

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 Exceptions to Report of the Special Master

**EXCEPTION IN PART OF DEFENDANTS
STATE OF TENNESSEE, CITY OF MEMPHIS, AND
MEMPHIS LIGHT, GAS & WATER DIVISION
TO REPORT OF THE SPECIAL MASTER
AND BRIEF IN SUPPORT OF EXCEPTION**

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**EXCEPTION IN PART OF DEFENDANTS
TO REPORT OF THE SPECIAL MASTER**

The Special Master correctly rejected Mississippi's claims and recommended the dismissal of its Complaint. But the Special Master also recommended that the Court dismiss "with leave to amend the complaint to include a claim for equitable apportionment." Rep. 26; *see* Rep. 2 (similar). Because leave to amend would conflict with core original-jurisdiction principles and create undue prejudice, Defendants except to the Special Master's recommendation on that narrow point. The Court should thus adopt the Special Master's recommendations except for his conclusion that Mississippi should receive "leave to amend the complaint." Rep. 26.

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GLOSSARY

2009 Compl.	Compl., <i>Mississippi v. City of Memphis, et al.</i> , No. 139, Orig. (U.S. Sept. 2, 2009) (reproduced at App. 54a-64a)
2014 Compl.	Compl., <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. June 6, 2014)
2016 Op.	Memorandum of Decision on Motions To Dismiss and Motion To Exclude, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. Aug. 12, 2016) (Special Master's Dkt. #55)
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) (Special Master's Dkt. #93)
App.	Appendix bound together with this brief
Aquifer	Middle Claiborne Aquifer
DFOF	Defendants' Proposed Findings of Fact, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. Sept. 19, 2019) (Special Master's Dkt. #115) (reproduced at App. 65a-140a)
<i>Hood</i> 2005 Compl.	Compl., <i>Hood ex rel. Mississippi v. City of Memphis, et al.</i> , No. 2:05CV32-GHD, Dkt. #2 (N.D. Miss. Feb. 1, 2005) (reproduced at App. 1a-29a)

<i>Hood</i> 2006 Am. Compl.	First Am. Compl., <i>Hood ex rel. Mississippi v. City of Memphis, et al.</i> , No. 2:05CV32-GHD, Dkt. #112 (N.D. Miss. Oct. 5, 2006) (reproduced at App. 30a-50a)
Hr'g Tr.	Transcript of Evidentiary Hearing Before Special Master, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (May 20-24, 2019) (Special Master's Dkts. #105-#109)
Joint Exhibit	Exhibit filed jointly by the parties in the evidentiary hearing before the Special Master in May 2019
Miss. Post-Hearing Response Br.	State of Mississippi's Combined Response to Defendants' Post-Hearing Briefs, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. Oct. 21, 2019) (Special Master's Dkt. #127)
Mississippi Embayment	Mississippi Embayment Regional Aquifer System
Rep. or Report	Report of the Special Master, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. Nov. 5, 2020) (Special Master's Dkts. #135 & #136)
Special Master	Honorable Eugene E. Siler, Jr.
Stip. Fact	Plaintiff's and Defendants' Joint Statement of Stipulated and Contested Facts, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. Feb. 27, 2018) (Special Master's Dkt. #64)

- Tr. (Branch) Deposition Transcript of Charles Thomas Branch, *Hood ex rel. Mississippi v. City of Memphis, et al.*, No. 2:05CV32-GHD (N.D. Miss. Oct. 1, 2007) (excerpt reproduced at App. 53a) (excerpt submitted as part of the record by Defendants in Joint Submission of Deposition Designations (Sept. 14, 2018))
- Tr. (Crawford) Deposition Transcript of Jamie Crawford, *Hood ex rel. Mississippi v. City of Memphis, et al.*, No. 2:05CV32-GHD (N.D. Miss. July 30, 2007) (excerpt reproduced at App. 51a-52a) (excerpt submitted as part of the record by Defendants in Joint Submission of Deposition Designations (Sept. 14, 2018))
- USGS U.S. Geological Survey

INTRODUCTION

For more than 15 years, Mississippi has claimed that state tort law, rather than the federal equitable-apportionment doctrine, governs the water in the multistate Middle Claiborne Aquifer (“Aquifer”). Mississippi took this position to sidestep equitable apportionment’s heightened pleading requirements and to avoid scrutiny of its own water use. Mississippi alleges neither a water shortage nor any impediment to its ability to obtain water from the Aquifer. Rather, it claims to “own” the Aquifer’s groundwater and asserts that Defendants owe money damages for pumping from Tennessee’s side of the resource.

After years of discovery and a week-long evidentiary hearing, the Special Master correctly rejected Mississippi’s position. This Court’s cases establish that equitable apportionment is the exclusive remedy for disputes over interstate water resources. The facts confirm that the Aquifer is an interstate resource underlying eight States. Because Mississippi has “not requested equitable apportionment,” the Special Master thus recommended the dismissal of Mississippi’s Complaint. Rep. 2. But he also recommended that Mississippi receive “leave to amend the complaint to include a claim for equitable apportionment” of the Aquifer. Rep. 26.

Although the Special Master’s analysis was correct in virtually every respect, the final point was not. Allowing Mississippi to add an equitable-apportionment claim would violate this Court’s standard for amending pleadings in original actions, thwart equitable apportionment’s stringent pleading requirements, and prejudice Defendants. Mississippi has not made, and cannot make, the threshold showing of injury necessary to apportion the Aquifer. The Court should dismiss its Complaint with prejudice.

JURISDICTION

On June 29, 2015, this Court granted Mississippi’s motion for leave to file its Complaint against Tennessee, the City of Memphis, Tennessee, and the Memphis Light, Gas & Water Division.¹ The Court’s jurisdiction over this controversy between two States is both original and exclusive. *See* U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a).

The Court referred the matter to the Special Master on November 10, 2015. On November 5, 2020, the Special Master issued his Report recommending that this Court dismiss Mississippi’s Complaint but grant Mississippi leave to file an amended complaint asserting a claim for equitable apportionment. On December 7, 2020, the Court authorized the filing of exceptions to that Report.

