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No. 143, Original

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IN THE  
**Supreme Court of the United States**

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STATE OF MISSISSIPPI,  
*Plaintiff,*  
v.

STATE OF TENNESSEE, CITY OF MEMPHIS, TENNESSEE,  
AND MEMPHIS LIGHT, GAS & WATER DIVISION,  
*Defendants.*

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**On Motion for Leave To File Bill of Complaint**

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**BRIEF OF DEFENDANT STATE OF TENNESSEE  
IN OPPOSITION TO STATE OF MISSISSIPPI'S  
MOTION FOR LEAVE TO FILE  
BILL OF COMPLAINT IN ORIGINAL ACTION**

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## QUESTIONS PRESENTED

In 2010, this Court denied Mississippi's motion for leave to file an original action against Defendants alleging wrongful conversion of groundwater supposedly owned by Mississippi. On the same day, the Court denied Mississippi's petition for a writ of certiorari challenging the Fifth Circuit's ruling in a separate action – in which Mississippi asserted substantially identical claims – that the doctrine of equitable apportionment, rather than state property law, governs Mississippi's alleged rights to that same groundwater. Four years later, Mississippi now again seeks leave to file a bill of complaint alleging that Defendants have wrongfully converted the same groundwater. The questions presented are:

- (1) Whether this Court's longstanding water-rights precedents continue to foreclose Mississippi's claim to sovereign ownership of all interstate groundwater residing within its territorial boundaries; and
- (2) Whether the doctrine of issue preclusion bars Mississippi from relitigating the Fifth Circuit's holding, which was essential to a final judgment in a prior proceeding, that Mississippi must seek an equitable apportionment before suing Defendants for wrongfully converting the groundwater at issue.

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## INTRODUCTION

This is the third attempt by Mississippi to seek more than \$600 million in alleged damages concerning groundwater in the Memphis Sands Aquifer (“Aquifer”), which is an underground water resource that underlies parts of both Mississippi and Tennessee. Mississippi, however, still cannot plead or prove that a single Mississippi resident has suffered a water shortage from Memphis’s use of the Aquifer. As with Mississippi’s first two unsuccessful attempts to secure this Court’s review of its damages claims, Mississippi’s current effort also fails – both on the merits and because of issue preclusion from a prior suit litigated to final judgment.

In 2010, this Court denied without prejudice Mississippi’s proposed bill of complaint (the “2009 Complaint”), which complained that the City of Memphis’s and Memphis Light, Gas & Water’s (“MLGW”) extraction of groundwater from the Aquifer allegedly caused groundwater to flow from Mississippi into Tennessee. *See Mississippi v. City of Memphis*, 559 U.S. 901 (2010) (App.<sup>1</sup> 26a). The 2009 Complaint claimed that Memphis’s and MLGW’s groundwater pumping constituted conversion of Mississippi’s water, based on a theory that every State has a sovereign property right under state law to all groundwater naturally residing within its territorial boundaries (the “territorial property rights theory”). Although Mississippi’s principal argument was that this Court’s equitable-apportionment doctrine did not apply to the Aquifer, it asked in the alternative for equitable apportionment of the Aquifer between Mississippi and Tennessee.

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<sup>1</sup> References to “App.” are to the appendix to this brief; references to “Miss. App.” are to the appendix to Mississippi’s brief.

In its order denying leave, this Court cited two precedents demonstrating that both of Mississippi's claims for relief were legally insupportable as pleaded. Those same cases also confirm that leave should again be denied in this case because Mississippi has failed to cure the deficiencies in its 2009 Complaint. The first citation (*Virginia v. Maryland*, 540 U.S. 56 (2003)) rejected Mississippi's territorial property rights theory and made clear that the federal common-law doctrine of equitable apportionment governs disputes over interstate groundwater resources, including the Aquifer. *See id.* at 74 n.9. The second citation (*Colorado v. New Mexico*, 459 U.S. 176 (1982)) was for the well-settled principle that a State asserting a claim for equitable apportionment must demonstrate "real or substantial injury or damage" to avail itself of this Court's original jurisdiction. *Id.* at 187 n.13 (internal quotations omitted). Mississippi's alternative request for equitable apportionment of the Aquifer in the 2009 Complaint was deficient because it failed to allege any such injury.

On the same day this Court denied leave to file the 2009 Complaint, it also denied Mississippi's petition for a writ of certiorari seeking review of the Fifth Circuit's decision in *Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625 (5th Cir. 2009) (App. 11a-25a). *See* 130 S. Ct. 1319 (2010). In *Hood*, Mississippi brought a virtually identical claim for conversion against Memphis and MLGW, also based on the territorial property rights theory raised in the 2009 Complaint in this Court. After extensive discovery, both the district court and the Fifth Circuit – like this Court – rejected that theory. *See* App. 17a-18a. "The Aquifer is an interstate water source, and the amount of water to which each state is entitled from

a disputed interstate water source must be allocated [through equitable apportionment] before one state may sue an entity for invading its share.” *Id.* Based on that holding, the Fifth Circuit affirmed the district court’s dismissal of Mississippi’s complaint under Federal Rule of Civil Procedure 19 for failure to join Tennessee as an indispensable party.

Now, four years later, Mississippi seeks leave to file a new original action. Mississippi does not allege that circumstances have changed since the Court’s rejection of the 2009 Complaint, nor does it allege any “real or substantial injury or damage” entitling it to bring an equitable-apportionment claim. Rather, Mississippi’s proposed Complaint simply rehashes its prior argument that the equitable-apportionment doctrine does not apply to the Aquifer because it is “not a shared natural resource,” even though it admittedly lies beneath both States. Miss. Br. 6.

This Court should deny leave to file Mississippi’s proposed Complaint for two reasons. First, the Court previously rejected Mississippi’s territorial property rights theory – the sole basis for Mississippi’s present Complaint – when it denied leave to file the 2009 Complaint. Mississippi has offered no reason why this Court should reconsider its prior, correct decision. Under well-settled precedent, if Mississippi is entitled to any relief at all, that relief must come solely through an equitable apportionment. Mississippi’s new complaint expressly disclaims any such relief, which in any event remains foreclosed because Mississippi can show no injury caused by Tennessee’s actions.

Second, leave also should be denied because issue preclusion bars Mississippi from renewing the territorial property rights theory that *Hood* rejected.

Both the district court and the Fifth Circuit in *Hood* held that the Aquifer is a shared interstate resource and that the equitable-apportionment doctrine – not state law – governs Mississippi’s rights to the groundwater in the Aquifer. Mississippi’s attempt to reassert the very same argument that both courts in *Hood* rejected violates basic issue-preclusion principles and threatens burdensome litigation over issues already resolved at great expense.

Both clear defects in Mississippi’s Complaint warrant this Court exercising its discretion to deny leave to file. If the Court grants Mississippi’s motion and permits further development of the case, it should, at the very least, entertain full briefing and argument on motions to dismiss at an early stage of the litigation.<sup>2</sup> Early resolution of the dispositive legal questions raised by Mississippi’s proposed Complaint would obviate the need for expensive discovery before a special master. Should the Court perceive benefit in referring the case to a special master, however, it should do so without prejudice to Tennessee’s right to seek prompt adjudication of its motion to dismiss.

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<sup>2</sup> See *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973) (noting that this Court’s “object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented”); see also *Texas v. New Mexico*, 134 S. Ct. 1050, 1050 (2014) (granting leave to file proposed complaint but allowing respondent to “file a motion to dismiss” within 60 days); *Idaho ex rel. Andrus v. Oregon*, 429 U.S. 163, 164 (1976) (per curiam) (grant of leave to file is “not a judgment that the bill of complaint . . . states a claim upon which relief may be granted”).

## STATEMENT

1. As Mississippi's Complaint acknowledges, the Aquifer is a large underground water source that lies beneath both Mississippi and Tennessee (as well as several other States). See Compl. ¶¶ 18, 22, 41. For more than 125 years, Memphis has relied on the Aquifer for water serving the residential and commercial needs of a large metropolitan area. See Miss. App. 138a-140a, 202a. DeSoto County, Mississippi, which is located across the Mississippi border from Memphis, also pumps water from the Aquifer, but it is far less populated than Memphis and thus uses far less water.<sup>3</sup>

On February 1, 2005, Mississippi filed a lawsuit against Memphis and MLGW (but not Tennessee) in the United States District Court for the Northern District of Mississippi. See *Hood ex rel. Mississippi v. City of Memphis*, No. 2:05CV32-D-B (N.D. Miss.). Mississippi alleged that Memphis's and MLGW's extraction of water from the Aquifer had created a "cone of depression" that caused water in the Aquifer otherwise lying beneath Mississippi to flow over the border into Tennessee. See 5th Cir. Rec.<sup>4</sup> 51 (¶ 20(d)). Mississippi further alleged that Memphis's pumping of groundwater had harmed Mississippi's ability to use the Aquifer. *Id.* at 49-53 (¶¶ 19-22). From that core allegation, Mississippi further asserted various common-law torts against Memphis and MLGW. *Id.* at 53-62 (¶¶ 23-52).

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<sup>3</sup> As of July 2013, the Census Bureau estimated that DeSoto County has approximately 168,000 residents, compared to nearly 940,000 residents in Shelby County, Tennessee, which includes Memphis. See <http://www.census.gov/popest/data/counties/totals/2013/CO-EST2013-01.html>.

<sup>4</sup> References to "5th Cir. Rec." are to the record from *Hood ex rel. Mississippi v. City of Memphis*, No. 08-60152.

In March 2005, Memphis filed a motion to dismiss Mississippi's complaint for lack of jurisdiction, contending that Tennessee was a necessary party under Federal Rule of Civil Procedure 19 and that joinder of Tennessee would bring the case within this Court's exclusive original jurisdiction. *Id.* at 120-21. The district court denied that motion in August 2005. *Id.* at 300. Mississippi then filed an amended complaint, in which it withdrew the initial complaint's allegations of harm to Mississippi's use of the Aquifer. The only allegation of harm preserved in Mississippi's amended complaint was the loss of its alleged property right in the groundwater that Memphis had supposedly caused to flow into Tennessee. *Id.* at 779-88 (¶¶ 23-52).

On June 12, 2007, Memphis filed motions for judgment on the pleadings, again asserting that Mississippi's amended complaint should be dismissed for failure to join Tennessee (as well as Arkansas) as a party. On September 25, 2007, the district court denied that motion. *Id.* at 2883-85. On January 28, 2008, after extensive discovery – and approximately two weeks prior to the scheduled bench trial – the court announced *sua sponte* that it was reconsidering that ruling. *Id.* at 3488-89. After further briefing and argument, the court dismissed Mississippi's claims for failure to join Tennessee. App. 4a-10a.

