

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 Exceptions To The Report Of The Special Master

**SUR-REPLY OF THE STATE OF MISSISSIPPI
IN SUPPORT OF ITS EXCEPTIONS TO
REPORT OF THE SPECIAL MASTER**

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**GLOSSARY OF RECORD CITATION
ABBREVIATIONS**

Abbreviation	Definition
Col. Br.	<i>Amicus</i> Brief by the States of Colorado, Idaho, Nebraska, North Carolina, North Dakota, Oregon, South Dakota, and Wyoming in Support of Defendant Tennessee
J-__	Refers to the Parties' Jointly Submitted Exhibits
L.P. Br.	<i>Amicus</i> Brief by Law Professors
Memphis Rep.	Reply of Defendant City of Memphis and Memphis, Light, Gas & Water to Exceptions of Plaintiff State of Mississippi to Report of the Special Master
Miss. Ex. Br.	Exceptions Brief by Plaintiff State of Mississippi
NYB Br.	<i>Amicus</i> Brief by the New York City Bar Association
P-__	Refers to Plaintiff's Exhibit
Rep.	Special Master's Report and Recommendation
Tenn. Rep.	Reply of Defendant State of Tennessee to Exceptions of Plaintiff State of

	Mississippi to Report of the Special Master
Tr.	Refers to the transcript of the evidentiary hearing conducted by the Special Master on May 19, 2019 to May 24, 2019, with the parenthetical identifying the witness providing the testimony.
U.S. Br.	<i>Amicus</i> Brief by the United States of America

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I. INTRODUCTION

Mississippi seeks remedies for an intentional violation of its sovereign authority over all waters within its borders, an “essential attribute of sovereignty” retained by States under the United States Constitution. *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 631-32 (2013). This retained sovereign attribute carries with it a foundational legal principle under which Mississippi possesses the exclusive right and authority under the Constitution to regulate, control, and protect natural resources located within its borders for the benefit of its citizens. The protection of Mississippi’s sovereignty is at issue in this proceeding between States.

The material facts are few and undisputed. Since the 1960’s, Defendants have knowingly and intentionally constructed and operated well fields equipped with commercial turbine pumps to pull billions of gallons of groundwater out of Mississippi into Tennessee for commercial sale. The briefs filed in opposition to Mississippi’s Exceptions to the Special Master’s Report ignore the constitutional principles at issue, and never offer any authority under the Constitution and laws of the United States recognizing any cross-border right or interest of one State in the natural resources located in another State. No such right or interest exists, *Rhode Island v. Massachusetts*, 37 U.S. 657, 733 (1838), and Defendants’ conduct is a direct invasion of Mississippi’s sovereign authority and obligations to its citizens.

Defendants attempt to shield themselves from accountability for this conduct by invoking the federal

common law remedy of equitable apportionment, a remedy created to resolve disputes between States over their right to appropriate streamflow in interstate rivers and streams. The groundwater here would remain in the earth in Mississippi for thousands of years under natural conditions and presents no such issue. In addition, equitable apportionment does not create rights of general application and cannot empower Defendants to reach into Mississippi and capture, without Mississippi's permission, groundwater that is subject to Mississippi's exclusive authority and control under the Constitution. Indeed, Defendants' assertion that the Court should reject "Mississippi's sovereignty-based framework," Tenn. Rep. at 25, overlooks the basis for that framework which is the Constitution itself.

The Court should reject the Special Master's adoption of Defendants' arguments, find that Defendants have violated the rights of Mississippi and its citizens under the Constitution, and permit Mississippi's claims to proceed to a hearing regarding appropriate remedies.