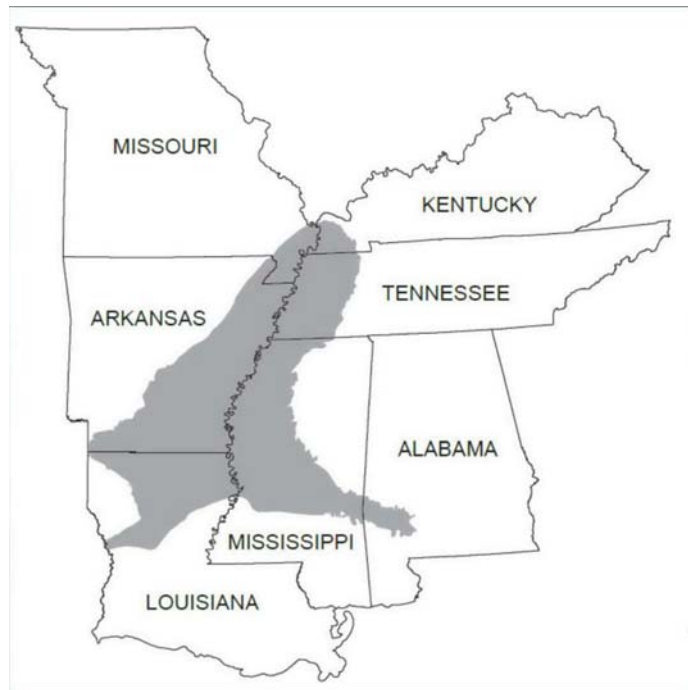
STATEMENT

A. The Middle Claiborne Aquifer

The Middle Claiborne Aquifer is a large, multistate aquifer that spans much of the Gulf Coast Plain around the Mississippi River. The Aquifer extends horizontally beneath portions of eight different States: Tennessee, Mississippi, Arkansas, Louisiana, Alabama, Kentucky, Missouri, and the southernmost tip of Illinois. DFOF ¶¶ 64, 97 (App. 88a, 94a); Rep. 17. The map below shows the generally agreed-upon border of the Aquifer as illustrated by the U.S. Geological Survey (“USGS”), the federal agency tasked

¹ For simplicity, Defendants refer to the City of Memphis and the Memphis Light, Gas & Water Division collectively as “Memphis.” Although all Defendants are filing a joint brief in support of their limited exception in part to the Special Master’s Report, Memphis and Tennessee reserve the right to file separately in response to any forthcoming exceptions by Mississippi.

with monitoring and evaluating water resources. DFOF ¶ 5 (App. 71a).



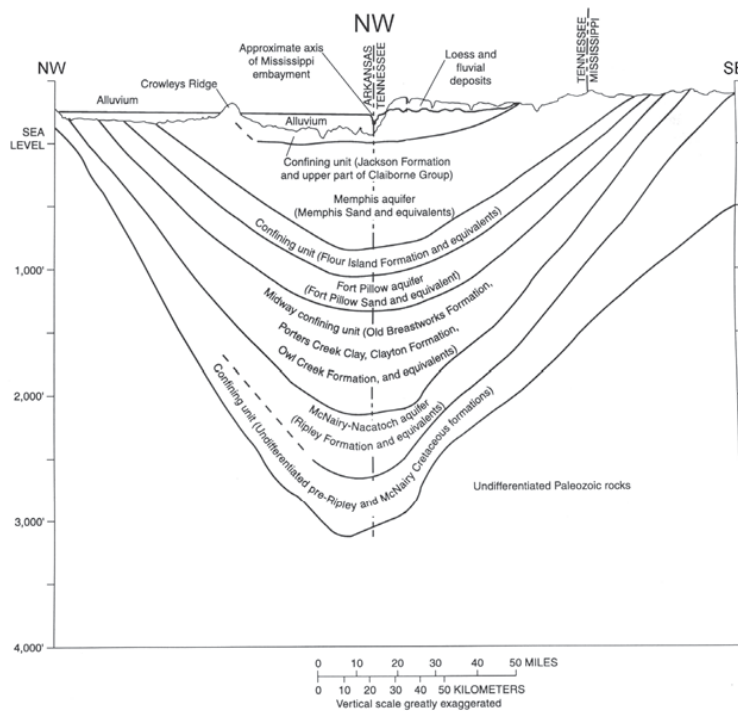
Joint Exhibit 71 (excerpt).²

Groundwater exists beneath the land surface in the pore spaces of rocks, sediments, and other geological material. DFOF ¶ 6 (App. 71a). Hydrogeologists classify sections of geological materials as distinct formations, or hydrogeological units, based on the material's ability to transmit water. *Id.* ¶ 7 (App. 71a-72a). There are two main types of hydrogeological units: aquifers and confining layers. An aquifer contains sufficient saturated, permeable materials to yield usable quantities of water to wells and springs.

² The document from which the above figure has been excerpted, which was submitted in its entirety as Joint Exhibit 71, can be found at <https://pubs.usgs.gov/sim/3014/pdf/sim3014.pdf>.

Id. ¶¶ 9-10 (App. 72a). A confining layer is made of less permeable materials and can separate aquifers. *Id.* ¶ 11 (App. 72a).

The Middle Claiborne Aquifer is one layer within the Mississippi Embayment Regional Aquifer System (“Mississippi Embayment”) – a group of interconnected hydrogeological units in the Mississippi River Valley area. *Id.* ¶¶ 48, 50 (App. 80a). Viewed as a cross section, the Mississippi Embayment contains a number of laterally extensive aquifers separated by confining layers. *Id.* ¶¶ 16, 50, 51 (App. 74a, 80a). The figure below shows the general structure of the Mississippi Embayment in the Memphis area, as illustrated by the U.S. Environmental Protection Agency. It labels the Aquifer as the “Memphis” aquifer, which is another name for the same formation. *See id.* ¶¶ 191-197 (App. 112a-113a).



Joint Exhibit 76 at pdf p. 32.³ The intervening confining layers in the Mississippi Embayment restrict, but do not obstruct, the vertical movement of water from one aquifer to another. DFOF ¶¶ 11, 52 (App. 72a-73a, 82a). In the area around Memphis, the Aquifer is “confined,” meaning that it has an overlying confining layer creating enough pressure such that, when a well is placed in the Aquifer, water rises in the well above the bottom of the confining layer. *Id.* ¶ 23 (App. 75a). The elevation to which that water rises in the well is the “potentiometric” level, and it reflects the pressure in the aquifer and the elevation of the well. *Id.* ¶ 26 (App. 76a).