The district court concluded that Mississippi's claim of conversion necessarily implicated Tennessee's sovereign interests in the shared use of the Aquifer. Noting that “the doctrine of equitable apportionment has historically been the means by which disputes over interstate waters are resolved,” the court held that it could not determine whether Memphis and MLGW were “pumping water that



belongs to the State of Mississippi” without such an apportionment. App. 4a, 5a. Because any such apportionment necessarily would implicate Tennessee’s sovereign interests, the court concluded that Tennessee was a “necessary party.” App. 6a-7a. And, because joinder of Tennessee as a defendant would trigger this Court’s exclusive jurisdiction under 28 U.S.C. § 1251(a), the court dismissed Mississippi’s complaint without prejudice pursuant to Rule 19(b). App. 7a-10a.

2. The Fifth Circuit affirmed. It concluded that the district court “made no error of law” in determining that an equitable apportionment of the Aquifer was a condition precedent to Mississippi’s claims for relief. App. 17a-18a. Citing this Court’s longstanding precedents, the Fifth Circuit held that “[t]he Aquifer is an interstate water source, and the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share.” *Id.* (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-05 (1938)). It then agreed with the district court’s determination that such an allocation would require “application of the equitable apportionment doctrine,” which made Tennessee a necessary party. App. 18a-20a.

Before the Fifth Circuit, “Mississippi’s fundamental argument” was “that the Aquifer’s water is not an interstate resource subject to equitable apportionment.” App. 17a. The Fifth Circuit squarely rejected that argument. It found that the Aquifer “flows, if slowly, under several states” and thus is legally “indistinguishable from a lake bordered by multiple states or from a river bordering several states depending upon it for water.” App. 18a. Given that

the Aquifer is an interstate groundwater resource, the Fifth Circuit further “rejected” Mississippi’s argument “that state boundaries determine the amount of water to which each state is entitled.” App. 19a. Rather, it held that the “Aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests.” App. 20a. Such an allocation, the court explained, must (in the absence of an interstate compact) take place in an “equitable apportionment action” in this Court. App. 25a.

Mississippi then sought certiorari. *See* Miss. Cert. Pet., No. 09-289 (filed Sept. 2, 2009). It again contended that the Aquifer contains groundwater that, “[u]nlike the surface water of watersheds, streams, rivers and lakes,” is a “pure finite resource” that “under natural conditions” would never flow into Tennessee. *Id.* at 3. The Fifth Circuit had erred, according to Mississippi, by applying this Court’s “equitable apportionment cases” to such groundwater. *Id.* at 9. It had further erred, Mississippi contended, by rejecting the argument that Mississippi owns all “ground water resources within the geographical confines of its boundaries as a function of statehood.” *Id.* at 11-12. Mississippi thus asked this Court to grant certiorari and hold that “equitable apportionment is not an appropriate remedy for the wrong asserted by Mississippi.” *Id.* at 14.

On January 25, 2010, this Court denied certiorari. *See* 130 S. Ct. 1319.

3. On September 2, 2009, contemporaneous with its certiorari petition, Mississippi filed a provisional motion for leave to file the 2009 Complaint against Memphis, MLGW, and Tennessee. That complaint contained two causes of action. First, Mississippi

reprised its territorial property rights theory, alleging that Memphis's and MLGW's pumping of water constituted a "wrongful diversion, taking and conversion of state-owned natural resources." 2009 Compl. ¶ 24. Second, Mississippi alleged that, "*if and only if* this Court determines that Mississippi does not own and control the ground water resources within its borders," the Court should "determine the equitable apportionment of the ground water in the aquifer" between Tennessee and Mississippi. *Id.* ¶ 5(c).

Tennessee opposed leave to file the 2009 Complaint, arguing that Mississippi's territorial property rights theory was inconsistent with this Court's longstanding precedents holding that States' rights with respect to interstate water resources must be determined through the federal common-law doctrine of equitable apportionment. *See* 2009 Tenn. Opp. 12-19. Absent an equitable apportionment, Tennessee maintained, Mississippi could not claim damages based on alleged misappropriation of water in the Aquifer. As for Mississippi's alternative claim for equitable apportionment, Tennessee explained that Mississippi had failed to plead – and in fact had affirmatively disclaimed – any actual injury to its use of the Aquifer that would warrant this Court's intervention. *Id.* at 23-30.

On January 25, 2010, the same day it denied Mississippi's certiorari petition, the Court denied Mississippi's motion for leave without prejudice, citing *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003), and *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982). App. 26a. By referencing those precedents, the Court indicated that the doctrine of equitable apportionment, not state property law, governs States' respective rights to the Aquifer. *See*

*Virginia v. Maryland*, 540 U.S. at 74 n.9 (“Federal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other’s interest in the river.”). It also confirmed that, to bring a viable equitable-apportionment action, Mississippi must allege that Tennessee has caused “substantial injury or damage” to Mississippi’s use of the Aquifer. *Colorado v. New Mexico*, 459 U.S. at 187 n.13 (internal quotations omitted). The Court’s dismissal of the 2009 Complaint “without prejudice” indicated that Mississippi could seek leave to refile an equitable-apportionment claim in the future if it could allege facts satisfying this Court’s injury requirement.

4. Mississippi’s current Complaint rests entirely on the same territorial property rights theory previously rejected by this Court and by the lower courts in *Hood*. As before, Mississippi alleges (at ¶¶ 14, 38) that “[t]his case does not fall within the Court’s equitable apportionment jurisprudence” because the groundwater on its side of the Aquifer is a “limited natural resource” that “[u]nder natural conditions” would “not leave Mississippi’s groundwater storage.” Based on that theory, Mississippi requests (at Br. 22-25) that this Court declare that Mississippi owns the groundwater in the Aquifer underlying its territory, award at least \$615 million in damages for the groundwater allegedly taken by Tennessee since 1985, and enjoin Tennessee’s, Memphis’s, and MLGW’s future use of the Aquifer.

Unlike the 2009 Complaint, Mississippi’s proposed Complaint does not seek equitable apportionment of the Aquifer, even as fallback relief. As a result, the proposed Complaint contains no facts to support a

right to equitable apportionment. Specifically, the proposed Complaint does not even purport to satisfy this Court's requirement that a State asserting equitable apportionment allege "substantial injury or damage" to its use of the shared resource. The only injury on which Mississippi relies (at ¶ 54) is the loss of its claimed property interest in the groundwater that allegedly would have remained within Mississippi's borders.

### REASONS FOR DENYING MOTION FOR LEAVE TO FILE COMPLAINT

The "requirement that leave be obtained before a complaint may be filed in an original action serves an important gatekeeping function." *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (citation omitted). By screening proposed complaints at the threshold, that requirement ensures that this Court's original jurisdiction remains available for only those cases possessing the utmost "seriousness and dignity." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). To invoke this Court's original jurisdiction, a State must "allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor." *Alabama v. Arizona*, 291 U.S. 286, 291-92 (1934). Under that demanding standard, pleading a viable cause of action is necessary but not sufficient; a proposed complaint must also allege injury that is "clearly shown to be of serious magnitude and imminent." *Id.* at 292.

Mississippi's proposed Complaint fails to satisfy that standard for two reasons, either of which is sufficient to warrant denying Mississippi's motion for leave. First, this Court already rejected Mississippi's territorial property rights theory in its prior order denying leave to file the 2009 Complaint, and Missis-

issippi offers no reason for this Court to reconsider its previous order. Second, Mississippi's Complaint is barred by issue preclusion. The territorial property rights theory asserted in the Complaint is indistinguishable from the theory Mississippi litigated and lost in *Hood*, and Mississippi is precluded from relitigating that theory in a new action.

**I. THIS COURT SHOULD DENY LEAVE FOR THE SAME REASONS IT DENIED MISSISSIPPI LEAVE TO FILE THE 2009 COMPLAINT**

**A. Mississippi's Proposed Complaint Rests On The Same Territorial Property Rights Theory This Court Rejected In Denying Leave To File The 2009 Complaint**

This Court's rationale for denying leave to file the 2009 Complaint applies again to Mississippi's current Complaint. The current Complaint alleges that Mississippi retains a "sovereign prerogative[]" to control interstate "waters naturally residing within its boundaries." Compl. ¶ 38. This Court previously denied Mississippi leave to bring a claim based on that very theory, and the theory is no sounder now than it was then. More than a century of water-rights jurisprudence makes clear that interstate waters must be apportioned, either by compact or by this Court, before a State acquires an enforceable right to those waters. *See 4 Waters & Water Rights* § 36.02, at 36-8 to 36-9 & nn.16-17 (Robert E. Beck, ed., 2004 repl. vol.) ("[t]he Supreme Court has made it abundantly clear that it has little patience with claims of absolute 'ownership' by *either* [the state or federal] government"). Because Mississippi has not obtained an equitable apportionment, it cannot bring a tort claim based on the alleged conversion of water from the Aquifer.

Mississippi's motion for leave argues (at Br. 6) that the Aquifer is not subject to equitable apportionment because it is not a naturally shared resource, even though it underlies both Mississippi and Tennessee. Mississippi made the very same assertion in support of its failed 2009 Complaint. *See* 2009 Compl. ¶ 2 ("The formation comprising the aquifer spans a subterranean area between Mississippi and Tennessee, although the ground water stored in the dense sands is not a natural resource shared between these states."). Mississippi likewise made that argument in its petition for a writ of certiorari in *Hood*, which this Court also denied. *See infra* note 18. Mississippi offers no reason why this Court now should reconsider a theory it twice found insufficient to justify plenary review. That failure alone warrants denial of the motion for leave.

The current Complaint is even more deficient than the 2009 Complaint because, this time, Mississippi has expressly abandoned its fallback claim for equitable apportionment. In denying leave to file the 2009 Complaint, this Court noted that a party seeking equitable apportionment must demonstrate "real or substantial injury or damage." *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982) (internal quotations omitted). Despite the passage of four years, Mississippi has done nothing to amend its complaint to allege any such injury or harm. On the contrary, Mississippi's new Complaint affirmatively disclaims any claim for equitable apportionment and relies exclusively on the territorial property rights theory previously rejected by this Court. This Court should deny leave for the same reasons it denied leave to file the 2009 Complaint.

## **B. This Court Correctly Rejected Mississippi's Argument That A State Owns Interstate Waters Located Within Its Borders**

Even if this Court were to consider Mississippi's territorial property rights theory anew, it should reach the same result. This Court's prior order correctly rejected that theory as inconsistent with more than a century of its water-rights decisions.

Under this Court's well-settled precedents, a State has no inherent right to the portion of an interstate water resource that happens to reside within its territorial boundaries. Rather, for more than a century, "disputes over the allocation of water [have been] subject to equitable apportionment by the courts." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2125 (2013). Equitable apportionment is a "flexible doctrine which calls for 'the exercise of an informed judgment on a consideration of many factors'" beyond mere geography. *Colorado v. New Mexico*, 459 U.S. at 183 (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)). Indeed, a court apportioning an interstate water resource owes fidelity not to territorial boundaries, but to the cause of "secur[ing] a 'just and equitable' allocation" in light of "all relevant factors." *Id.* (quoting *Nebraska v. Wyoming*, 325 U.S. at 618). Were it otherwise, States would have carte blanche to divert water in a river, stream, or lake within their territory, to the detriment of other States sharing the interstate water resource.