II. ARGUMENT

A. "The Aquifer" Is Not the Natural Resource at Issue.

Defendants argue that the "natural resource at issue is the Middle Claiborne Aquifer (the 'Aquifer')," and build their defense around apportioning "the Aquifer" as they define it: "a massive underground water resource that lies beneath portions of Tennessee, Mississippi, and six other states...." Memphis Rep. at

1. Defendants, however, want to turn Mississippi's claims into something they are not.

Mississippi's case is and always has been premised on Defendants' intentional and unlawful taking of groundwater that was present *in situ* in northwest Mississippi but pumped across the border into Tennessee by MLGW for commercial sale. Before this cross-border pumping, the groundwater at issue was residing hundreds of feet deep in the earth of northwest Mississippi in tiny pore spaces between and around particles of unconsolidated sedimentary materials. The groundwater crept an inch or two a day (at an inch a day, taking 1750 years to move 10 miles), and under natural conditions remained in Mississippi for an average of 7,542 years. Miss. Ex. Br. at 6-8. As water in the soil, the groundwater was a component of the subterranean geological structure of Mississippi and, therefore, a part of Mississippi's sovereign territory.

Defendants' lengthy discussion of the geographic location and hydrologic characteristics of "the Aquifer" ignores the lack of any *legal authority and right* to use modern commercial groundwater pumping technology to appropriate the Mississippi groundwater at issue. The respective legal rights of Mississippi and Tennessee to groundwater located in Mississippi are controlled by the Constitution.

Two principles are dispositive. First, Mississippi possesses *exclusive* sovereign authority over all groundwater located in Mississippi as an "essential

attribute of sovereignty” retained under the Constitution. *Tarrant*, 569 U.S. at 631-32.¹

Second, Defendants have *no* authority over nor legal rights to groundwater located in Mississippi because under the Constitution, the authority and rights of each State end at its borders and do not extend into sister States. *Rhode Island*, 37 U.S. at 733.²

Defendants’ equitable apportionment arguments conflict with these dispositive principles, as does their assertion that “Mississippi cannot limit its claim to only a particular subset of water within the Middle Claiborne.” Tenn. Rep. at 26. Mississippi must limit its claims to groundwater located in Mississippi because its sovereign authority over groundwater in the Middle Claiborne ends at its borders. *See Rhode Island*, 37 U.S. at 733.³

¹ Tennessee’s argument that States have “territorial sovereignty” over land within their borders, but *not* over water, Tenn. Rep. at 30, is misplaced. *See, e.g., Tarrant*, 569 U.S. at 631-32 (State’s sovereign powers include “control over waters within their own territories”). *Cf. County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (referring to “the States’ longstanding regulatory authority over land and groundwater”).

² Some groundwater in Mississippi will eventually creep into Tennessee under natural conditions, and when it does, Defendants can capture it. But while groundwater is in Mississippi, it is under Mississippi’s exclusive control and authority and Defendants have no rights to it.

³ *Sporhase v. Nebraska*, 458 U.S. 941 (1982) is inapplicable. The Nebraska statute at issue in *Sporhase* contained a reciprocity provision restricting the withdrawal of groundwater in Nebraska for transfer to and use in other States. *Id.* at 943. The Court

B. Equitable Apportionment Does Not Apply.

The arguments of Defendants and various *amici*, including the United States, relying on equitable apportionment simply ignore the Constitution and its limitations on federal common law. As the Court recognized in *Kansas v. Colorado*, 206 U.S. 46, 95-96 (1907), federal common law cannot conflict with, but must protect, the Constitution. *See also D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (federal common law implements federal law and the Constitution) (Jackson, concurring). Accordingly, none of the Court's equitable apportionment cases create cross-border water rights or regulatory authority.

Defendants' assertion that "equitable apportionment applies broadly to all different kinds of resources," Tenn. Rep. at 2, misstates the scope of the Court's equitable apportionment jurisprudence. The Court's equitable apportionment cases have been limited to the surface water in interstate rivers and streams (or migrating fish traveling interstate in them), and the equitable apportionment remedy has never been applied outside that context. Miss. Ex. Br. at 28-30.⁴

rejected the argument that the groundwater was not an article of commerce, *id.* at 953-54, and held this statutory restriction violated the negative commerce clause. *Id.* at 957-58. No issues of interstate commerce are present here, as Mississippi's case only involves groundwater located in the earth subject to Mississippi regulation.