Groundwater within the Middle Claiborne, and virtually all aquifers, is constantly moving from areas of higher potentiometric level to areas of lower potentiometric level. *Id.* ¶¶ 19, 34, 264 (App. 74a, 77a, 129a-130a). Under natural conditions, groundwater in the Aquifer slowly flowed across state lines, including from Mississippi to Tennessee. Rep. 24; DFOF ¶ 135 (App. 102a).

Human development of the Aquifer occurs through groundwater pumping. Pumping in the Memphis area from the Aquifer began in approximately 1886. DFOF ¶ 131 (App. 101a). Pumping from any well lowers the potentiometric level surrounding the well, *id.* ¶ 38 (App. 78a), and naturally creates a cone-shaped pattern of reduced potentiometric levels around a pumped well, which hydrogeologists call a “cone of depression,” Rep. 13; DFOF ¶ 39 (App. 78a). Such a cone of depression causes water to flow from surrounding areas towards the well. DFOF ¶ 40

³ The document in which the above figure appears, which was submitted in its entirety as Joint Exhibit 76, can be found at <https://bit.ly/2N36eBP>.

(App. 78a). Every well creates a cone of depression, and it is impossible to develop a groundwater resource without creating one. *Id.* ¶¶ 41, 220 (App. 78a, 122a). A confined aquifer (as the Aquifer is near Memphis) remains fully saturated even when pumped; the water in the aquifer within the cone of depression is just under less pressure.⁴ *Id.* ¶¶ 23, 45 (App. 75a, 79a).

Well pumping has caused many cones of depression throughout the Aquifer.⁵ Rep. 21-23. One of them exists in the area around the City of Memphis (Shelby County, Tennessee), in the southwest corner of the State near the Mississippi and Arkansas borders. DFOF ¶ 122 (App. 99a). The Memphis-area cone of depression is the result of nearby pumping in *all* three States. *Id.* ¶¶ 119-120 (App. 98a).

Memphis relies on the Aquifer's groundwater as its primary public water source and pumps from several well fields throughout Shelby County. *Id.* ¶¶ 257-259 (App. 128a-129a). In DeSoto County, Mississippi – just across the state border – Mississippi is pumping from wells that are closer to the state border than any of Memphis's wells. *Id.* ¶ 223 (App. 122a); Stip. Fact 14 (at p. 102). All of the wells in the area are drilled straight down into the Aquifer, and none crosses any state boundary. DFOF ¶¶ 117-118 (App. 98a). Because there is no physical or hydrological barrier at the border between Mississippi and Tennessee, pumping in either State near the border naturally affects groundwater that lies beneath the

⁴ A confined aquifer stays fully saturated as long as the potentiometric level remains above the overlying confining layer. DFOF ¶ 45 (App. 79a).

⁵ See discussion *infra* pp. 7-9 (discussing Joint Exhibit 19 at pdf p. 34).

other State. Rep. 21-23; DFOF ¶¶ 76-77 (App. 90a).⁶ By creating a cone of depression, such pumping can induce groundwater to flow within the Aquifer from one State to the other. DFOF ¶¶ 123-124 (App. 99a). This cross-border effect allegedly caused some groundwater to deviate from its natural flow path and migrate within the Aquifer from Mississippi into Tennessee. Rep. 1-2; DFOF ¶ 75 (App. 90a). That alleged pumping-induced cross-border flow lies at the heart of this lawsuit.

In recent years, the cone of depression in the Memphis area has shrunk and stabilized, in part because Memphis's pumping decreased significantly between 2000 and 2016. DFOF ¶ 228 (App. 123a). The stabilized cone of depression indicates that there is a relative balance – or equilibrium – between recharge and discharge in the Aquifer in the Memphis area. *Id.* ¶¶ 228, 230 (App. 123a). Mississippi's expert admitted that there is no evidence that Memphis is inflicting harm on the Aquifer itself. *Id.* ¶¶ 229, 247 (App. 123a, 126a). Mississippi's own evidence at trial also showed that pumping in DeSoto County has increased in recent years to approximately 20 million gallons per day. *Id.* ¶ 231 (App. 123a-124a). Mississippi has been able to obtain these increased volumes of water from the Aquifer without any difficulty. *Id.* ¶¶ 240-243 (App. 125a-126a).

Other States besides Tennessee and Mississippi also pump groundwater from the Aquifer. Such pumping has created substantial cones of depression outside the Memphis area. The below figure from the USGS shows the estimated change in potentio-

⁶ This is true for other areas of pumping along the Arkansas-Louisiana and Louisiana-Mississippi borders. DFOF ¶¶ 126-130 (App. 100a-101a).

metric levels in the Aquifer as of 2007, as compared to pre-development conditions, with the dark brown areas illustrating the deepest cones of depression.