As this Court already has recognized, those principles foreclose Mississippi's claim to sovereign ownership of water flowing underneath its territory. In briefing Mississippi's prior complaint, Tennessee articulated at length why this Court's precedents foreclose Mississippi's territorial property rights



theory. See 2009 Tenn. Opp. 12-23. The same arguments again suffice to dispose of Mississippi's claims.<sup>5</sup> Specifically, this Court's equitable-apportionment cases have "consistently denied" the proposition – critical to Mississippi's theory of conversion – that a State automatically possesses sovereign "ownership or control" over all interstate "waters flowing within her boundaries." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938) (internal quotations omitted); see *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983) ("[A] State may not preserve solely for its own inhabitants natural resources located within its borders.").<sup>6</sup>

Indeed, the proper allocation of interstate waters is "neither dependent on nor bound by existing legal rights to the resource being apportioned." *Idaho ex rel. Evans*, 462 U.S. at 1025. Mississippi's continued assertion (at ¶ 11) of a sovereign "prerogative" over the Aquifer cannot be squared with that core principle. A State's asserted territorial interest in interstate water is not controlling; it "must give way in some circumstances to broader equitable considera-

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<sup>5</sup> Because Mississippi's present arguments do not differ materially from the ones it made in 2009, the arguments in Tennessee's previous brief continue to apply and are incorporated here by reference. For the Court's convenience, Tennessee presents an updated version of those arguments here.

<sup>6</sup> See also *Colorado v. New Mexico*, 467 U.S. 310, 323 (1984) (concluding that a State's border is "essentially irrelevant to the adjudication of these sovereigns' competing claims"); *Colorado v. New Mexico*, 459 U.S. at 182 n.8 ("reject[ing]" contention "that the mere fact that the Vermejo River originates in Colorado automatically entitles Colorado to a share of the water"); *Kansas v. Colorado*, 206 U.S. 46, 115 (1907) (rejecting as "untenable" contention that an interstate river was "really two rivers, one . . . terminating at or near the state line, and the other commencing at or near the place where the former ends").

tions.” *Idaho ex rel. Evans*, 462 U.S. at 1025. For that reason, in a dispute between two co-equal sovereigns over an interstate water resource, traditional property rights concepts simply do not apply. See *Kansas v. Colorado*, 206 U.S. at 97-98 (equitable-apportionment doctrine requires the Court to settle interstate water disputes “in such a way as will recognize the equal rights of both [States] and at the same time establish justice between them”).

That principle rests on the sound judgment that “strict adherence” to a rigid “rule” of allocation would hamper this Court’s ability to obtain “just and equitable” results in interstate water cases. *Nebraska v. Wyoming*, 325 U.S. at 618. Allocating interstate waters involves a “delicate adjustment of interests” that must be sensitive to a wide array of hydrological, climactic, and economic forces, and this Court takes care to tailor its apportionment decisions in light of “all” such “relevant factors.” *Id.* To bypass those factors and declare that Mississippi simply owns all water within its borders – no matter the consequences for other States – would vitiate the “flexible doctrine” that has long proved essential to achieving “just and equitable allocation[s]” of interstate water. *Colorado v. New Mexico*, 459 U.S. at 183 (internal quotations omitted).<sup>7</sup>

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<sup>7</sup> Mississippi’s arguments (at ¶¶ 10-12) based on the “public trust” doctrine are unavailing. As Tennessee has explained, that doctrine concerns a State’s control over purely intrastate waters vis-à-vis private parties. See 2009 Tenn. Opp. 19-23. Mississippi’s reliance on *Cinque Bambini Partnership v. Mississippi*, 491 So. 2d 508 (Miss. 1986), *aff’d sub nom. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988), therefore remains misplaced. That case, like the others Mississippi cites, addressed a dispute between a State and a private claimant over wholly intrastate lands and waters. See 484 U.S. at 472-

**C. This Court Also Properly Rejected Mississippi's Argument That Equitable Apportionment Does Not Apply To Groundwater Sources Such As The Aquifer**

Mississippi argues (at ¶ 41) that equitable apportionment does not apply because the Aquifer is not an “interstate river or stream” that “naturally move[s] or flow[s] north into Tennessee.” That, too, rehashes an argument this Court has correctly rejected. Mississippi previously argued to this Court that equitable apportionment applies only to “water historically naturally flowing across state lines.” 2009 Miss. Reply Br. 3. In doing so, Mississippi unsuccessfully advanced the same theories and cited the same cases on which it now relies.<sup>8</sup>

Mississippi's latest attempt to resurrect those theories fares no better. This Court has applied the equitable-apportionment doctrine broadly to all

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73. The holding that a State's title over such intrastate waters prevails over competing private claimants in no way suggests the broad exception to equitable-apportionment doctrine that Mississippi seeks.

<sup>8</sup> Compare 2009 Miss. Reply Br. 1 (“The ground water at issue is intrastate in character and would never reside within Tennessee's boundaries under natural conditions.”) with Miss. Br. 6 (Aquifer contains “intrastate water” “which does not naturally move from one state to another”); compare 2009 Miss. Reply Br. 6-7 (distinguishing “Tennessee's Authorities” as focusing on “flowing ‘interstate waters’” rather than “intrastate ground water”) with Miss. Br. 1 n.2 (calling equitable-apportionment cases as inapplicable to “groundwater” that is not a “naturally shared resource”); compare 2009 Miss. Br. 12 (asserting Mississippi's “dominion over the waters within its territorial boundaries” and citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988)) with Miss. Br. 5 (asserting Mississippi's “full control and authority over the groundwater stored naturally within its territorial borders” and also citing *Phillips*).

interstate “disputes over the allocation of water.” *Tarrant Reg’l Water Dist.*, 133 S. Ct. at 2125. When the Court first formulated that doctrine in the seminal case of *Kansas v. Colorado*, it explained that equitable apportionment applies “whenever . . . the action of one state reaches, through the agency of natural laws, into the territory of another state” and thereby requires the Court to reconcile the competing “rights of the two states” in a manner that “recognize[s] the equal rights of both.” 206 U.S. at 97-98.

That venerable formulation of the doctrine easily encompasses Mississippi’s claims. Mississippi admits that the “geological formation in which the groundwater is stored straddles two states.” Compl. ¶ 41. It further admits that the Aquifer is an interconnected hydrological formation and that, in its natural state, the water in the Aquifer flows, even if slowly, across state boundaries. See Miss. Br. 7, 18-19. Because the Aquifer is a shared interstate water resource, any claim of ownership implicates the “rights of the two states.” *Kansas v. Colorado*, 206 U.S. at 98.

Moreover, Mississippi’s theory is a quintessential example of “the action of one state reach[ing], *through the agency of natural laws*, into the territory of another state.” *Id.* at 97 (emphasis added). Mississippi does not (and cannot) allege that Memphis’s wells have crossed physically into its territory. See Miss. App. 94a (depicting location of wells).<sup>9</sup> Rather, Memphis’s pumping allegedly (at ¶¶ 24-25)

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<sup>9</sup> Although Mississippi’s brief (at 15-16) refers to Memphis “reaching beneath the state border into Mississippi’s territory,” this is simply hyperbolic rhetoric, as its own Complaint makes clear that MLGW’s wells do not physically cross Mississippi’s borders. See Compl. ¶¶ 14, 19; Miss. Br. 10.

“siphon[s]” water out of Mississippi by creating a “substantial drop in pressure” that induces water in Mississippi to flow “northward at an accelerated velocity.” Such a phenomenon epitomizes the “agency of natural laws” at work. *Kansas v. Colorado*, 206 U.S. at 97. Indeed, it is conceptually no different from a claim that an upstream State has diverted river water that would naturally have flowed downstream; in both cases, the claim that a State has altered the natural flow of a shared water resource is subject to equitable apportionment, to ensure “recogni[tion] [of] the equal rights of both” States. *Id.* at 98.

Contrary to Mississippi’s contention that the question of “states’ sovereign authority over . . . groundwater” is “an undecided Constitutional question,” Br. 2 n.2, this Court on several occasions has recognized that groundwater and surface water share salient hydrological characteristics that make it appropriate to include groundwater in apportionment decisions. In *Washington v. Oregon*, 297 U.S. 517 (1936), for example, this Court addressed a claim – similar to Mississippi’s – that Oregonian farmers should be enjoined from pumping subsurface water. *Id.* at 523-26. The Court applied the equitable-apportionment doctrine and concluded that no injunction was warranted because the water pumped from wells in Oregon did not “materially lessen[]” water available in Washington. *See id.* at 526 (internal quotations omitted). Mississippi simply ignores this case and others applying equitable apportionment to groundwater resources.<sup>10</sup>

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<sup>10</sup> *See also Nebraska v. Wyoming*, 515 U.S. at 14 (addressing claim that “groundwater pumping in Wyoming can . . . deplete surface water flows” within context of equitable apportionment);

Mississippi's attempt to distinguish groundwater and surface water is also inconsistent with this Court's decision in *Idaho ex rel. Evans v. Oregon*. In that case, this Court applied the doctrine of equitable apportionment to anadromous (migratory) fish, reasoning that "the natural resource of anadromous fish is sufficiently similar" to water in a flowing stream, because "a State that overfishes a run downstream deprives an upstream State of the fish it otherwise would receive." 462 U.S. at 1024. That conclusion was premised on a recognition – equally applicable here – that "a State may not preserve solely for its own inhabitants natural resources located within its borders." *Id.* at 1025. If that principle applies to migratory fish, it surely applies to an interstate groundwater resource such as the Aquifer.

Finally, applying equitable apportionment to interstate groundwater resources such as the Aquifer "comports with [this Court's] emphasis on flexibility in equitable apportionment." *Colorado v. New Mexico*, 459 U.S. at 188. Under that "flexible doctrine," *id.* at 183, there is nothing talismanic about whether water is underground, or whether it moves "exceedingly slow," Miss. Br. 18 (internal quotations omitted). See App. 18a (finding such facts "of no analytic significance"). As the Fifth Circuit correctly held, the Aquifer "flows, if slowly, under several states, and it is indistinguishable from a lake bordered by multiple states or from a river bordering several states

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*Texas v. New Mexico*, 462 U.S. 554, 556-57 & nn.1-2 (1983) (discussing effects of aquifer pumping on nearby Pecos River); *Kansas v. Colorado*, 206 U.S. at 114 (rejecting attempt to distinguish "subsurface water" from surface "stream" otherwise subject to equitable apportionment).

depending upon it for water.” *Id.*<sup>11</sup> There is no coherent reason to treat such waters any differently than the interstate surface waters that Mississippi concedes are subject to equitable apportionment.