⁴ In *Idaho ex rel. Evans v Oregon*, 462 U.S. 1017 (1983), the Court held that equitable apportionment applied to the parties' dispute over anadromous fish in the Columbia-Snake River system, but the

Tennessee’s assertion that the Court has applied equitable apportionment to “groundwater connected to interstate surface water,” Tenn. Rep. at 10, is not supported by its citations. The Court has *never* equitably apportioned groundwater. As the United States explains in its *amicus* brief: “Although this Court has previously addressed the effects of groundwater pumping, it has done so only in cases involving the apportionment of interstate streams, where issues have arisen regarding whether the pumping of groundwater hydrologically connected to the stream has impaired a downstream State’s share of water under an interstate compact or apportionment decree.” U.S. Br. at 19 fn.2.

Tennessee’s argument that equitable apportionment applies to “any claims that one State is depriving another State of its ability to use” an interstate resource is unsupported and irrelevant. Tenn. Rep. at 10. Mississippi’s claims are not based on “its ability to use” an “interstate resource.” Mississippi’s claims are based on the inability of Defendants under the Constitution to unilaterally appropriate and use groundwater located in Mississippi, held in trust by Mississippi for its citizens, and subject to Mississippi’s exclusive regulatory authority and control. Mississippi seeks in this proceeding to discharge its duties as a trustee under the public trust doctrine and preserve

opinion includes dicta relating to different areas of Constitutional inquiry, including the Court’s negative commerce clause cases, which is not applicable or relevant to this proceeding. *Id.* at 1024-25.

and protect its sovereignty and rights under the Constitution.

Mississippi emphasizes that none of this Court's equitable apportionment cases were premised on claims that a State was reaching beyond its borders and unilaterally appropriating natural resources located in another State. Indeed, the Court in *Kansas v. Colorado* was careful to point out: "This suit involves no question of boundary or of the limits of territorial jurisdiction." 206 U.S. at 80. Because Mississippi's claims *are* predicated on questions of boundary and the limits of territorial jurisdiction, this Court's equitable apportionment cases have no application to this case. Quite simply, equitable apportionment does not create rights of general application and cannot extend Defendants' powers and rights out of Tennessee into Mississippi. *Rhode Island*, 37 U.S. at 733 (1838).

C. The Constitution's Sovereign-Based Framework Prohibits Defendants' Cross-Border Pumping.

Defendants denounce "Mississippi's sovereign-based framework," Tenn. Rep. at 25, but the Court acknowledged and enforced the Constitution's "sovereign-based framework" in *Tarrant*, making it clear that States possess the sovereign authority under the Constitution "to control water within their own boundaries," and that one State may not unilaterally reach into a neighboring State to capture water that is subject to its neighbor's sovereign control. 569 U.S. at

632-33. That is what Mississippi seeks to prevent here.⁵

Defendants' assertion that *Tarrant* and the Constitution only prohibit a State from "physically entering" another State's territory to access a water resource, Tenn. Rep. at 30, is wrong for several reasons. First, the cones of depression and other hydrologic changes in Mississippi created by MLGW's pumping operations extend approximately 17 miles into Mississippi and constitute *actual physical intrusions into Mississippi*.

Second, Defendants cannot do indirectly what the Constitution forbids them to do directly. *Smith v. Turner*, 48 U.S. 283, 458 (1849). It is undisputed that MLGW placed three well fields right next to the Mississippi border in the mid-1960's and early 1970's with the full knowledge and intention that those well fields would, every day, capture millions of gallons of groundwater from Mississippi. *See* Miss. Ex. Br. at 12. Defendants claim the water they pump is "located in" Tennessee because their wells are "located in" Tennessee, Memphis Rep. at 25; Tenn. Rep. at 31, but