24 Groundwater Availability of the Mississippi Embayment

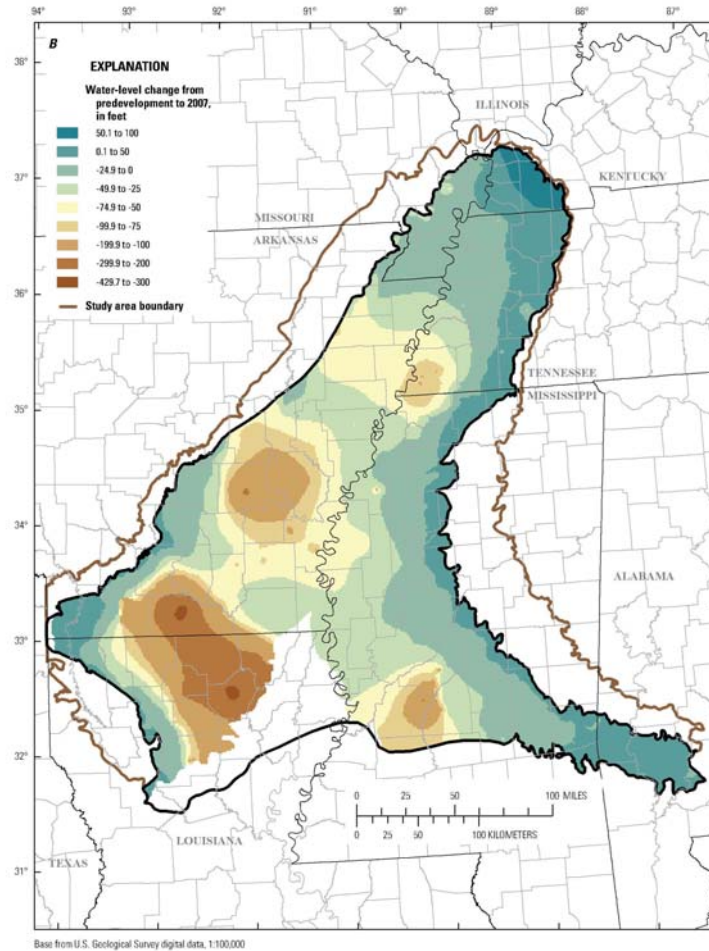


Figure 14. Water-level change from predevelopment to 2007 in the A, Mississippi River Valley alluvial aquifer and B, the middle Claiborne aquifer.—Continued

Joint Exhibit 19 at pdf p. 34.⁷

As can be seen in the figure, the cone of depression in the Memphis area is less significant than other cones of depression within the Aquifer, such as the one caused by Mississippi's pumping near Jackson, Mississippi. DFOF ¶¶ 255-257 (App. 128a-129a). And many of the other cones of depression also cross state lines. For example, the cone of depression centered around Jackson, Mississippi, extends into Louisiana. *Id.* ¶ 129 (App. 100a). A cone of depression caused by pumping in Arkansas extends into Mississippi. *Id.* ¶ 130 (App. 100a-101a). And the largest and deepest cross-border cone of depression in the Aquifer is caused by pumping in Arkansas and Louisiana. *Id.* ¶ 257 (App. 128a-129a).

B. Procedural History

1. In 2005, Mississippi filed a complaint in federal district court asserting common-law tort claims against Memphis, alleging that Memphis's pumping had damaged the Aquifer and interfered with Mississippi's use of the Aquifer. *See Hood* 2005 Compl. ¶ 20 (App. 8a). Mississippi then amended its complaint in 2006 to withdraw its allegations of harm, narrowing its claims solely to the theory that Memphis's pumping violated Mississippi's inherent property rights to the groundwater in the Aquifer. *See Hood* 2006 Am. Compl. ¶¶ 23-52 (App. 38a-48a).

Memphis moved to dismiss, arguing that the Aquifer is an interstate resource whose rights must be allocated via an equitable apportionment in this Court before any State can claim a property right to

⁷ The document in which the above figure appears, which was submitted in its entirety as Joint Exhibit 19, can be found at <https://pubs.usgs.gov/pp/1785/pdf/PP1785.pdf>.

its groundwater. *See Hood ex rel. Mississippi v. City of Memphis*, 533 F. Supp. 2d 646 (N.D. Miss. 2008). Although the district court initially denied the motion, it later *sua sponte* revisited the issue and dismissed the complaint without prejudice under Federal Rule of Civil Procedure 19, holding that Mississippi's sole litigation remedy lay in an equitable-apportionment action against Tennessee in this Court. *Id.* at 647-50. Mississippi appealed, arguing that its claims did *not* require an equitable apportionment. *See Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625, 629 (5th Cir. 2009). The Fifth Circuit affirmed, *see id.* at 629-31, and this Court denied certiorari, *see Mississippi v. City of Memphis*, 559 U.S. 904 (2010).

In 2009, contemporaneously with seeking certiorari in *Hood*, Mississippi sought leave to file an original action against Tennessee and Memphis again asserting state-law tort claims based on Memphis's pumping from the Aquifer. *See* 2009 Compl. ¶ 24 (App. 62a). For the first time, Mississippi also alternatively requested equitable apportionment "*if and only if* this Court determines that Mississippi does not own and control the ground water resources within its borders." *Id.* ¶ 5(c) (App. 56a-57a). This Court denied Mississippi leave without prejudice, citing its prior cases holding that equitable apportionment governs interstate water disputes and that a State seeking equitable apportionment must plead and prove a serious injury. *See Mississippi v. City of Memphis*, 559 U.S. 901, 901 (2010) (citing *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003); *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982)).

2. Four years later, in 2014, Mississippi again sought leave to file an original action against Tennessee and Memphis. This time, Mississippi

disclaimed any equitable apportionment. *See* 2014 Compl. ¶ 38 (“This case does not fall within the Court’s equitable apportionment jurisprudence.”). Mississippi instead sought only tort-based relief – primarily a large damages award – based on its alleged inherent property rights in the Aquifer. *See id.* ¶¶ 40-57; Rep. 4-6. In 2015, the Court granted leave to file the complaint, *Mississippi v. Tennessee*, 135 S. Ct. 2916 (2015), and referred the case to the Special Master, *Mississippi v. Tennessee*, 136 S. Ct. 499 (2015).

Mississippi pleads that the water in the Aquifer beneath Mississippi is “a finite, confined intrastate natural resource over which Mississippi became sovereign at the time it was admitted as a state in the United States.” 2014 Compl. ¶ 17. Mississippi maintains that, if another State like Tennessee pumps water within its own borders, thereby “altering the water’s natural . . . path” and causing water to flow into that State that otherwise “would never naturally move” into the State, it violates Mississippi’s “sovereign rights.” *Id.* ¶¶ 24, 41, 51. Mississippi claims damages of “not less than \$615 million,” which it alleges is “the value of the Mississippi groundwater Defendants have wrongfully taken, plus prejudgment interest.” *Id.* ¶ 55.

Before the Special Master, Defendants moved to dismiss Mississippi’s Complaint on the pleadings. The Special Master held at the outset that, “under federal common law, equitable apportionment is necessary to grant relief in a dispute over interstate water in the absence of an interstate compact.” 2016 Op. 1. Because Mississippi has disclaimed an equitable apportionment, the Special Master reasoned that dismissal would be warranted if the Aquifer

is an interstate resource. *Id.* Although the Special Master discerned no plausible allegations that “the water at issue is *not* interstate,” *id.* at 32 (citing 2014 Compl. ¶¶ 18, 19, 22-24) (emphasis added), he ordered “an evidentiary hearing on the limited – and potentially dispositive – issue of whether the Aquifer is, indeed, an interstate resource,” *id.* at 1.