#### **D. Mississippi Cannot Recover Damages For Tennessee’s Use Of Unapportioned Waters**

Because Mississippi has abandoned its equitable-apportionment claim, it has no legally cognizable claim for damages arising out of Memphis’s and MLGW’s use of the Aquifer. Recovery of damages for wrongful use of an interstate water resource like the Aquifer is permitted only after this Court has issued an equitable-apportionment decree or after the adverse States have entered into an interstate compact. *See Kansas v. Colorado*, 514 U.S. 673, 679-80 (1995) (adjudicating dispute over “post-Compact” pumping); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (permitting damages for violation of compact). As the Fifth Circuit correctly held, this Court’s cases foreclose Mississippi from “su[ing] an entity for invading its share” of the Aquifer because the “amount of water to which each state is entitled” from the Aquifer has not been “allocated” through an “equitable apportionment.” App. 17a-18a (citing *Hinderlider*, 304 U.S. at 104-05). Leave to file Mississippi’s proposed complaint thus should be denied because it is inconsistent with this Court’s settled water-rights precedents.

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<sup>11</sup> Contrary to Mississippi’s contention (at Br. 18), this Court has made clear that equitable apportionment is not limited to rapidly “flowing water.” *See Wisconsin v. Illinois*, 449 U.S. 48, 48 (1980) (amending decree equitably apportioning waters “diverted from Lake Michigan”).

## II. LEAVE SHOULD BE DENIED BECAUSE MISSISSIPPI'S CLAIMS ARE BARRED BY ISSUE PRECLUSION

This Court also should deny leave because Mississippi's proposed Complaint is barred by issue preclusion, which "foreclos[es] successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001).<sup>12</sup> Issue preclusion embodies the "fundamental precept of common-law adjudication" that a party cannot "dispute[]" an issue that a prior court has "directly determined" against it. *Montana v. United States*, 440 U.S. 147, 153 (1979) (internal quotations omitted). Because Mississippi's claims depend on the very same territorial property rights theory that it advanced and lost in *Hood*, issue preclusion bars its claims as a matter of law.

### A. The Fifth Circuit Rejected Mississippi's Argument That It Owns The Portion Of The Aquifer Located Within Its Borders

Mississippi does not dispute that the Fifth Circuit's ruling in *Hood* was a "valid court determination essential to [a] prior judgment." *New Hampshire v. Maine*, 532 U.S. at 748-49. Thus, issue preclusion bars Mississippi's proposed Complaint if it seeks to relitigate an "issue of fact or law" that was "actually litigated and resolved" in *Hood*. *Id.*

Mississippi's proposed Complaint rises and falls on one core issue: whether, in the absence of an equitable apportionment, Mississippi has any enforceable

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<sup>12</sup> The term "issue preclusion" has "replaced a more confusing lexicon" and now "encompasses the doctrines once known as 'collateral estoppel' and 'direct estoppel.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008).



right to a specific amount of the groundwater in the Aquifer. The Fifth Circuit in *Hood* held squarely that it does not. See App. 17a-18a (holding that the “amount of water to which each state is entitled” from the Aquifer “must be allocated before one state may sue an entity for invading its share”). That ruling is sufficient to trigger issue preclusion. Even had Mississippi now discovered some new error in the Fifth Circuit’s ruling – and it has not, see *supra* Part I – it remains bound by that ruling nonetheless. See Restatement (Second) of Judgments § 27 cmt. c (1982) (a party that loses issue is precluded from making “new arguments . . . to obtain a different determination of that issue” in a later case).<sup>13</sup> Accordingly, Mississippi is precluded from seeking any relief against Defendants until it satisfies *Hood*’s requirement that it first obtain an apportionment of the Aquifer through an “interstate compact or equitable allocation.” App. 20a.

Mississippi’s arguments to the contrary only confirm that issue preclusion is particularly appropriate here. Mississippi not only seeks to relitigate *Hood*’s core holding, but also repeats the very same arguments the Fifth Circuit already considered and rejected. First, Mississippi reprises (at Br. ii) its territorial property rights theory that it has “sole sovereign authority over” groundwater residing “within its borders.” As in *Hood*, Mississippi attempts to

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<sup>13</sup> See also *Park Lake Res. Ltd. Liab. Co. v. Department of Agriculture*, 378 F.3d 1132, 1137 (10th Cir. 2004) (issue preclusion bars relitigation based on a “new theory”); *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Homestake Min. Co.*, 722 F.2d 1407, 1411-12 (8th Cir. 1983) (party cannot avoid issue preclusion by presenting “new theories” that are “simply additional arguments why [prior court] should have reached a different result”).

use geography to claim sovereign ownership of all waters within its territorial boundaries.<sup>14</sup> But the Fifth Circuit “rejected the argument” that “state boundaries determine the amount of water to which each state is entitled from an interstate water source.” App. 19a. Instead, the Fifth Circuit found that the Aquifer falls “squarely within . . . the equitable apportionment doctrine,” under which a State’s territorial boundaries have little significance. App. 18a.

*Second*, Mississippi invokes the “public trust doctrine” as support for its claim of sovereign authority over groundwater within its borders. See Compl. ¶¶ 10-12. In doing so, Mississippi makes the same arguments – and relies on the same authority – as it did in *Hood*. See App. 19a (noting that Mississippi “cit[ed] to Mississippi and federal law demonstrating the state’s sovereign rights over the soil, forest, minerals, etc.”).<sup>15</sup> The Fifth Circuit, however, held that doctrine inapplicable because the “Aquifer is not a fixed resource like a mineral seam, but instead

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<sup>14</sup> Compare Miss. C.A. Br. 17 (groundwater in Aquifer “has belonged to the State, as sovereign, since the time of statehood in 1817”) with Compl. ¶ 44 (groundwater in Aquifer “became the sovereign property of Mississippi” “upon its admission to the Union in 1817”).

<sup>15</sup> Compare Miss. C.A. Br. 43 (invoking “public trust doctrine” to support Mississippi’s ownership of “waters within the state’s geographical confines”; citing *Cinque Bambini*, 491 So. 2d at 516) with Compl. ¶¶ 11-12 (invoking “public trust doctrine” as evidence of Mississippi’s “ownership of all groundwater resources within Mississippi”; also citing *Cinque Bambini*); compare Miss. C.A. Br. 40 (arguing that similar precepts are “codified in Mississippi’s statutory modern regulated riparian regime”; citing Miss. Code Ann. § 51-3-1 (1985 & Supp. 2006)) with Compl. ¶ 12 (making identical point; citing Miss. Code Ann. § 51-3-1).

migrates across state boundaries.” *Id.* As such, Mississippi’s rights to the Aquifer must be determined not by reference to “state boundaries,” but through an equitable apportionment. *Id.*

*Third*, Mississippi attempts to avoid the doctrine of equitable apportionment by characterizing (at Br. 18) the groundwater in the Aquifer as “[i]ntrastate water,” rather than a shared interstate water resource. That too merely recycles an argument it made and lost in *Hood*.<sup>16</sup> See App. 17a (rejecting “Mississippi’s fundamental argument” “that the Aquifer’s water is not an interstate resource subject to equitable apportionment”); App. 7a (rejecting Mississippi’s argument “that only Mississippi water is involved in this suit”).

*Finally*, Mississippi argues that the groundwater in the Aquifer is not subject to an equitable apportionment because it is underground and does not flow as rapidly as that of a river or stream. Mississippi also made that very same argument in *Hood*,<sup>17</sup> and

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<sup>16</sup> Compare Miss. C.A. Br. 23 (“Only water underlying Mississippi and pumped only by Defendants is involved in this suit.”) with Compl. ¶ 38 (Aquifer is “not a shared natural resource”); compare Miss. C.A. Br. 23 (“the portions of the aquifer that are owned by Mississippi and Tennessee, respectively, have been determined and fixed by the boundary line between the two states”) with Compl. ¶ 50 (“groundwater at issue originated in Mississippi” and is “*neither* interstate water *nor* a naturally shared resource”).

<sup>17</sup> Compare Miss. C.A. Br. 38 (distinguishing “equitable apportionment cases” as “involv[ing] waters in turbulent flow between states” rather than an “underground aquifer” “situated within Mississippi’s borders”) with Compl. ¶ 48 (“[e]quitable apportionment principles have only been applied by this Court to those disputes [involving] water available within each state under natural conditions such as rivers and other surface waters”); compare Miss. C.A. Reply Br. 9 (“The aquifer is not a

the Fifth Circuit squarely rejected it. *See* App. 18a (“The Aquifer flows, if slowly, under several states, and it is indistinguishable from a lake bordered by multiple states or from a river bordering several states depending upon it for water.”); *id.* (finding Mississippi’s distinction between groundwater and surface water to be “of no analytical significance”).

Mississippi already had a full and fair opportunity to litigate those issues, including the opportunity to convince this Court that the Fifth Circuit erred in resolving them against Mississippi. In fact, Mississippi’s certiorari petition in *Hood* raised the same arguments that it now (again) urges this Court to adopt.<sup>18</sup> Having failed to persuade this Court that the Fifth Circuit’s asserted error warranted certiorari, Mississippi is estopped from challenging the Fifth Circuit’s ruling yet again in a new action. *See Montana v. United States*, 440 U.S. at 153 (“once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is

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river and, in its natural unstressed state, a constant volume comprising Mississippi’s share would always be contained within the State’s borders.”) *with* Compl. ¶ 41 (the Aquifer is “not part of an underground river, stream or lake” that would “flow north into Tennessee” under “natural conditions”).

<sup>18</sup> *Compare* Miss. Cert. Pet. 12 (Mississippi “owns the surface water and ground water resources within the geographical confines of its boundaries as a function of statehood”) *with* Compl. ¶ 38 (Mississippi has “sovereign prerogative[.]” over “waters naturally residing within its boundaries”); *compare* Miss. Cert. Pet. 16-17 (invoking “public trust doctrine”; citing *Cinque Bambini*) *with* Compl. ¶¶ 11-12 (same); *compare* Miss. Cert. Pet. 12 (distinguishing “equitable apportionment cases” as “involv[ing] disputes between states over surface water flowing through both states in a river, its tributaries or water sheds”) *with* Compl. ¶ 48 (equitable apportionment applies only to water “such as rivers and other surface waters, and the watersheds supplying them”).

conclusive in subsequent suits based on a different cause of action”).

