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No. 143, Original

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In the
Supreme Court of the United States

STATE OF MISSISSIPPI,
Plaintiff,

v.

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

On Exceptions To The Report Of The Special Master

**PLAINTIFF'S REPLY TO DEFENDANTS'
EXCEPTION TO REPORT OF THE
SPECIAL MASTER**

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INTRODUCTION

The question presented in Mississippi's Original Action is whether Mississippi holds exclusive retained territorial sovereign authority and the right to preserve, protect and control groundwater located within its borders, making Defendants' intentional cross-border pumping of Mississippi groundwater a violation of the United States Constitution. The Special Master rejected Mississippi's argument that Defendants' pumping of groundwater interfered with its sovereignty and recommended dismissal of the Complaint with leave to amend to seek equitable apportionment. Rep. at 1, 26, 32.

Mississippi's exceptions urge the Court to reject the Special Master's Report and enter a decree in favor of Mississippi (1) finding and holding that Defendants knowingly, intentionally, and wrongfully violated Mississippi's sovereignty and exceeded the limits of Tennessee's retained sovereign authority by their cross-border groundwater pumping and taking of Mississippi groundwater, and (2) ordering such further proceedings as needed to establish all remedies to which Mississippi is entitled.

In contrast, Defendants' exception solely challenges the Special Master's recommendation that Mississippi be granted leave to seek the remedy of equitable apportionment. Throughout this litigation, Defendants have consistently and repeatedly argued that equitable apportionment should be Mississippi's sole remedy in this case. *See, e.g.*, D.E. 28 (Memphis Defs.' Mot. for J. on the Pleadings at 28) ("The sole judicial mechanism for resolving this interstate water dispute is equitable

apportionment.”).¹ Now, however, Defendants argue that Mississippi should be peremptorily foreclosed from seeking equitable apportionment.²

This Court should reject Defendants’ exception. First, Defendants’ contention that permitting leave to amend the Complaint would improperly enlarge the scope of the litigation is meritless and unfounded speculation regarding what might happen in such a future proceeding. Further, Defendants are wrong in asserting that Mississippi’s failure to seek equitable apportionment earlier somehow renders the Special

¹ See also D.E. 30 (Tennessee’s Mot. for J. on the Pleadings at 22) (“Mississippi’s factual allegations establish that equitable apportionment applies to the Aquifer.”); D.E. 70 (Defs.’ Mot. for Summ. J. at 1) (“Because equitable apportionment is the exclusive remedy for disputes between States over rights to a shared interstate water resource”); D.E. 114 (Tennessee’s Post-Hearing Brief at 3-4) (“But equitable apportionment—not the property-rights concepts Mississippi invokes—supplies the exclusive judicial remedy for a State claiming rights in an interstate resource.”); D.E. 115 (Defs.’ Proposed Conclusions of Law at 1) (“Equitable apportionment is the exclusive remedy for interstate water resources, including groundwater resources.”); D.E. 131 (Tr. of Closing Arg. at 40-41) (“[T]he evidence demonstrates why the Court should not depart from the equitable apportionment principle for interstate water disputes in this instance.”); *Id.* at 42 (“[T]he only legal remedy available to Mississippi is by equitable apportionment.”).

² Defendants’ exception and brief contain some inaccurate conclusions and characterizations of facts or law that are relevant to the merits of Mississippi’s claims and exceptions but not directly relevant to Defendants’ exception. Mississippi does not concede such conclusions and characterizations by Defendants and will address those in Mississippi’s sur-reply in support of its exceptions.

Master's recommendation error. Mississippi did not seek equitable apportionment under the Court's cases addressing interstate rivers and streams because those cases do not apply to, and have never addressed, the Constitutional rights, wrongful acts, and type of groundwater that are at issue in this case.

Second, Defendants' primary argument is that an equitable apportionment remedy in this case would fail on the merits, but this argument is premature and based on a record that was not developed for such purposes. As defined, the Special Master's evidentiary hearing was not intended to address the "substantial harm" Mississippi must show for equitable apportionment. Instead, the hearing was expressly limited to the issue of whether Defendants violated the Constitution by their cross-border groundwater pumping and was not conducted to address damages issues.

Before developing its specific arguments in response to Defendants' exception, Mississippi wishes to reiterate and reaffirm its contention that equitable apportionment is not an appropriate remedy for addressing one State's violations of another State's territorial sovereignty, including the use of pumping stations on the border to acquire groundwater located in another State. Mississippi's reply to Defendants' exception is not and should not be interpreted as a concession or suggestion by Mississippi that equitable apportionment is an appropriate remedy in this case. This is a case of first impression. Mississippi simply seeks to fully preserve all rights and remedies this Court may determine are available to Mississippi.

ARGUMENT

It is Mississippi's position that the Special Master erred in finding and holding that Defendants' cross-border groundwater pumping did not violate the Constitution of the United States. Should the Court disagree in the context of the evidentiary hearing as conducted, the Court should grant Mississippi leave to amend and not dismiss Mississippi's entire case with prejudice as argued by Defendants for the following reasons:

1. Including Equitable Apportionment as a Remedy Would Not Unreasonably Alter the Scope of This Litigation.

Defendants argue that allowing Mississippi to seek equitable apportionment in this proceeding is inappropriate because it would "substantially enlarge" the scope of this litigation. Defs.' Br. at 16-19. This argument fails for several reasons.