The parties then conducted nearly two years of discovery and summary judgment briefing over the limited issue identified by the Special Master. The Special Master denied Defendants’ motion for summary judgment in the interest of creating a “robust record,” despite concluding that, “by rejecting equitable apportionment, Mississippi might have abandoned [its] only mechanism for relief.” 2018 Op. 27. The proceedings culminated in a five-day evidentiary hearing addressing whether the Aquifer is, as a factual matter, an interstate water resource. Five expert witnesses testified, and the parties submitted thousands of pages of documentary evidence.

Based on the evidentiary record compiled in discovery and presented at the hearing, the Special Master recommended that Mississippi’s Complaint be dismissed because the Aquifer is an interstate resource for which equitable apportionment supplies the exclusive litigation remedy. Rep. 2, 26. Although the Special Master recognized that “Mississippi has explicitly not requested equitable apportionment in this action,” Rep. 2, the Report nonetheless “recommends that Mississippi’s complaint be dismissed with leave to amend the complaint to include a claim for equitable apportionment,” Rep. 26.

SUMMARY OF ARGUMENT

The Special Master correctly recommended dismissal of Mississippi's Complaint because the equitable-apportionment doctrine preempts Mississippi's claims concerning the interstate Aquifer. The Special Master erred, however, in recommending that the Court grant Mississippi leave to amend its Complaint "to include a claim for equitable apportionment." Rep. 26.

I.A. Mississippi cannot satisfy this Court's standard for amending pleadings in original actions. That is because allowing Mississippi to add an equitable-apportionment claim would expand this action far beyond the scope contemplated by the Court's order authorizing Mississippi to file its Complaint. The Court granted Mississippi leave to pursue only *tort* claims that rest on the (faulty) premise that Mississippi inherently owns certain portions of the Aquifer. Because Mississippi disclaimed equitable apportionment, *see* 2014 Compl. ¶ 38, Mississippi cannot assert equitable apportionment in an amended complaint. Further, equitable apportionment differs radically from Mississippi's current claims and requires the Court to balance competing state interests and related equitable factors. An equitable apportionment also may involve some or all of the other six States overlying the Aquifer, whose rights and interests could be affected by any resulting decree.

B. The Court should not permit Mississippi to sidestep the stringent pleading requirements for an equitable apportionment by granting it leave to file an amended complaint. This Court correctly denied Mississippi leave to assert an equitable-apportionment claim in 2010, holding that Mississippi had not alleged the requisite injury to its sovereign

interests. See *Mississippi v. City of Memphis*, 559 U.S. 901, 901 (2010) (citing *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982)). Nothing has changed to warrant a different result. Quite the opposite: the record confirms that Mississippi has not suffered any injury at all, much less one of sufficient magnitude to warrant an equitable apportionment. Indeed, the evidence showed that the pumping of which Mississippi complains – which occurs solely within Tennessee – has *not* caused more water to flow from Mississippi to Tennessee than would flow under natural conditions.

II. Even applying the more liberal amendment standard from ordinary civil actions, the Court should not permit Mississippi to amend. Granting Mississippi leave to pursue a claim it has long abandoned would prejudice Defendants, which have litigated this action for years in reliance on Mississippi's consistent representation that an equitable apportionment is not at issue. That disclaimer was not the result of a pleading error; it was a strategic decision that allowed Mississippi to pursue monetary damages, relief an equitable apportionment does not permit. Mississippi's disclaimer also enabled it to avoid scrutiny into its own pumping. An equitable-apportionment litigation at this point would be tremendously complicated and expensive, prejudicing Defendants.

III. The Court should dismiss the Complaint with prejudice. Because Mississippi has not made, and cannot make, the threshold showing necessary to assert an equitable-apportionment claim, the Court should bar it from asserting such a claim based on the existing record. Consistent with longstanding original-jurisdiction principles, the Court should

preclude Mississippi from pursuing an equitable apportionment in a new action unless and until it can show a material change in circumstances resulting in substantial injury to its sovereign interests.

ARGUMENT

I. GRANTING MISSISSIPPI LEAVE TO ASSERT AN EQUITABLE-APPORTIONMENT CLAIM IS CONTRARY TO THE STANDARD FOR AMENDING PLEADINGS IN ORIGINAL ACTIONS

This Court’s standard for amending pleadings in original-jurisdiction cases forecloses Mississippi from adding an equitable-apportionment claim to this one. In original actions, the Court asks whether an amendment “would take the litigation beyond what [this Court] reasonably anticipated when [it] granted leave to file the initial pleadings.” *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995). If a proposed amendment would so expand the action, leave to amend is denied. *Id.* “[T]he solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure” does not apply. *Id.*⁸ The Court’s “less complaisant” standard comports with its “traditional reluctance to

⁸ In ordinary civil actions, under Rule 15(a)(2), leave to amend should be liberally granted unless there is “any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962) (quoting Fed. R. Civ. P. 15(a)(2)). In original actions, the Federal Rules of Civil Procedure and the Court’s precedents construing those Rules serve only as “guides.” *South Carolina v. North Carolina*, 558 U.S. 256, 276 n.8 (2010) (quoting Sup. Ct. R. 17.2); *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). In any event, leave to amend is unwarranted even under the ordinary, liberal standard. *See infra* Part II.

exercise original jurisdiction in any but the most serious of circumstances.” *Id.* It also advances the Court’s goal in original actions of rapidly “dispos[ing] of issues that would only serve to delay adjudication” or “needlessly add to the expense” of the litigation. *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). Both considerations warrant denying leave to amend here.

A. An Amendment Asserting Equitable Apportionment Would Substantially Enlarge This Litigation’s Scope

A new equitable-apportionment claim would take this case far beyond what this Court anticipated when it granted Mississippi leave to file. In 2010, during an earlier incarnation of this action, the Court denied Mississippi leave to assert an equitable-apportionment claim. *See Mississippi v. City of Memphis*, 559 U.S. 901, 901 (2010) (citing *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982)). The Court granted Mississippi leave to file its present Complaint five years later, only after Mississippi abandoned any claim for equitable apportionment. *See* 2014 Compl. ¶ 38 (“This case does not fall within the Court’s equitable apportionment jurisprudence.”); *Mississippi v. Tennessee*, 135 S. Ct. 2916 (2015). This action’s bedrock premise ever since has been Mississippi’s affirmative disclaimer of any equitable-apportionment claim.