**B. Mississippi’s Proposed Complaint Is Inconsistent With Issue Preclusion’s Core Purposes**

Issue preclusion is “central to the purpose” of civil litigation. *Montana v. United States*, 440 U.S. at 153. By preventing “parties from contesting matters that they have had a full and fair opportunity to litigate,” issue preclusion avoids “the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action.” *Id.* at 153-54. This Court has “reaffirmed” those benefits repeatedly, expanding issue preclusion even to “contexts not formerly recognized at common law.” *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Courts therefore have “broad discretion” to apply issue preclusion to “protect[] litigants” and “promot[e] judicial economy.” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 331 (1979).

Mississippi’s attempt to relitigate the claims it lost in *Hood* offends those core policies. The “cost and vexation,” *Allen*, 449 U.S. at 94, threatened by Mississippi’s recycled claims is particularly severe: the *Hood* litigation already spanned more than five years, required three separate rounds of dispositive briefing before the district court, and involved roughly 15 depositions and five extensive expert reports. That effort culminated in a 3,586-page record on appeal, another round of briefing and oral argument before the Fifth Circuit, and 75 combined pages of certiorari-stage briefing before this Court. Allowing Mississippi to rehash its claims from *Hood* thus would impose on Defendants the “burden of relitigating an identical issue” previously decided at great expense. *Parklane Hosiery*, 439 U.S. at 326.

There is little reason to think that Mississippi's claims would be any less burdensome to resolve this time around. Interstate "disputes over the allocation of water" before this Court "often result[] in protracted and costly legal proceedings." *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2125. Mississippi's new action, if allowed to proceed, will likely be even more costly than *Hood*. For one thing, Mississippi's inclusion of Tennessee as a defendant broadens the scope of the proceedings and will compound the parties' expense. *Cf. Nebraska v. Wyoming*, 504 U.S. 982, 982 (1992) (noting that "proceedings were expanded and made more costly" by presence of additional "intervenor/amici").

Moreover, original actions "tax the limited resources of this Court" by "diverting [its] attention from [its] 'primary responsibility as an appellate tribunal.'" *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 762 (1981) (Rehnquist, J., dissenting)). Unlike in *Hood*, Mississippi's proposed Complaint now asks this Court, rather than a trial court "actually presiding over the introduction of evidence," "to play the role of factfinder." *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971). Mississippi's request that this Court assume those "vexatious" and "unfamiliar tasks" so that Mississippi can relitigate the points it lost in *Hood* not only flouts the policy of judicial economy on which issue preclusion rests; it represents an "abuse of the opportunity to resort to [this Court's] original jurisdiction." *Id.* at 498-99 (internal quotations omitted).

Mississippi's proposed Complaint also frustrates issue preclusion's other core purpose of promoting "reliance on adjudication." *Allen*, 449 U.S. at 94.

Fostering such reliance is particularly crucial to the “adjudication of water rights,” where the “policies advanced by the doctrine of *res judicata* perhaps are at their zenith.” *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983); see *Arizona v. California*, 460 U.S. 605, 619-20 (1983) (noting that issue-preclusion principles assume particular importance “with respect to rights in real property,” including “the holding and use of water rights”).

Those policies apply fully here. For the past four years, Defendants have formulated policy regarding water in the Aquifer – which serves vital municipal needs<sup>19</sup> – in reliance on the Fifth Circuit’s holding that Mississippi may not “sue an entity for invading its share” of the Aquifer unless and until the Aquifer is equitably apportioned. App. 17a-18a. Mississippi’s attempt to relitigate that holding now – and to seek damages (at ¶ 55) for water pumped in direct reliance on *Hood* – threatens to upend Defendants’ settled expectations in an area where this Court has recognized a “compelling need for certainty.” *Arizona v. California*, 460 U.S. at 620. As in *Arizona*, a “major purpose” of the rulings in *Hood* was to offer Defendants a measure of “assurance” regarding “the amount of water they can anticipate to receive” from the Aquifer. *Id.* Allowing Mississippi to circumvent the Fifth Circuit’s ruling through a new lawsuit in

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<sup>19</sup> The water at issue, according to Mississippi, represents roughly “15-20% of Memphis’ total water supply.” Compl. ¶ 26; see Miss. App. 140a-141a (asserting that groundwater in the Aquifer is “superior in quality” and permits cost-effective distribution to Memphis consumers).

this Court therefore would “run[] directly counter to the strong interest in finality in this case.” *Id.*<sup>20</sup>

In sum, Mississippi’s proposed Complaint epitomizes the sort of counterproductive litigation that issue preclusion is intended to curtail. This Court has “substantial discretion to make case-by-case judgments” about whether to exercise its original jurisdiction, and it generally does so only where the “seriousness and dignity of the claim” is beyond reproach. *Mississippi v. Louisiana*, 506 U.S. 73, 76-77 (1992) (internal quotations omitted); see *Arizona v. California*, 460 U.S. at 619 (applying the “principles” of issue preclusion even where “the technical rules of preclusion [were] not strictly applicable”). Mississippi’s proposed claims – which are premised on arguments that *Hood* rejected conclusively – do not warrant the exercise of this Court’s scarce resources.<sup>21</sup>

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<sup>20</sup> Because Tennessee makes only “[d]efensive use” of “collateral estoppel” – *i.e.*, preventing Mississippi from “asserting a claim [it] has previously litigated and lost against another defendant” – this case raises none of the fairness concerns present with nonmutual offensive issue preclusion. *Parklane Hosiery*, 439 U.S. at 326 n.4; see *id.* at 329-30. In any event, nonmutual preclusion is fully warranted here: Mississippi had a “full and fair’ opportunity to litigate” in *Hood*, *id.* at 332, and a “future suit[]” involving Tennessee – which was the linchpin of the Rule 19 issue that *Hood* decided – was plainly “foreseeable” to Mississippi when it litigated *Hood*, *id.* at 330.

<sup>21</sup> Mississippi’s status as a sovereign State does not immunize it from the normal operation of issue-preclusion principles. Any claim Mississippi might otherwise have to such an exemption is inapplicable in a “case between two States, in which each owes the other a full measure of respect.” *New Hampshire v. Maine*, 532 U.S. at 756. Further, as to Memphis and MLGW, Mississippi “is litigating the same issue arising under virtually identical facts against the same part[ies].” *United States v.*



### C. *Hood's Dismissal Under Rule 19 Does Not Lessen Its Issue-Preclusive Effect*

Mississippi cannot avoid *Hood's* preclusive effect by arguing that its complaint was dismissed “without prejudice” pursuant to Rule 19(b) for failure to join a necessary party. App. 10a. Although a Rule 19 dismissal “does not operate as an adjudication on the merits” under Rule 41(b) and thus “does not bar a second action as a matter of claim preclusion,” 18A Charles A. Wright et al., *Federal Practice and Procedure* § 4436, at 154 (2d ed. 2002 & 2013 Supp.), such a dismissal has full *issue*-preclusive effect. *See id.* (dismissal without prejudice “does preclude relitigation of the issues determined”); *id.* § 4435, at 134 (“[A]n entire claim may be precluded by a judgment that does not rest on any examination whatever of the substantive rights asserted.”); Restatement (Second) of Judgments § 20 cmt. b (“issue preclusion appl[ies]” even to a non-merits judgment that “does not bar another action on the same claim”) (citation omitted).

In that respect, Rule 19 dismissals are analogous to dismissals for lack of jurisdiction, which likewise qualify as non-merits decisions under Rule 41(b). As this Court has explained, once “a Federal court has decided” a “contested issue” of jurisdiction, a later court “in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact.” *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). Similarly, the courts of appeals have held repeatedly

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*Stauffer Chem. Co.*, 464 U.S. 165, 173 (1984). In such circumstances, any justification for allowing Mississippi to relitigate the *Hood* decision “loses its force.” *Id.*; *see id.* (rejecting “justifications for . . . allowing relitigation” in similar cases involving the United States).

that a jurisdictional dismissal “without prejudice” precludes a party from later contesting “the issue which was litigated in the prior action.” *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983) (Scalia, J.) (internal quotations and ellipses omitted).<sup>22</sup>

The same is true of dismissals under Rule 19. As with jurisdictional dismissals, a dismissal for “failure to join an indispensable party” is “entitled to issue preclusive effect.” *In re Sonus Networks, Inc. Shareholder Deriv. Litig.*, 499 F.3d 47, 59 (1st Cir. 2007) (internal quotations omitted). In both contexts, allowing “relitigation of the very same issues actually decided in the first litigation” runs counter to issue preclusion’s rationale – avoiding wasteful relitigation and promoting judicial economy – despite the lack of an “adjudication of the substance of the underlying claim.” *Id.* at 59-60 (calling this the “accepted

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<sup>22</sup> See also, e.g., *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218-19 (10th Cir. 2006) (“It cannot be gainsaid that even a dismissal without prejudice will have a preclusive effect on the [decided] issue in a future action.”); *Gavilan-Cuate v. Yetter*, 276 F.3d 418, 420 (8th Cir. 2002) (“Though a jurisdictional determination is not usually binding on future proceedings, it is binding as to issues that are addressed by the Court in determining the jurisdictional question.”); *Okoro v. Bohman*, 164 F.3d 1059, 1062 (7th Cir. 1999) (Posner, J.) (“[a] judgment that does not resolve the dispute between the litigants and in that sense is not ‘on the merits’ may nevertheless have a preclusive effect”); *Bromwell v. Michigan Mut. Ins. Co.*, 115 F.3d 208, 212-13 (3d Cir. 1997) (“A dismissal for lack of subject-matter jurisdiction, while not binding as to all matters which could have been raised, is, however, conclusive as to matters actually adjudged.”) (internal quotations omitted); *Baris v. Sulpicio Lines, Inc.*, 74 F.3d 567, 571 (5th Cir. 1996) (“[D]ismissals for lack of jurisdiction, for improper venue, or for failure to join a party as specified by [Rule 19] . . . preclude[s] relitigation of the specific issue of jurisdiction, venue, or joinder already resolved.”).

modern view [of] issue preclusion”).<sup>23</sup> Here, Mississippi spent five years pursuing its claim of territorial ownership of the Aquifer, and both the district court and the Fifth Circuit rejected that argument after lengthy discovery. Because Mississippi’s attempt to relitigate that same issue runs afoul of well-settled preclusion principles, this Court should again deny Mississippi leave to file its proposed Complaint.

### CONCLUSION

Mississippi’s motion for leave to file a complaint should be denied. Because the sole legal theory in Mississippi’s proposed Complaint is both contrary to this Court’s equitable-apportionment precedents and barred by issue preclusion, the denial should be with prejudice. Alternatively, if the Court grants Mississippi’s motion for leave, it should permit Defendants to file motions to dismiss the proposed Complaint prior to discovery and entertain full briefing and argument on those motions.