⁵ The *amicus* brief filed by certain law professors ("L.P. Br.") primarily criticizes Mississippi for asserting a "water-ownership" theory, L.P. Br. at 3-14, but as Mississippi has explained in its Exceptions brief, its claims are premised on the Constitution, including its sovereign authority and duties as trustee over groundwater in Mississippi. Even the law professors acknowledge: "As a state sovereign, Mississippi has the duty and right to protect water supplies for its future and current citizens. Those are the rights and duties of a sovereign trustee over the state's natural resources." *Id.* at 3. Mississippi agrees and seeks to fulfill and to exercise such duties and rights in this action.

it is undisputed that MLGW's massive commercial pumping operations have pulled billions of gallons of groundwater *across the border* from Mississippi into Tennessee for production and sale by MLGW. *See* Miss. Ex. Brief at 10-12 and n.9. These undisputed facts refute Defendants' assertion that no "cross-border" pumping occurred here.

Defendants also assert they are merely reaching into Mississippi "through the agency of natural laws." Tenn. Rep. at 16 and 21 ("the laws of hydraulics"); Memphis Rep. at 25 ("Cones of depression are the natural consequence, or natural agency, of pumping"). MLGW, however, is using man-made, commercial turbine pumps designed to forcibly disrupt natural conditions and capture groundwater located in Mississippi through mechanical pumping. These activities are artificial, unnatural activities, not natural ones, *i.e.*, MLGW's taking of Mississippi groundwater cannot occur absent MLGW's affirmative, artificial intervention.⁶

Furthermore, the involvement of "natural laws" does not automatically transform a dispute between States into an equitable apportionment action as Defendants contend. Tenn. Rep. at 14, 16; Memphis Rep. at 22. For example, *Missouri v. Illinois*, 180 U.S. 208 (1901) — the case cited by the Court in *Kansas v. Colorado*, 206 U.S. at 97, to coin the phrase "agency of

⁶ The laws of nature are among "the basic tools of scientific and technological work." *Gottschalk v. Benson*, 409 U.S. 63, 670 (1972). Indeed, the laws of nature will frequently be involved, to some extent, in an activity by one person causing wrongful harm to another.

natural laws” — was not an equitable apportionment case but a *nuisance* suit, seeking an injunction stopping the transportation of sewage from the City of Chicago into and down the Mississippi River by the agency of natural laws, harming States along the Mississippi River. 180 U.S. at 241-48.

Defendants also assert that pumping always creates a cone of depression, implying the impacts of MLGW’s pumping on Mississippi are unavoidable, Tenn. Rep. at 4, Memphis Rep. at 25; and assert that “adopting Mississippi’s theory functionally would preclude States from developing the resource in close proximity to the state border.” Tenn. Rep. at 25. However, the undisputed facts refute those statements. The evidence shows that groundwater hydrogeologists and water well operators can predict the extent and depth of the cones of depression that will be created by their pumping operations and can take actions to *control* the geographic reach of those cones of depression, and thereby eliminate the adverse effects of their operations on neighboring properties. *See* Miss. Ex. Br. at 37-38. Defendants have never disputed this important point.

In summary, Mississippi’s case falls squarely within the principle recognized in *Tarrant* that one State may not reach into another State and interfere with its neighbor’s Constitutional right “to control water within its own borders.” 569 U.S. at 632. Moreover, Tennessee cannot do indirectly what the Constitution forbids it to do directly. *Smith*, 48 U.S. at 458. As *Tarrant* makes clear, Tennessee has no claim of right in law or equity

to groundwater located within the territorial boundaries of Mississippi.

D. The Constitution’s Sovereign-Based Framework Will Promote the Preservation and Protection of Groundwater.

Defendants’ arguments that “Mississippi’s sovereign-based framework” would “destabilize state water policy,” “frustrate the public interest, and be “difficult to administer” (Tenn. Rep. at 23-26) are unfounded. Mississippi’s “sovereign-based framework” is nothing more than a required application of *the Constitution* and provides *clear/bright line* guidance with simple rules. If they are not already, water purveyors would be required to design and operate their wells to capture only groundwater from their State, prohibiting cross-border extractions of groundwater unless the water purveyor obtains permission from a neighboring State to capture water located in the neighboring State. This structure provides encouragement and incentives to States to enter agreements regarding the management of their respective groundwater resources in border areas, including the construction and operation of wells near their borders.