The Court should not allow Mississippi to reverse course now and add the equitable-apportionment claim it previously disavowed. Such an amendment would expand the scope of the case from what the Court “reasonably anticipated when [it] granted leave to file the initial pleadings.” *Nebraska*, 515 U.S. at 8. Four critical distinctions make the magnitude of that expansion clear.

First, the standard for amending pleadings does not permit a State to make a claim that it has previously disavowed. In *Ohio v. Kentucky*, for example, Ohio’s original complaint had claimed that the border with Kentucky was located on the “northerly low water mark” of the Ohio River and had recognized that “any claim that its border was located in the middle of the river” was “foreclosed.” 410 U.S. at 650 & n.6 (emphasis omitted). Five years later, Ohio sought leave to add a claim that the border was in fact in the middle of the Ohio River. *Id.* at 643. Given Ohio’s “persistent failure to assert [that] claim,” the Court concluded Ohio could not raise “the middle-of-the-river issue at this very late date.” *Id.* at 649. Similarly, here, the Court should not permit Mississippi to assert via amendment a claim it has affirmatively disavowed.

Second, an equitable-apportionment claim requires a showing of a threshold injury that Mississippi has never made. *See infra* Part I.B. In an equitable-apportionment case, “the burden on the complaining state is much greater than that generally required to be borne by private parties.” *Colorado v. Kansas*, 320 U.S. 383, 393 (1943). That burden requires a State seeking equitable apportionment to plead (and later prove) a substantial injury to its ability to use the shared water resource. *See Florida v. Georgia*, 138 S. Ct. 2502, 2514 (2018). Mississippi has not even tried to make that showing. On the contrary: Mississippi’s central legal theory is that it possesses inherent property rights in the Aquifer that relieve it of any burden to allege such injury. *See* 2014 Compl. ¶ 44 (claiming “groundwater located and stored naturally under Mississippi is owned and held by Mississippi as a sovereign State and is subject to Missis-

Mississippi's exclusive dominion and control"); *see generally id.* ¶¶ 40-57; Rep. 4-6. An equitable-apportionment claim would represent a radical departure from that thesis.

Third, an equitable-apportionment claim would require a liability analysis that differs dramatically from Mississippi's existing claims. Equitable apportionment allocates rights to a shared water resource based on a complex range of factors and equities. *See Florida*, 138 S. Ct. at 2515; *Colorado*, 459 U.S. at 186-88; *Kansas v. Colorado*, 206 U.S. 46, 108 (1907). The Court's approach is "flexible" and requires the Court to consider "all relevant factors," such as "physical and climatic conditions," "the extent of established uses," "the availability of storage water," and States' competing interests. *South Carolina*, 558 U.S. at 271 (quoting *Colorado*, 459 U.S. at 183) (emphasis added). That analysis involves "extensive and 'specific factual findings,'" *Florida*, 138 S. Ct. at 2515 (quoting *Colorado*, 459 U.S. at 190) (emphasis in *Florida*), and "protracted and costly legal proceedings," *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 619 (2013). By contrast, Mississippi's current claims, by design, turn on the limited question whether it has inherent property rights to the Aquifer's groundwater. Rep. 5-6.

Fourth, an equitable-apportionment claim may require discovery from – and, potentially, direct participation by – non-party States. The Aquifer extends beneath portions of eight different States. Rep. 17; DFOF ¶¶ 64, 97 (App. 88a, 94a). Each of those eight States would arguably have an interest in how rights to the Aquifer were equitably apportioned. *See* DFOF ¶¶ 97-109 (App. 94a-96a); Tr. 45:24-46:8 (Branch); Tr. 142:23-143:18 (Crawford).

Arkansas, for example, pumps substantially from the Aquifer and has created cones of depression deeper and larger than the one that Mississippi attributes to Memphis's pumping. DFOF ¶¶ 129-130, 257 (App. 100a-101a, 128a-129a). Moreover, Mississippi's own experts concede that much of the disputed groundwater near the Mississippi-Tennessee boundary would flow into Arkansas under natural conditions. *Id.* ¶¶ 137-150 (App. 102a-106a). An amendment would thus affect Arkansas's (and other States') rights and interests, potentially adding new parties and complexities to the case.

This Court's 2015 order authorizing this action did not contemplate such complexity. Because an equitable-apportionment action would stray well outside the boundaries of that order, the Court should deny leave to amend. *See Nebraska*, 515 U.S. at 8.

B. Mississippi Should Not Be Permitted To Sidestep The Requirement That It Show A Substantial Injury Of Serious Magnitude

Leave to amend would also undermine the "important gatekeeping function" this Court performs in original actions. *Nebraska*, 515 U.S. at 8. Here, any equitable-apportionment claim should not even get out of the gate. Mississippi has failed to make the threshold showing necessary to invoke this Court's jurisdiction over any equitable-apportionment claim. For that reason, Mississippi would not receive leave to bring an equitable-apportionment claim in a new action. The Court should not allow Mississippi to evade that outcome by smuggling in such a claim via amendment.⁹

⁹ Even were the Court to conclude that it lacks discretion to deny a State leave to file a bill of complaint, *see Nebraska v.*

1. The standard for invoking an equitable apportionment is demanding when one State alleges harm from another State over a shared resource

In 2010, this Court correctly denied Mississippi leave to bring an equitable-apportionment claim. *Mississippi*, 559 U.S. at 901 (citing *Colorado*, 459 U.S. at 187 n.13). The *Colorado* decision cited by the