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<sup>23</sup> It is immaterial that the issue the Fifth Circuit previously decided in the context of Rule 19 now bars Mississippi’s claims on the merits. See *Matosantos Commercial Corp. v. Applebee’s Int’l, Inc.*, 245 F.3d 1203, 1210 (10th Cir. 2001) (whether “the issue foreclosed in the present case goes to the merits” is “not legally significant”); *Roth v. McAllister Bros., Inc.*, 316 F.2d 143, 145 (2d Cir. 1963) (prior jurisdictional dismissal preclusive as to later claim on the merits). Allowing Mississippi to contest the Fifth Circuit’s ruling – whether in the context of the merits (as in this case) or another dispute over Rule 19 (as in *Hood*) – would permit duplicative litigation that is “inconsistent with the doctrine of collateral estoppel.” *Matosantos*, 245 F.3d at 1209.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION

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Civil Action No. 2:05CV32-D-B

JIM HOOD, Attorney General, *ex rel.*,  
THE STATE OF MISSISSIPPI, Acting for  
Itself and *Parens Patriae* for and on behalf of the  
People of the State of Mississippi,  
*Plaintiff,*

v.

THE CITY OF MEMPHIS, TENNESSEE, AND  
MEMPHIS LIGHT, GAS & WATER DIVISION,  
*Defendants.*

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[Filed Feb. 6, 2008]

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**BENCH OPINION DISMISSING ACTION**  
**WITHOUT PREJUDICE**

The United States Supreme Court held, in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 101-102 (1998), that Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case and that “for a court to pronounce upon [the merits] when it has no jurisdiction to do so is for a court to act *ultra vires*.” See also *Villarreal v. Smith*, 201 Fed. Appx. 192, 194 (5th Cir. 2006) (“A federal court has the affirmative duty to inquire into jurisdiction whenever the possibility of a lack of jurisdiction arises.”); *Warren v. United States*, 874

F.2d 280, 281-82 (5th Cir. 1989) (holding that “federal courts are under a continuing duty to inquire into the basis of jurisdiction . . .”); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1297 (5th Cir. 1985) (“United States District Courts . . . have the responsibility to consider the question of subject matter jurisdiction *sua sponte* . . . and to dismiss any action if such jurisdiction is lacking.”); Fed. R. Civ. P. 12(h)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”).

### *Discussion*

The Plaintiff initiated this action seeking past and future damages as well as equitable relief related to the Defendants’ alleged wrongful appropriation of groundwater from the Memphis Sands Aquifer.

Although it is the Defendants that seek a ruling that the State of Tennessee is an indispensable party to this action, “when an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder.” *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir. 1986). Because the court has indicated that a possibly necessary party is absent from this action, the burden of disputing joinder falls on the Plaintiff.

Rule 19(a) of the Federal Rules of Civil Procedure provides in part that:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person

claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (I) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

Rule 19(b) states that:

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors a court should consider in determining whether a party is indispensable include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

Under Rule 19, the court's analysis is conducted as follows:

The court initially must determine whether the absent person's interest in the litigation is suffi-

cient to satisfy one or more of the tests set out in the first sentence of Rule 19(a). There is no precise formula for determining whether a particular nonparty must be joined under Rule 19(a). Rather, the decision has to be made in terms of the general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them. If joinder under Rule 19(a) is not feasible because, e.g., it will deprive the court of subject matter jurisdiction, the court must examine the four considerations described in Rule 19(b) to determine whether the action may go forward (without the absentee) or must be dismissed, the absent person being thus regarded as indispensable.

*Faloon v. Sunburst Bank*, 158 F.R.D. 378, 380 (N.D. Miss. 1994).

While there are apparently no reported cases dealing with interstate subsurface water or aquifers, it is admitted by all parties and revealed in exhibits that the Memphis Sands or Sparta aquifer lies under several States including the States of Tennessee and Mississippi.

In applying the dictates of Rule 19 to the facts of this case, the court holds that the State of Tennessee is a necessary and indispensable party. First, the doctrine of equitable apportionment has historically been the means by which disputes over interstate waters are resolved. The United States Supreme Court has held that it possesses a "serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States." *Arizona v.*

*California*, 373 U.S. 546, 564 (1963); see *Texas v. New Mexico*, 462 U.S. 554, 567 (1983) (The Supreme Court held that “[t]here is no doubt that this court’s jurisdiction to resolve controversies between two states . . . extends to a properly framed suit to apportion the waters of an interstate stream between States through which it flows . . .”).

The subject aquifer in the case sub judice has not been apportioned, neither by agreement of the involved States nor by the U.S. Supreme Court. However, absent apportionment, this court cannot afford relief to the Plaintiff and hold that the Defendants are pumping water that belongs to the State of Mississippi, because it has not yet been determined which portion of the aquifer’s water is the property of which State. It is simply not possible for this court to grant the relief the Plaintiff seeks without engaging in a *de facto* apportionment of the subject aquifer; such relief, however, is in the original and exclusive jurisdiction of the United States Supreme Court because such a dispute is necessarily between the State of Mississippi and the State of Tennessee. Throughout the years, the Supreme Court has adjudicated many such disputes pursuant to its original and exclusive jurisdiction, including one between the States of Mississippi and Louisiana involving the Mississippi River. See, e.g., *Louisiana v. Mississippi*, 516 U.S. 22 (1995); *Mississippi v. Louisiana*, 506 U.S. 73 (1992); *Virginia v. Maryland*, 540 U.S. 56 (2003); *Kansas v. Colorado*, 514 U.S. 673 (1995); *Nebraska v. Wyoming*, 515 U.S. 1 (1995); *Colorado v. New Mexico*, 467 U.S. 310 (1984); *Arizona v. California*, 373 U.S. 546 (1963); *New Jersey v. New York*, 345 U.S. 369 (1953); *Nebraska v. Wyoming*, 325 U.S. 665 (1945); *Connecticut v. Massachu-*

*setts*, 282 U.S. 660 (1931); *Kansas v. Colorado*, 206 U.S. 46 (1907). In another analogous case, the Fifth Circuit held that the United States was an indispensable party in a suit filed by a Texas municipality and other individual landowners against several defendants who claimed irrigation rights to the Rio Grande River; while the Plaintiffs in that case did join the United States as a defendant, the Fifth Circuit held that sovereign immunity prevented joinder of the United States, but because it was a necessary and indispensable party and the suit could therefore not go forward without it as a party, the suit was dismissed. *Miller v. Jennings*, 243 F.2d 157 (5th Cir. 1957).

While this court, in initially denying the Defendants' motion seeking relief under Rule 19, relied upon another Supreme Court case, *Illinois v. City of Milwaukee, Wisconsin*, 406 U.S. 91 (1972), for the proposition that a State need not be joined in a nuisance action brought by a neighboring State against cities and local commissions in that State and involving an interstate waterway, the court finds that cases such as *Louisiana v. Mississippi* are more closely analogous to the case *sub judice* because the partition of an interstate body of water is a necessary condition of affording the Plaintiff relief in this case. The case *sub judice* involves a proprietary or ownership interest in subsurface water. The *Illinois v. City of Milwaukee, Wisconsin* case did not involve a dispute over ownership of interstate water or any other property; the *Louisiana v. Mississippi* case, as well as other aforecited cases, did involve disputes over such ownership issues.

Turning to Rule 19(a)'s requirements, the court finds that Rule 19(a)(1) renders the State of Tennes-

see a necessary party because in its absence complete relief cannot be accorded among those already parties to the action. This is true because to afford the State of Mississippi the relief sought and to hold that the Defendants have misappropriated Mississippi's water from the Memphis Sands aquifer, the court must necessarily determine which portion of the aquifer's water belongs to Mississippi, which portion belongs to Tennessee, and so on, thereby effectively apportioning the aquifer. Mississippi cannot be afforded any relief otherwise. The court also notes that, while the Plaintiff contends on the one hand that only Mississippi water is involved in this suit, it also contends that the sole basis for the court's jurisdiction is the existence of a federal question because interstate water is the subject of the suit. The Plaintiff cannot have it both ways. The court also notes that diversity jurisdiction is not possible in this case because the Plaintiff State of Mississippi brings this suit on its own behalf and it is clear that a State is not a citizen of itself and therefore cannot sue or be sued in federal court on the basis of federal diversity jurisdiction. *Moor v. County of Alameda*, 411 U.S. 693 (1973).

However, joinder of the State of Tennessee as a party to this suit is not possible because this court is without jurisdiction to hear such a dispute. As noted previously, original and exclusive jurisdiction of all controversies between two or more States is vested in the United States Supreme Court. See 28 U.S.C. § 1251. Thus, the court must also examine the dictates of Rule 19(b) and determine whether, in equity and good conscience, this action should proceed among the parties before it, or should be dismissed, with the State of Tennessee being thus regarded as

indispensable. The court will examine Rule 19(b)'s four considerations in turn.

First, the court must consider to what extent a judgment rendered in Tennessee's absence might be prejudicial to Tennessee or to those already parties to this action. The court holds that a judgment in this matter rendered in the absence of Tennessee will be acutely prejudicial to Tennessee's interests. As the Supreme Court has noted, no single State is permitted to impose its own policy choices on neighboring States. *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996); see *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934) (holding that a State "cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of [a neighboring State]."). In effect, a judgment adverse to the Defendants in this case, prior to apportionment of the subject aquifer (which can only occur via agreement by the impacted States or by the Supreme Court), would determine the rights of the State of Tennessee and its citizens to the valuable water resources in the subject aquifer, without Tennessee having been a party to this action. Thus, the court finds that a judgment rendered in Tennessee's absence in this case would be prejudicial to Tennessee.

Second, the court is unaware of any means by which, via protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice to Tennessee can be lessened or avoided. To afford any relief to the Plaintiff of necessity requires apportionment of the subject aquifer, thereby causing great prejudice to Tennessee.

Third and fourth, a judgment rendered in Tennessee's absence will not be adequate given the factors



previously discussed by the court; however, the Plaintiff in this matter will certainly have an adequate remedy if this action is dismissed for non-joinder. As noted above, original and exclusive jurisdiction over disputes of this type are vested in the United States Supreme Court, which has typically in the past assigned these disputes to a Special Master, who then makes proposed findings of fact and conclusions of law to the Supreme Court, which subsequently renders a decision in the case. This court's decision today in no way ends this dispute or renders the State of Mississippi without its day in court. While the Supreme Court has stated that "where possible, States [should] settle their controversies by mutual accommodation and agreement," if such a resolution is not possible in this case, a well-established means exists for Mississippi to petition the Supreme Court for apportionment of the waters of the Memphis Sands aquifer in a suit that properly joins all necessary and indispensable parties, including the State of Tennessee. *See, e.g., Louisiana v. Mississippi*, 516 U.S. 22 (1995); *Mississippi v. Louisiana*, 506 U.S. 73 (1992); *Kansas v. Colorado*, 206 U.S. 46 (1907).

Given the foregoing, the court hereby finds that the State of Tennessee is a necessary and indispensable party to this action pursuant to Rule 19 of the Federal Rules of Civil Procedure. Because the joinder of Tennessee is not possible in this court, the court hereby determines that in equity and good conscience this action should be dismissed without prejudice, with the State of Tennessee being regarded by the court as indispensable.