Conversely, the “borderless common” water regime advocated by Defendants would empower every State to take as much groundwater from a neighboring State as it wants until (a) it causes substantial damage to the groundwater resource itself (which may be irreversible and does not serve public policy), and (b) the neighboring State seeks and obtains equitable apportionment from the Court—an expensive, lengthy,

and highly uncertain undertaking. The law professors' *amicus* brief points out that an apportionment of aquifers may not even be "technically feasible." L.P. Br. at 18. "The supply in a flowing river is easy to gauge. But determining the available supply of an aquifer requires extensive measuring and modeling and remains an educated guess." *Id.* at 18-19. *See also* Miss. Ex. Br. at 47-48 and fn. 18.

Furthermore, under Defendants' regime, a State may conscientiously seek to conserve and protect its groundwater through active regulation of well location, completion, and groundwater withdrawals, but those efforts could be nullified by water purveyors in another State installing wells within a few feet of the State border. In contrast, recognizing States' sovereign interests in and duties to apply the public trust doctrine as mandated by the Constitution will induce cooperation among States.⁷

⁷ The borderless common regime advocated by Tennessee is also materially inconsistent with its own statutory recognition that all waters within its borders are held by Tennessee in public trust for the benefit of its citizens. Tenn. Code Ann. § 68-221-702. Contrary to Tennessee's argument, Tenn. Rep. at 33, § 68-221-702 is not limited to "intrastate" water. Instead, "waters" is statutorily defined to include "any and all water, public or private, on or beneath the surface of the ground, which are *contained within, flow through, or border upon* Tennessee." Tenn. Code Ann. § 68-221-703(24) (emphasis added). *See also* Miss. Ex. Br. at 41-43. The Court's frequent recognition of the right of each State to regulate and control the use of waters within its borders has certainly never made a distinction between "interstate" and "intrastate" waters. *See, e.g., Tarrant*, 569 U.S. at 631-32 (State's sovereign powers include "control over waters within their own territories").

Finally, Defendants argue that MLGW's groundwater operations and others around the country have been installed and operated based on the (assumed) application of equitable apportionment, Tenn. Rep. at 25, but there is absolutely no record evidence supporting this assertion. The record evidence establishes that Defendants knew Mississippi's rights under the Constitution were implicated when they placed three well fields within a few miles of the Mississippi border. *See, e.g.*, J-22 at page 9 and 59 of 69 (1964 USGS report prepared in cooperation with Memphis which (a) advised that heavy pumping by Memphis and others in Shelby County was inducing flow of groundwater from Mississippi into Tennessee, and (b) identified "questions which need to be answered," including "the legal and economic aspects of continued development").

E. The Question of Proper Relief is Not Yet Before the Court.

The concerns raised by Defendants and certain *amici* about opening "floodgates" of litigation and damages liability are speculative. Mississippi's claims under the Constitution surely may not be denied simply because Defendants could incur monetary liability for violating Mississippi's Constitutional sovereignty.

The *amicus* brief of Colorado and certain other States also asserts it would be wrong for damages or injunctive relief to be awarded "without a known duty to another state," Col. Br. at 3-4, and that the respective rights and obligations of States must first be established by an interstate compact or judicial

equitable apportionment. *Id.* at 4-6. However, *the Constitution* established the respective rights and obligations of the States over 200 years ago. As the Colorado *amici* acknowledge: “States enjoy sovereign control of natural resources and land use within their border.” *Id.* at 5. Under the Constitution, each State is obligated to respect the sovereignty of their neighboring States. These are *known, existing* duties under the Constitution, not new ones. Defendants should be called to task for intentionally siphoning billions of gallons of Mississippi groundwater into Tennessee for capture and commercial sale.