Colorado, 136 S. Ct. 1034, 1034 (2016) (Thomas, J., dissenting from denial of motion for leave to file complaint), it does not follow that an *amendment* should be liberally granted. The Court long has cautioned that its original jurisdiction “is of so delicate and grave a character,” *Louisiana v. Texas*, 176 U.S. 1, 15 (1900), that it “should be exercised ‘sparingly,’” *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981)); *see also id.* at 475 (Thomas, J., dissenting) (recognizing there are “sound reasons” for that approach); *Nebraska*, 136 S. Ct. at 1035 (Thomas, J., dissenting from denial of motion for leave to file complaint) (same). Before moving the Court “to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another,” *Washington v. Oregon*, 297 U.S. 517, 522 (1936), Mississippi therefore must be presumed to have thought through its allegations with extreme care and diligence, including its decision to disclaim equitable apportionment in its Complaint. 2014 Compl. ¶ 38. And regardless of the Court’s discretion to deny leave to file a baseless claim, the Court can exercise its gatekeeping function in original actions by dismissing for failure to state a claim. *See, e.g., Montana v. Wyoming*, 563 U.S. 368, 372-73, 389 (2011) (Thomas, J.) (dismissing claim for failure to state a claim after Court granted leave to file bill of complaint). Mississippi’s equitable-apportionment claim would be dismissed at the threshold because Mississippi has not suffered a substantial injury. *See infra* pp. 22-24. Leave to amend remains unwarranted for that reason alone. *See* 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1487, at 743 (3d ed. 2010) (“Wright & Miller”) (“[I]f a complaint as amended could not withstand a motion to dismiss or summary judgment, then the amendment should be denied as futile.”).

Court explains the well-settled principle that a State seeking equitable apportionment must demonstrate “real or substantial injury or damage” before invoking this Court’s original jurisdiction. *Colorado*, 459 U.S. at 187 n.13. Such injury must represent a “‘threatened invasion of rights’ that is ‘of serious magnitude.’” *Florida*, 138 S. Ct. at 2514 (quoting *Washington*, 297 U.S. at 522). Because Mississippi’s previous request for equitable apportionment lacked facts demonstrating such an injury, the Court rejected Mississippi’s proposed claim at the threshold.

The denial of leave in 2010 was consistent with the Court’s repeated dismissal of equitable-apportionment claims for lack of a cognizable injury. For example, in *Washington v. Oregon*, the Court dismissed Washington’s claims because groundwater pumping by Oregon farmers did not “materially lessen[] the quantity of water available for use within the State of Washington.” 297 U.S. at 526. *See also Kansas*, 206 U.S. at 117 (dismissing claim despite “perceptible injury to portions of the Arkansas valley in Kansas, particularly those portions closest to the Colorado line, [because] to the great body of the valley it has worked little, if any, detriment”). When a State cannot show substantial harm from one State’s extraction of water in a shared resource, the Court’s consistent course has been to deny leave to file rather than “delay adjudication on the merits.” *Ohio*, 410 U.S. at 644.

2. The record conclusively establishes that pumping in Tennessee is not harming Mississippi

The Court correctly applied the standard for invoking an equitable apportionment to Mississippi’s motion for leave to file a complaint in 2010, and nothing has changed to warrant a different result.

In fact, the record evidence compiled by the Special Master confirms the wisdom of the Court's prior ruling. As the evidentiary hearing made clear, Mississippi has suffered no injury of serious magnitude and, thus, cannot state a claim for equitable apportionment. *See Ohio*, 410 U.S. at 645 (denying leave to amend where, "even assuming the new allegations to be true, no cause of action is stated").

At the threshold, it is undisputed that Defendants never physically entered Mississippi to capture water. Rep. 21, 29. The wells in Tennessee are all drilled straight down, and any cross-border effects are merely the natural consequence of developing the resource. DFOF ¶¶ 41, 123-124 (App. 78a, 98a-99a). Mississippi therefore does not even attempt to show any invasion of its territory. *Cf. Tarrant Reg'l Water Dist.*, 569 U.S. at 630-31, 638-39 (concluding that the Red River Compact did "not create any cross-border rights in signatory States"); *see also* Rep. 29-30.

More fundamentally, the evidence confirms that Mississippi is able to obtain the water it needs. This is not a case "where the claims to the water . . . exceed the supply." *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945). Although the pumping-induced cones of depression decrease the Aquifer's potentiometric levels, the resource has remained fully saturated. DFOF ¶¶ 243, 267 (App. 126a, 130a). Mississippi's own expert testified that the volume of water beneath DeSoto County has changed very little since pumping began more than 100 years ago. *Id.* ¶ 241 (App. 125a). Mississippi thus has been able to increase its water usage substantially over the last few decades. *Id.* ¶¶ 240, 242-243 (App. 125a-126a). Indeed, Mississippi's own evidence showed that pumping in DeSoto County – the county in Missis-

ssippi immediately south of Memphis – has increased without difficulty. *Id.* ¶ 231 (App. 124a).

Nor is there evidence that Defendants’ pumping harms the Aquifer. Mississippi’s experts admitted that there is no indication of any degradation in the Aquifer’s water quality. *Id.* ¶¶ 246, 249 (App. 126a-127a). There is also no evidence that pumping from the Aquifer in Tennessee exceeds the amount of water naturally recharging into the Aquifer. *Id.* ¶¶ 83, 180, 229 (App. 91a, 112a-113a, 123a). And, in recent years, water levels have stabilized in the Memphis area, demonstrating that the Aquifer is in relative equilibrium. *Id.* ¶ 256 (App. 128a).

The evidence also showed that pumping in Tennessee has *not* caused more water to flow from Mississippi to Tennessee than would have otherwise. *Id.* ¶ 229 (App. 123a). It is undisputed that water was flowing from Mississippi to Tennessee under pre-development conditions, *id.* ¶¶ 135-150 (App. 102a-106a), and Defendants’ unrebutted expert testimony shows that those natural Mississippi-to-Tennessee flows were far more substantial than Mississippi had alleged. In fact, according to the most sophisticated peer-reviewed pre-development study done to date, less water is flowing from Mississippi to Tennessee today than was flowing under pre-development conditions. *Id.* ¶¶ 151-171 (App. 106a-111a). The decline in cross-border flows is due to several factors, including *Mississippi’s* increased pumping along the border, which is “intercepting . . . flow that would have naturally gone into Tennessee.” Hr’g Tr. 853:19-854:6 (Waldron) (May 23, 2019); DFOF ¶¶ 155-156 (App. 107a).

In sum, the trial record confirms that Mississippi has suffered no meaningful injury at all, much less an injury of such “serious magnitude” that warrants

leave to pursue an equitable apportionment. *Florida*, 138 S. Ct. at 2514.