While the court makes no formal determination in its opinion today regarding the necessity or indispen-

sability of the State of Arkansas to this action, the court is of the opinion that Arkansas (via its current Attorney General) should be put on notice of the pendency of this action and any future action filed in the Supreme Court.

This opinion is appealable to the United States Court of Appeals for the Fifth Circuit. The court directs that all submissions to this court be included in and made a part of the record in this case.

A separate order in accordance with this bench opinion shall issue this day.

*ORDER OF DISMISSAL PURSUANT  
TO BENCH RULING*

After hearing oral argument and receiving briefs regarding the court's jurisdiction over this matter, the court rules that the State of Tennessee is a necessary and indispensable party to this action pursuant to Rule 19 of the Federal Rules of Civil Procedure. This court, however, is not empowered to join Tennessee as a party to this action because original and exclusive jurisdiction of disputes between States resides with the United States Supreme Court pursuant to 28 U.S.C. § 1251(a). This action is accordingly dismissed without prejudice pursuant to Rule 19(b) of the Federal Rules of Civil Procedure.

While the court makes no formal determination in this order regarding the necessity or indispensability of the State of Arkansas to this action, the court is of the opinion that Arkansas, via its Attorney General, should be put on notice of this action and any future proceedings herein.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 08-60152

JIM HOOD, Attorney General, *ex rel.*,  
THE STATE OF MISSISSIPPI, Acting for  
Itself and *Parens Patriae* for and on behalf of the  
People of the State of Mississippi,  
*Plaintiffs-Appellants*,  
v.

THE CITY OF MEMPHIS, TENNESSEE, AND  
MEMPHIS LIGHT, GAS & WATER DIVISION,  
*Defendants-Appellees*.

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[Filed June 5, 2009]

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Before HIGGINBOTHAM, BENAVIDES, and  
STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

In this lawsuit, the state of Mississippi seeks damages from the City of Memphis and Memphis Light, Gas and Water ("MLGW") (collectively, "Memphis"), for the alleged conversion of groundwater in the Memphis Sands Aquifer (the "Aquifer"). The district court dismissed Mississippi's lawsuit without prejudice, holding that Tennessee is an indispensable party to the suit and that the court was without power to join Tennessee. We AFFIRM.

## I. BACKGROUND

The Aquifer is located beneath portions of Tennessee, Mississippi, and Arkansas. There is no interstate compact governing use of the Aquifer's water, and thus no specific volumes of groundwater from the Aquifer have been apportioned to Mississippi, Tennessee, or Arkansas. The Aquifer is the primary water source for both DeSoto County, Mississippi, and the city of Memphis, Tennessee, which lies just across the state line from DeSoto County. Mississippi seeks past and future damages, as well as equitable relief, related to Memphis's allegedly wrongful appropriation of groundwater from the Aquifer.<sup>1</sup> Mississippi alleges that part of the groundwater that Memphis pumps from the Aquifer is Mississippi's sovereign property and that the state must therefore be compensated.

MLGW, a division of the City of Memphis, owns and operates one of the largest artesian water systems in the world. It is responsible for providing gas, electricity, and water to its residential, business, governmental, and other customers, who are primarily citizens of Memphis. Although three of its groundwater well fields are located near the Tennessee border, all of MLGW's wells are located within Tennessee, and Memphis and Tennessee contend that this

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<sup>1</sup> Although there was some dispute between the parties below as to the basis of jurisdiction, federal question jurisdiction is present both because 28 U.S.C. § 1331(a) includes suits brought by a state and because federal common law will apply to the dispute. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 99 (1972).

municipal water program operates under the direction and control of Tennessee law.<sup>2</sup>

Mississippi asserts that MLGW's groundwater pumping has created an underground "cone of depression" centered under Memphis and extending into Mississippi. Mississippi states that this cone of depression causes groundwater that would otherwise lie beneath Mississippi to flow across the border and into the cone under Tennessee, and thus become available to be pumped by Memphis. Mississippi argues that due to the growth of Memphis's water system the Aquifer is being drawn down at a higher rate than it is being replenished, thus causing water levels to drop.

Mississippi filed its first complaint against Memphis in February 2005. Memphis filed a motion to dismiss on several bases, including that the state of Tennessee was an indispensable party pursuant to Federal Rule of Civil Procedure 19. The motion to dismiss was denied in August 2005. Memphis then moved to "amend" the district court's order or to certify an interlocutory appeal. Construing the motion to amend as a motion for rehearing, the district court denied both motions in September 2005. Memphis filed an answer and subsequent amended answer. Mississippi filed an amended complaint in October 2006, eliminating certain claims and clarifying its request for an award of monetary damages for

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<sup>2</sup> See, e.g., TENN.CODE ANN. § 68-221-707 (Tennessee Department of Environment and Conservation exercises supervision over operation of public water systems, including features of operation that affect quantity of water supplied). Mississippi contends that Memphis's groundwater pumping is not controlled by Tennessee law, but cites no legal authority for that conclusion, and neither does it address the provisions of Tennessee law cited in Memphis's brief.

Memphis's alleged misappropriation of Mississippi's groundwater.

In June 2007, Memphis moved for judgment on the pleadings, again arguing that Tennessee was an indispensable party to the suit. Memphis also moved for partial summary judgment on several of Mississippi's claims. In September 2007, the court denied the motions.

In late January 2008, shortly before the bench trial was to start, the district court announced that it had decided *sua sponte* to revisit the issue of Tennessee's possible status as an indispensable party and thus the court's subject-matter jurisdiction. After briefing from the parties and oral argument, the district court dismissed the suit for failure to include Tennessee, an indispensable party.<sup>3</sup> Mississippi appeals.

## II. DISCUSSION

### A. *Standard of Review*

We review the district court's decision to dismiss for failure to join an indispensable party for an abuse of discretion. *HS Res., Inc. v. Wingate*, 327 F.3d 432, 438-39 (5th Cir. 2003). Determining whether an entity is an indispensable party is a highly-practical, fact-based endeavor, and "[Federal Rule of Civil Procedure] 19's emphasis on a careful examination of the facts means that a district court will ordinarily be in a better position to make a Rule 19 decision than a circuit court would be." *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir. 2006). However, "[a]

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<sup>3</sup> In its opinion dismissing this suit, the district court directed that the Arkansas Attorney General should be put on notice of the pendency of this action and any future action filed in the U.S Supreme Court, although the court refrained from determining whether Arkansas is also an indispensable party.

court abuses its discretion when its ruling is based on an erroneous view of the law.” *Chaves v. M/V Medina Star*, 47 F.3d 153, 156 (5th Cir. 1995).

Determining whether to dismiss a case for failure to join an indispensable party requires a two-step inquiry. First the district court must determine whether the party should be added under the requirements of Rule 19(a). Rule 19(a)(1) requires that a person subject to process and whose joinder will not deprive the court of subject-matter jurisdiction be joined if:

(A) in that person’s absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person’s absence may: (i) as a practical matter impair or impede the person’s ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED.R.CIV.P. 19(a)(1). While the party advocating joinder has the initial burden of demonstrating that a missing party is necessary, after “an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder.” *Pulitzer-Polster*, 784 F.2d at 1309.

If the necessary party cannot be joined without destroying subject-matter jurisdiction, the court must then determine whether that person is “indispensable,” that is, whether litigation can be properly pursued without the absent party. *HS Res.*, 327 F.3d at 439. The factors that the district court is to consider

in making this determination are laid out in Rule 19(b):

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by; (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

FED.R.CIV.P. 19(b).

Mississippi contends that the district court misapplied Rule 19 in holding that Tennessee is a necessary and indispensable party because its suit does not implicate any sovereign interest of Tennessee. Mississippi argues that its suit does not require an equitable apportionment of the Aquifer because the state owns the groundwater resources of the state as a self-evident attribute of statehood, and thus there is no interstate water to be equitably apportioned. Mississippi further argues that it is not seeking relief for damages caused by the direct actions of Tennessee, and therefore the suit is not an action between states invoking the original jurisdiction of the Supreme Court.

Memphis responds that the district court correctly determined that the nature of Mississippi's claims and asserted ownership of a water resource that it shares with Tennessee makes Tennessee an indispensable party to suit. Memphis argues that because Tennessee's sovereign ownership rights in the Aquifer water, the same which Mississippi seeks to protect, are implicated, the case cannot be properly



resolved without Tennessee's participation. Memphis points to a century of Supreme Court case law addressing the equitable apportionment of interstate waters among states to argue that the district court correctly held that joining Tennessee would create a suit between states that must be filed in the Supreme Court.<sup>4</sup>

*B. Tennessee is a Necessary Party to this Water Ownership Dispute*

The district court held that Tennessee was a necessary party under Rule 19(a)(1) because in its absence complete relief could not be accorded between Memphis and Mississippi. The court explained that it could not determine whether Memphis had misappropriated water from the Aquifer without determining *what portion* of the Aquifer belongs to Mississippi and Tennessee respectively, and thus an equitable apportionment of the Aquifer between the states was required. In so holding, the district court rejected Mississippi's argument, renewed on appeal, that only Mississippi's water is at issue. Mississippi's fundamental argument as to why Tennessee's presence in the lawsuit is unnecessary is that the Aquifer's water is not an interstate resource subject to equitable apportionment, and therefore Tennessee's sovereign interests are not implicated by the suit.

We find that the district court made no error of law as to the necessity of equitably apportioning the Aquifer. The Aquifer is an interstate water source, and the amount of water to which each state is

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<sup>4</sup> Tennessee, participating in this appeal as *amicus curiae*, asserts that it has a sovereign interest in its share of Aquifer water as great as that asserted by Mississippi, and it therefore is a necessary and indispensable party to any suit over Memphis's withdrawals from the Aquifer.

entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share. See *Hinterlander v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-05 (1938). Allocation of an interstate water source is accomplished through a compact approved by Congress or an equitable apportionment. *Id.*

"Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). The Supreme Court has described the applicability of this doctrine in broad terms:

[W]henever . . . the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

*Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907). Determining Mississippi and Tennessee's relative rights to the Aquifer brings this case squarely within the original development and application of the equitable apportionment doctrine. The fact that this particular water source is located underground, as opposed to resting above ground as a lake, is of no analytical significance. The Aquifer flows, if slowly, under several states, and it is indistinguishable from a lake bordered by multiple states or from a river bordering several states depending upon it for water. See, e.g., *Nebraska v. Wyoming*, 515 U.S. 1 (1995) (allocation of North Platte River); *Wisconsin v. Illinois*, 449 U.S.