Memphis’ floodgates argument based on “established uses” is an equitable apportionment concept having no application to this case. Memphis Rep. at 31. Memphis also expresses concern about the changes it may have to make for violating Mississippi’s rights, *id.* at 31-32, but that is a potential dilemma of Memphis’ own making. Memphis installed three well fields right next to the border knowing Mississippi’s rights would be implicated. The record also shows Memphis could have obtained all the water it would ever need from the Mississippi River; or placed its well fields at locations to the north and east of Memphis and captured all the groundwater it needed without impacting Mississippi. *See* Miss. Ex. Br. at 43-44.

Significantly, the damages arguments raised by Defendants and *amici* are premature. Mississippi seeks all available remedies, including damages and injunctive relief, but the precise relief Mississippi may be entitled to receive is not currently before the Court. In exercising its original jurisdiction, the Court’s

equitable powers are broad and flexible, and the Court “may ‘mould each decree to the necessities of the particular case’ and ‘accord full justice’ to all parties.” *Kansas v. Nebraska*, 574 U.S. 445, 456 (2015), quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Therefore, in the next stage of these proceedings, the Court may take the concerns of Defendants and *amici* into account in fashioning the relief it awards Mississippi.⁸ The damages issues that have been raised are not, however, issues that may properly be considered at this stage of the proceedings.⁹

F. Mississippi Has Suffered Substantial Harm.

Defendants’ assertion that Mississippi has suffered no harm is simply inaccurate. Defendants have taken *billions* of gallons of groundwater from Mississippi and caused adverse changes to hydrogeologic conditions in

⁸The Colorado *amicus* brief expresses concern about the possibility of damages being awarded for cross-border extractions, Col. Br. at 8-9, but the Court will need to balance such concerns with (1) the equities of a State being fairly compensated for violations of its sovereign rights and harm to their citizens, and (2) the importance of awarding remedies that will serve as a deterrent, e.g., a water purveyor will not be deterred from capturing groundwater from a neighboring State if the water purveyor knows it will suffer no economic consequences for doing so but only be told to stop.

⁹ Contrary to Memphis’ assertion, Mississippi is not seeking a “windfall,” Memphis Rep. at 32, but is merely seeking compensation for the massive appropriation of Mississippi groundwater without permission from or payment of compensation to Mississippi.

northwest Mississippi.¹⁰ Defendants' cone of depression has caused a reduction of "total available drawdown" within the cone's area/zone of influence in Mississippi. This interferes with the operation of each well located in Mississippi within the cone of depression and reduces their "maximum yield" -- which means that more wells and pumps are required in Mississippi to recover its water needs and which also causes increased power costs for Mississippi's water producers. *See* Miss. Ex. Br. at 15-17.¹¹

In addition, Mississippi has been injured by the invasion of its sovereignty. *See Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) ("It is beyond doubt that the complaint asserts an injury to the United States—both the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury resulting from the alleged fraud."). It is also telling that in *Tarrant* the Court protected and enforced Oklahoma's sovereignty without requiring a showing of "substantial harm."

¹⁰ Defendants' assertion that Mississippi has plenty of groundwater remaining (Tenn. Rep. at 20-21; Memphis Rep. at 32) is like a bank robber arguing that the bank has plenty of money remaining. The harm suffered by Mississippi must be measured by what was taken, not by what remains.

¹¹ Defendants suggest that Mississippi's own pumping is to blame, Tenn. Rep. 26; Memphis Rep. 25-26, but the volumes pumped from wells in DeSoto County pale in comparison to MLGW's pumping volumes. *See* P-158, page 2 of 2. In addition, the evidence establishes that Mississippi's wells are simply mitigating the effects of MLGW's massive pumping operations. Tr. (Wiley) at 453-54, 469, 496-97; P-162, P-181.

G. Defendants Have Waived Their Issue Preclusion Argument and Mississippi's Claims Are Not, In Any Event, Barred by Issue Preclusion.