II. AN AMENDMENT AT THIS STAGE WOULD PREJUDICE DEFENDANTS

An amendment is not warranted even under the more liberal standard of Federal Rule of Civil Procedure 15(a)(2). The Court should not grant Mississippi leave to pursue an equitable apportionment in light of Mississippi's significant delay and the prejudice to Defendants. *See Foman*, 371 U.S. at 182.

Allowing an amendment at this stage would prejudice Defendants. Since Mississippi filed this Complaint, Defendants have incurred great expense litigating this case on the premise that Mississippi is *not* seeking an equitable apportionment. An amendment flipping that premise on its head will lead to yet another round of expensive and protracted discovery that prejudices Defendants and confers an unfair advantage on Mississippi. *See* 6 Wright & Miller § 1487, at 701 (“the most important factor listed by the Court for denying leave to amend is that the opposing party will be prejudiced”).

Mississippi has had ample opportunity to pursue an equitable apportionment during this case's long lifespan. Yet Mississippi's only attempt at asserting an equitable-apportionment claim in 15 years of litigation was an alternative argument in 2009, which this Court rejected. *See* 2009 Compl. ¶ 5(c) (App. 56a-57a); *Mississippi*, 559 U.S. at 901. Even after the evidentiary hearing before the Special Master, Mississippi again reiterated that it “does not seek equitable apportionment in this proceeding.” Miss. Post-Hearing Response Br. 37. The Court should not permit Mississippi to “assume a contrary position . . . to the prejudice of” Defendants, “simply

because [its] interests have changed.” *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

Mississippi’s refusal to seek equitable apportionment was a strategic decision, not a pleading error. *Cf. id.* at 753 (holding State to prior position where prior position could not be “regarded as a product of inadvertence or mistake”). *First*, Mississippi avoided making the heightened showing of injury required in an equitable-apportionment case, which, as the evidence has now confirmed, it cannot do. *See supra* Part I.B.

Second, Mississippi’s pleading strategy allowed it to seek monetary damages in excess of \$615 million. 2014 Compl. ¶¶ 55-56. A successful claim for equitable apportionment results in a decree governing future use of the shared resource, not damages. *See Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983). Disclaiming equitable apportionment was an intentional effort by Mississippi to seek a financial windfall.

Third, Mississippi’s pleading strategy sidestepped the balancing of state interests that an equitable-apportionment claim would require. Indeed, an equitable apportionment could well result in Mississippi receiving rights to *less* water than it currently takes from the Aquifer. An equitable apportionment would require the Court to evaluate all uses of the Aquifer, including Mississippi’s own pumping. *See Nebraska*, 515 U.S. at 14 (concluding that pumping by the complaining State “could well affect the relief to which [it] is entitled”). In performing that inquiry, the Court could consider Mississippi’s increased pumping in the Memphis area. DFOF ¶ 231 (App. 124a). The Court also could evaluate the other cones of depression, including the more extensive one caused by Mississippi’s pumping near Jackson,

Mississippi. *Id.* ¶¶ 255-256 (App. 128a). And it could look at pumping by Arkansas and Louisiana, which also have created more extensive cones of depression than the one near Memphis. *Id.* ¶ 257 (App. 128a-129a).

In an equitable apportionment, the Court would also consider “established uses” and balance the benefits and the harms to the parties. *Florida*, 138 S. Ct. at 2515 (quoting *Nebraska*, 325 U.S. at 618); see *Colorado*, 320 U.S. at 394. Memphis – the largest metropolitan area overlying the Aquifer – has pumped from the Aquifer since 1886 and long has used the Aquifer as its primary public water source. DFOF ¶¶ 131, 258-259 (App. 101a, 129a). Even Mississippi’s expert recognized that repositioning Memphis’s wells to eliminate the cone of depression of which Mississippi complains – if it is even possible at all – would impose “enormous” expense on Defendants. *Id.* ¶ 252 (App. 127a-128a) (quoting Hr’g Tr. 332:16-333:6 (Spruill) (May 21, 2019)). The equitable-apportionment doctrine does not support upending Defendants’ water system in so drastic a manner. Rather, the doctrine’s emphasis on stability – and protecting established users of shared interstate water resources – would support restricting Mississippi’s newer, more damaging pumping from the Aquifer. By pleading only tort claims and forswearing any equitable-apportionment claim, Mississippi strategically avoided that result.

Having persuaded the Court to allow Mississippi to bring a complaint by disavowing equitable apportionment, Mississippi should not be permitted to change positions “to gain an additional advantage at [Defendants’] expense.” *New Hampshire*, 532 U.S. at 755. The Court can and should deny leave to amend on that basis alone.

III. THE COURT SHOULD DISMISS THE COMPLAINT WITH PREJUDICE

The Court should dismiss Mississippi's Complaint with prejudice. As the Special Master correctly concluded, and as Defendants will further explain in their forthcoming replies to Mississippi's exceptions, the equitable-apportionment doctrine bars Mississippi's tort claims. A State asserting an interest in an interstate water resource has one, and only one, litigation remedy: a claim for equitable apportionment. Rep. 32. Because Mississippi has disclaimed any such claim, and could not plead one in any event, the dismissal of its Complaint should be with prejudice.

If Mississippi were ever to bring an equitable-apportionment claim based on the Aquifer, it must do so in a new action, and only if it can show a material change in circumstances leading to a substantial injury. In *Kansas v. Colorado*, for example, the Court dismissed Kansas's equitable-apportionment claim "without prejudice to the right of [Kansas] to institute new proceedings" if there was a "material increase in the depletion of the waters" resulting in substantial injury to Kansas. 206 U.S. at 117-18. More than 35 years later, the Court again dismissed Kansas's renewed claim because Kansas had failed to demonstrate that Colorado's use "materially increased" to the "serious detriment" of Kansas. *Colorado*, 320 U.S. at 400; *see also Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) (dismissing without prejudice to Connecticut's right to bring new suit whenever "a material increase of the amount of the waters" diverted by Massachusetts results in substantial injury to Connecticut). The same result is warranted here.

CONCLUSION

The Exception of Defendants to the Report of the Special Master should be sustained, and Mississippi's Complaint should be dismissed with prejudice.

Respectfully submitted,

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