48, 50 (1980) (amending order allocating usage of portions of Lake Michigan).<sup>5</sup>

Mississippi argues that it owns a fixed portion of the Aquifer because it controls the resources within its state boundaries, citing to Mississippi and federal law demonstrating the state's sovereign rights over the soil, forest, minerals, etc. Despite Mississippi's contentions, it is clear that the Aquifer is not a fixed resource like a mineral seam, but instead migrates across state boundaries. The Supreme Court has consistently rejected the argument advanced by different states, and advanced by Mississippi in this lawsuit, that state boundaries determine the amount of water to which each state is entitled from an interstate water sources.<sup>6</sup> See, e.g., *Hinterlander*, 304 U.S. at

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<sup>5</sup> A handful of Supreme Court cases mention aquifers in the context of interstate water disputes. See *Texas v. New Mexico*, 462 U.S. 554, 556-57, n.1, 2 (1983) (discussing role of New Mexico aquifers feeding the Pecos River, subject of litigation, and possible detrimental effects of pumping); *Wisconsin*, 449 U.S. at 50 (court order amending prior decree with requirements including "to the extent practicable allocations to new users of Lake Michigan water shall be made with the goal of reducing withdrawals from the Cambrian-Ordovician aquifer"). While these opinions do not address aquifer allocation directly, the fact that the aquifers were not treated differently from any other part of the interstate water supply subject to litigation supports the conclusion that the Aquifer at issue must be apportioned.

<sup>6</sup> Notably, the equitable apportionment doctrine has been used to address other migratory interstate resources, including the apportionment of fish that make an interstate migration. See *Idaho v. Oregon*, 462 U.S. 1017, 1024 (1983) ("Although that doctrine has its roots in water rights litigation, the natural resource of [migratory salmon] is sufficiently similar to make equitable apportionment an appropriate mechanism for resolving allocative disputes.").

102 (Colorado's contention that it "rightfully may divert and use . . . the waters flowing within her boundaries in this interstate stream . . . cannot be maintained. The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other," quoting *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922)).

The Aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests, and whose allotment is subject to interstate compact or equitable allocation. Therefore, we find no error in the district court's conclusion that Tennessee's presence in the lawsuit was necessary to accord complete relief to Mississippi and Memphis. See *Pulitzer-Polster*, 784 F.2d at 1309.

*C. Tennessee's Joinder Would Destroy Subject-Matter Jurisdiction*

After finding Tennessee to be a necessary party, the district court held that it was without power to join the state because original and exclusive jurisdiction over a suit between Mississippi and Tennessee would reside in the United States Supreme Court. See 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."). Mississippi argues that even if Tennessee's presence in the suit is necessary, it does not invoke the Supreme Court's original jurisdiction, and the district court could therefore retain jurisdiction over the case. We disagree.

Mississippi argues that the district court has subject-matter jurisdiction because this suit is only against Memphis, not Tennessee, and would at most be subject to the Supreme Court's original but non-

exclusive jurisdiction. See 28 U.S.C. § 1251(b)(3) (“The Supreme Court shall have original but not exclusive jurisdiction of . . . All actions or proceedings by a State against the citizens of another State.”). The Supreme Court has in the past stated a preference that such suits be brought in the district court in the first instance. See *United States v. Nevada*, 412 U.S. 534, 538 (1973). Mississippi’s argument that its suit is not against Tennessee hangs on the assertion that only Memphis’s actions, and not Tennessee’s, are at issue. See *Milwaukee*, 406 U.S. at 97 (holding that where Illinois sued Milwaukee for polluting Lake Michigan, not mandatory to sue Wisconsin as well). However, that contention ignores that, in contrast to *Milwaukee*, this suit requires an allocation of water rights between states: Memphis’s actions are not wrongful unless there is a defined allocation of water that it is allowed to pump. Tennessee is a necessary party under Rule 19(a) on that basis, and the suit is thus one between two states.

Mississippi correctly argues that a suit involving interstate water does not *automatically* invoke the jurisdiction of the Supreme Court and strip the district court of jurisdiction. However, the cases to which Mississippi analogizes are distinguishable. Four cases upon which Mississippi relies most heavily are suits against the U.S. Army Corps of Engineers (“Corps of Engineers”), not against other states, and therefore plainly not within the scope of 28 U.S.C. § 1251(a). See *Alabama v. U.S. Army Corps of Eng’s*, 424 F.3d 1117, 1130 (11th Cir. 2005) (“*Alabama II*”) (recognizing that Alabama’s suit against the Corps of Engineers was not a dispute between states, despite intervention of other states as parties, because the

litigation was over how the Corps of Engineers should fulfill its obligations under federal law); *Georgia v. U.S. Army Corps of Eng's*, 302 F.3d 1242, 1254-55 (11th Cir. 2002) (same); *Alabama v. U.S. Army Corps of Eng's*, 382 F. Supp. 2d 1301, 1309-12 (N.D. Ala. 2005) ("*Alabama I*") (same); also *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025-26 (8th Cir. 2003) (same).

Mississippi also relies heavily on *Milwaukee v. Illinois*, the case that the district court identified as the basis for its earlier rulings denying Memphis's arguments that Tennessee is an indispensable party. 406 U.S. 91 (1972). *Milwaukee* is distinguishable. *Milwaukee* involved a federal common law nuisance action to stop alleged pollution of Lake Michigan by the city of Milwaukee's sewage disposal practices. The Supreme Court denied Illinois's motion for leave to file a bill of complaint against Wisconsin, holding that the action did not trigger the Supreme Court's exclusive jurisdiction. The Court found that, under appropriate pleadings, Wisconsin could be joined as a defendant, but that it was not a mandatory defendant on the facts of the case. *Id.* at 97. The Court concluded that the case fell under 28 U.S.C. § 1251(b)(3), giving the Supreme Court original but not exclusive jurisdiction over certain actions, and therefore Illinois could and should file suit in the appropriate federal district court. *Id.* at 108.

Mississippi argues that *Milwaukee* is a more analogous case than the water-allocation cases because Mississippi, like Illinois, merely seeks to enjoin the actions of the city of Memphis and does not have any claim against Tennessee as a state. Mississippi's argument fails, however, because of the crucial factual difference between the two cases: *Milwaukee*

involved stopping the pollution of what was agreed to be an interstate water body, while Mississippi claims sole ownership of a portion of the interstate water at issue. Mississippi's suit necessarily asserts control over a portion of the interstate resource Memphis currently utilizes pursuant to Tennessee law. *See, e.g.,* TENN.CODE ANN. § 68-221-707(a)-(b) ("The [Tennessee Department of Environment and Conservation] shall exercise general supervision over the operation and maintenance of public water systems throughout the state. . . . [including] all the features of operation and maintenance which do or may affect the quality or quantity of the water supplied."). Tennessee's water rights are clearly implicated, even if Mississippi has sued only Memphis. *Cf. Colorado v. Kansas*, 320 U.S. at 393 (noting that controversy between states over rightful shares of the Arkansas River "is not to be determined as if it were one between two private riparian proprietors or appropriators"); *Kansas v. Colorado*, 206 U.S. at 100 (noting the court must consider the effect that one state's increased share of water has on another state in order to determine amount of water each is entitled to from river).

Tennessee cannot be joined to this suit without depriving the district court of subject-matter jurisdiction because a suit between Mississippi and Tennessee for equitable apportionment of the Aquifer implicates the exclusive jurisdiction of the Supreme Court under 28 U.S.C. § 1251(a).

#### *D. There Was No Abuse of Discretion in Dismissing the Suit*

Having concluded that Tennessee is a necessary party whose joinder would deprive the district court of subject-matter jurisdiction, we turn to whether the

district court abused its discretion in dismissing the suit under Rule 19(b). When assessing the Rule 19(b) factors, the relevant inquiry is “whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.” FED.R.CIV.P. 19(b); see *Pulitzer-Polster*, 784 F.2d at 1312 (“[W]e must assess the factors set out in Rule 19(b), seeking to avoid manifest injustice while taking full cognizance of the practicalities involved.”).

We find no abuse of discretion in the district court’s determination that Tennessee is an indispensable party and that in equity and good conscience the suit should be dismissed. Clearly a judgment rendered in Tennessee’s absence would be enormously prejudicial to Tennessee’s sovereign interest in its water rights. The specter of a determination of Tennessee’s water rights without the its participation in the suit is itself sufficiently prejudicial to render the state an indispensable party. Cf. *Hinterlider*, 304 U.S. at 106-07 (noting that judicial apportionment of water from an interstate stream is binding on all water claimants from each state); *New Jersey v. New York*, 283 U.S. 336, 346 (1931) (“[A river] offers a necessity of life that must be rationed among those that have power over it. . . . Both States have real and substantial interests in the River that must be reconciled as best they may.”). Further, there was no error in the district court’s finding that it could not fashion restrictions in the judgment so as to avoid the threat of prejudice to Tennessee’s sovereign interests or that a judgment rendered without Tennessee’s participation would be inadequate. Cf. *Idaho v. Oregon*, 462 U.S. 1017, 1025 (1983) (“[W]henver . . . the action of one State reaches through the agency of natural laws into the territory of another State, the question



of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them. . . ."); *Colorado v. Kansas*, 320 U.S. at 392 ("The reason for judicial caution in adjudicating the relative rights of states [to shares of interstate water] is that . . . they involve the interests of quasi-sovereigns, [and] present complicated and delicate questions. . .").

Finally, Mississippi will have an adequate remedy despite this suit's dismissal. See 28 U.S.C. § 1251(a). In an equitable apportionment action, the Supreme Court might take one of several actions, such as concluding that the existing withdrawals of groundwater from the Aquifer in Tennessee are appropriate or limiting the total volume of Aquifer water that may be withdrawn by either party. See *Colorado v. Kansas*, 320 U.S. at 391; *New Jersey*, 283 U.S. at 346.<sup>7</sup>

### III. CONCLUSION

For the foregoing reasons we AFFIRM the judgment of the district court.

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<sup>7</sup> Of course, the parties might also negotiate an interstate compact allocating the resource going forward rather than continue litigation. See *Colorado v. Kansas*, 320 U.S. at 392 (encouraging the parties to seek a negotiated, political solution rather than requiring the Supreme Court to make a necessarily imperfect determination).

SUPREME COURT OF THE UNITED STATES

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No. 139, Original

STATE OF MISSISSIPPI,  
*Plaintiff,*

v.

CITY OF MEMPHIS, TENNESSEE,  
MEMPHIS LIGHT, GAS & WATER DIVISION,  
AND TENNESSEE,  
*Defendants.*

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[Jan. 25, 2010]

Motion for leave to file a bill of complaint denied without prejudice. See *Virginia v. Maryland*, 540 U.S. 56, 74, n. 9, 124 S.Ct. 598, 157 L.Ed.2d 461 (2003); *Colorado v. New Mexico*, 459 U.S. 176, 187, n. 13, 103 S.Ct. 539, 74 L.Ed.2d 348 (1982).