Defendants argue Mississippi's claims are barred by issue preclusion, but the Special Master rejected that argument when ruling on Defendants' motion to dismiss. *See* Special Master Dkt. No. 55 (Memorandum Decision dated August 12, 2016) at 25-28; *see also* Report at 7 & n.3. ("Since the Special Master previously declined to recommend that the Supreme Court dismiss this action based on issue preclusion, it is not considered as a basis for the recommendation in this Report.")

Defendants did not file an exception to the Special Master's refusals to recommend dismissal based on issue preclusion. As a result, Defendants have waived their right to present issue preclusion arguments to the Court in this proceeding. *See Matter of Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 840 F.2d 1308, 1314 (7th Cir. 1988); *Video Views, Inc. v. Studio 21 Limited*, 797 F.2d 538, 539-40 (7th Cir. 1986). *See also, United States v. Lewis*, 621 F.2d 1382, 1386 (5th Cir. 1980) ("Defendant's failure to object to magistrate's report and recommendations on suppression of evidence motions was a waiver of his right to appeal the recommendation contained in the report.").

In any event Defendants' arguments have no merit.¹² Defendants argue the doctrine of issue preclusion bars Mississippi's claim because the district court and the Fifth Circuit have already ruled. Tenn. Rep. at 35. Neither of those courts, however, possessed any jurisdiction to limit Mississippi's rights and claims. Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1251(a) vest original and exclusive jurisdiction over controversies between the states in this Court. "[T]he description of . . . jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to any other federal court." *Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992).

To give preclusive effect to the statements of the district court and the court of appeals would improperly delegate this Court's exclusive authority to determine matters between States to courts without jurisdiction. As in *Mississippi v. Louisiana*, neither the federal district court nor the court of appeals had any authority to determine that equitable apportionment was Mississippi's exclusive remedy against Tennessee. Determining whether Tennessee was a necessary and indispensable party for purposes of Rule 19 was within the prerogative of those courts, *see Okoro v. Bohman*, 164 F.3d 1059, 1063 (7th Cir. 1999), but their extraneous comments on the ultimate remedies which may or may not be available in this Court exceeded their jurisdiction and are a nullity. Just as "[t]he States . . . are not bound by any district court or court of

¹² Only Tennessee has made any arguments on the issue. Memphis and MLGW simply incorporated Tennessee's arguments in a footnote. Memphis Rep. at 35, fn. 13.

appeals decision as to the boundary between them . . . ,” *Mississippi v. Louisiana*, 506 U.S. at 79, States cannot be bound by any district court or court of appeals decision purporting to determine the respective rights between them.¹³

In fact, the district court expressly declined to determine the respective rights of the States because it found that the Supreme Court had not yet “determined which portion of the aquifer’s water is the property of which State.” *Hood*, 533 F. Supp. 2d at 648. The district court opined that equitable apportionment was necessary but this statement is *dicta*; the district court did not have the authority to determine, considered no evidence, and therefore could not have attempted to determine the respective rights of the parties to the groundwater in issue. The district court’s recognition

¹³ In addition, issue preclusion only applies to a determination that is “essential to the judgment.” *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980)). “A determination ranks as necessary or essential only when the final outcome hinges on it.” *Bobby*, 556 U.S. at 835. The “necessary and essential” determination at issue was that Mississippi’s claims implicated Tennessee’s sovereign interests, and the district court’s jurisdictional holding was based on the fact that Tennessee had an interest in the proceedings but could not be joined in the suit because of the Supreme Court’s original jurisdiction over competing interests between two States. *See* Fed. R. Civ. P. 19(a), (b). Identifying the full range of claims Mississippi could assert against Tennessee was neither necessary nor essential to the lower courts’ decision under Rule 19 of the Federal Rules of Civil Procedure. Therefore, any statements the district court and court of appeals made concerning equitable apportionment and the relief potentially available to Mississippi were *dicta* and have no preclusive effect.

that it lacked authority to make these critical factual findings or binding legal conclusions is why it dismissed the suit.

