill testified that there are regional differences in thickness and areal distribution across the Aquifer, the “Memphis Sand” and “Sparta Sand” are “part of a single geological formation” or “part of the same hydrostratographic unit.” Ex. 20 (Spruill Dep. 9:4-9).

Middle Claiborne.” *Id.* at 6. Rather, Defendants seek to prevent Mississippi from giving the false impression that there is a barrier to interstate flow at or near the Mississippi-Tennessee border by mischaracterizing the relevant science. Mississippi does not deny that the first time it argued that there were two aquifers rather than one occurred *long after the close of discovery*, and Mississippi does not deny that Defendants have been prejudiced by its post-discovery change of theory. This new theory distracts from the actual scientific evidence.

The relevant scientific evidence for purposes of deciding whether there is an interstate water resource indicates that there is only one aquifer – one single, continuous hydrogeological unit – at issue. The Aquifer at issue – from which groundwater is withdrawn by pumps located in Tennessee and in Mississippi (among other States) – has been known by different names in different areas. Whether referred to as the Memphis Sand, Sparta Sand, or Middle Claiborne, it is undisputed that water flows throughout the formation without meaningful impediment, including past the “facies change,” and withdrawing water from the Aquifer in one State can impact groundwater flow in another State. Indeed, Mississippi’s claims are premised on these undisputed facts. Nor does the nomenclature change the undisputed fact that, before pumping began, the water in the Aquifer naturally flowed across state lines. These facts – which are undisputed – are those the Special Master found to be relevant to whether the Aquifer is interstate. Defendants are not

seeking to prevent Mississippi from offering valid scientific evidence about the fundamental hydrological and geological characteristics of the resource at issue. But Mississippi should not be allowed to offer newly invented *legal* theories that are inconsistent with the undisputed hydrological facts agreed upon by all sides' experts.

Mississippi is now arguing that its own "two-aquifer" theory is a "red herring." Pl.'s Resp. to Defs.' Mot. for Summ. J. 11-12 (Dkt. No. 71). Defendants agree. Mississippi's late-in-the-game argument is a needless distraction. Up until Mississippi changed theories, all of the parties had agreed that this original action concerned a single natural resource through which groundwater flows uninterrupted across state lines and which serves as a common and plentiful source of water for Tennessee and Mississippi. The Special Master has now twice found that "the water at issue is likely interstate in nature." Nov. 2018 Op. 13. The evidentiary hearing should focus on the limited issue of whether that resource is interstate and not be sidetracked by a dispute about nomenclature.

Any argument by Mississippi that there are "at least two distinct, but interconnected, Aquifers: the Sparta Sand and the Memphis Sand" (*id.* at 11) is, as Mississippi asserts, "beside the point" (*id.* at 13). That argument is irrelevant and a waste of time because it does not change the material and undisputed facts that the Special Master has identified as being relevant to the threshold issue. The Special Master should preclude any such evidence. Further, Mississippi has stipulated that

the Aquifer at issue – meaning the single hydrogeological unit that is pertinent to this dispute – extends beneath Mississippi and Tennessee. The Special Master should hold Mississippi to it.

CONCLUSION

The Special Master should grant Defendants’ joint motion to preclude Mississippi from arguing that there are two aquifers at issue.

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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