This Court is the only court that can determine whether Mississippi has asserted valid claims against Defendants based on the unique facts of this case.¹⁴

H. Defendants' Remaining Arguments Have No Merit.

Defendants distort the scope of Mississippi's public trust doctrine statutes, asserting that Mississippi's position in this case conflicts with Miss. Code Ann. § 51-3-41. Memphis Rep. at 30-31; Tenn. Rep. at 33-34. The statute, however, does nothing more than empower the Mississippi Commission on Environmental Quality to negotiate compacts or agreements with adjoining States.

As interpreted by Defendants, § 51-3-41 waives Mississippi's sovereign powers and nullifies the public trust, which is established in § 51-3-1 and attaches to *all* water in the State. The Court recognized in *Tarrant* that "States do not easily cede their sovereign powers, including their control over waters within their own territories," 569 U.S. at 631, and held that any ceding of such powers must be stated expressly and cannot be premised on ambiguity or silence. *Id.* at 632-33. There

¹⁴ The *amicus* brief of the United States concludes: "Like the Special Master, the United States does not recommend that this Court dismiss Mississippi's complaint on that ground." U.S. Br. at 28, fn. 4.

is nothing in § 51-3-41 that purports to waive or limit Mississippi's sovereign powers as Defendants assert.

Defendants' arguments that Mississippi is attempting to "regulate" Tennessee and impose its regulatory authority on Tennessee, Memphis Rep. at 26-27, are also inaccurate. Mississippi seeks to have the Court apply the Constitution's sovereign-based framework, utilize the State border as the line of demarcation between the States' respective realms of sovereign right and regulatory authority, and preserve and enforce Mississippi's rights under the Constitution to protect the natural resources within its borders. Nothing in that argument suggests that Tennessee must follow Mississippi law or water regulations.

Defendants also assert Mississippi seeks to apply Mississippi tort law, Memphis Rep. at 2, Tenn. Rep. at 25, but Mississippi's claims are premised on the Constitution. Mississippi's citation to both Mississippi and Tennessee tort law may be helpful to the Court in formulating a federal common law remedy appropriate in this unique case. *See Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981). Regardless, the Court is vested with the power to "regulate and mould the process it uses in such a manner as in its judgment will best promote the purpose of justice." *Kansas v. Nebraska*, 574 U.S. at 455, quoting *Kentucky v. Dennison*, 24 How. 66, 98, 16 L.Ed. 717 (1861).

I. The Constitution Controls, Not International Law.

The brief submitted by the New York City Bar Association ("NYB Br.") urges the Court to resolve this

dispute based on “principles of international law.” NYB Br. at 2. The first source of “international law” touted is the United Nations 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (“Convention”). NYB Br. at 2 and 14-15. The United States is not a party to the Convention,¹⁵ and it has been observed that “enthusiasm for [the Convention] appears to have waned” and “the current and future status of the convention appears uncertain.”¹⁶

The City Bar also advocates application of the United Nations International Law Commission’s 2006 Draft Articles on “The Law of Transboundary Aquifers,” but admits that those *draft* articles “have not been elevated to the status of a ... treaty.” NYB Br. at 2, 20-21. In any event, the United States Constitution controls the determination of this stage of the proceeding and reference to external sources is not appropriate.

¹⁵ See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&clang=_en.

¹⁶ Gabriel Eckstein, *The status of the UN Watercourses Convention: does it still hold water?*, 36 INT’L J. WATER RESOURCES DEV. 1, 429, 430, 451 (2020). See also *id.* at 448 (“[W]hatever the content and intent of the Watercourses Convention, its chequered history prevents it from being taken as credible evidence of customary international law.”) (quoting Charles B. Bourne, *The Primacy of the Principle of Equitable Utilization in the 1997 Watercourses Convention*, 35 CANADIAN YEARBOOK OF INT’L LAW 215, 230-31 (1997)).

III. CONCLUSION

The Court should decline to adopt the Special Master's recommendation, hold that Mississippi is entitled to relief, and order further proceedings.

Respectfully submitted,

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