Defendants first contend that "the Court should not permit Mississippi to assert via amendment a claim it has affirmatively disavowed." Defs.' Br. at 17 (citing *Ohio v. Kentucky*, 410 U.S. 641, 650 n.6 (1973)). However, the central issue in *Ohio v. Kentucky* was far different: there, Ohio had independently moved for leave to amend its complaint to add an allegation that it had affirmatively disavowed for over 150 years—*i.e.*, that the Ohio-Kentucky border should lie in the middle of the Ohio River. *Id.* at 650-51. Moreover, the Court referred the amendment decision to the *Special Master* (who recommended against it). *Id.* In this case, however, the Special Master has already

recommended—after reviewing the arguments and evidence presented thus far—that Mississippi should have leave to amend. Rep. at 1, 26, 32. Cf. *Nebraska v. Wyoming*, 515 U.S. 1, 6 (1995) (“Nebraska and Wyoming then sought leave to amend their pleadings, and we referred those requests to the Master.”).

As its exceptions to the Special Master’s Report explain, Mississippi believes that the case should be resolved based on Mississippi’s constitutional right to control the water within its borders. It therefore did not seek to prove that it was entitled to equitable apportionment. Nevertheless, as the Special Master recognized, if Mississippi’s claims under the Constitution are rejected in this case of first impression, the Court’s clarification of the proper standard for adjudicating Mississippi’s unique claims would warrant granting Mississippi leave to amend.

Nor would, as Defendants suggest, the addition of equitable apportionment expand the proceedings “far beyond the scope contemplated by the Court’s order authorizing Mississippi to file its Complaint.” Defs.’ Br. at 13. Mississippi asserted in its Complaint that it need only seek relief based on the Constitution, but Defendants have repeatedly argued that the federal common law remedy of equitable apportionment controls; so Defendants can hardly claim surprise or that they never “contemplated” the possibility of Mississippi needing, at some point in these proceedings, to resort to the remedy of equitable apportionment as an alternative. Accordingly, while an amended complaint would expand the proceedings, any

such expansion would not be unreasonable or unwarranted under the circumstances.

Without citation to any authority, Defendants further argue that equitable apportionment “*may* require discovery from – and, *potentially*, direct participation by – non-party States.” Defs.’ Br. at 18-19 (emphasis added). This argument is speculative. Moreover, the joinder of additional States is not a requirement where those States have not claimed to have been impacted. *See Arizona v. California*, 350 U.S. 114, 114 (1955) (denying motion of California to join Colorado and Wyoming as parties; motion to join Utah and New Mexico as parties “granted only to the extent of their interest in Lower Basin waters”).

2. Defendants’ Arguments on the Merits Do Not Warrant Denial of Leave to Amend.

Defendants’ primary argument against the addition of an equitable apportionment remedy is that Mississippi’s pursuit of equitable apportionment will fail on the merits. But such an argument is premature.

Having first argued that considering equitable apportionment would dramatically expand the scope of the litigation and require new evidence and a new legal standard, Defendants then argue that the existing evidence *already* resolves the case. Defendants should not be permitted to have it both ways.

In any event, Defendants’ assertion that Mississippi has not shown “substantial harm” (Defs.’ Br. at 17-18, 19-24) provides no basis for reversing the Special Master’s recommendation. Defendants repeatedly suggest that the *current record* prevents Mississippi

from making this showing on a remedy *it has not yet asserted and that was not heard by the Special Master*. See *id.* at 23-24 (“[T]he trial record confirms that Mississippi has suffered no meaningful injury at all, much less an injury of such ‘serious magnitude’ that warrants leave to pursue equitable apportionment.” (emphasis added)); *id.* at 25 (claiming that the “evidence has now confirmed” that Mississippi cannot show the injury required for equitable apportionment).

Defendants’ argument is premature because Mississippi has *not yet requested equitable apportionment*. This Court cannot look solely to the “trial record” for these facts (as Defendants suggest) because Mississippi never presented the remedy of equitable apportionment to the Special Master during the evidentiary hearing. The evidentiary hearing was limited in scope to whether the water at issue was an interstate resource. D.E. 56 (Oct 11, 2016 Order at 1).³ Mississippi therefore merely offered illustrative evidence of the impacts of Defendants’ pumping for context but did not develop nor present all evidence of harm related to an unpled remedy of equitable apportionment.⁴

³ Notably, Defendants also specifically objected to the introduction of evidence of harm as irrelevant. See *generally* D.E. 80-82 (Defs.’ Mots. in Limine).

⁴ The record, nevertheless, establishes some of the types of substantial harm Mississippi has suffered. See Mississippi Exceptions Brief at 14-17 (amount of groundwater taken by Defendants from Mississippi from 1965 through 2016 was approximately *411 billion gallons*; material adverse changes to hydrogeologic conditions in northwest Mississippi; reduction of

Defendants' arguments against a hypothetical equitable apportionment amendment are also premature. Defendants are asking the Court to dismiss an unpled remedy in a case that has not yet been decided on the merits of a theory adopted by the Special Master. There are not yet any proposed amendments for either this Court or the Special Master to "scrutinize[] closely . . . to see whether they would take the litigation beyond what [was] reasonably anticipated when [this Court] granted leave to file the initial pleadings." *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (citing *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973)).

Defendants assert that the Court "should not permit Mississippi to sidestep the stringent pleading requirements for an equitable apportionment by granting it leave to file an amended complaint." Defs.' Br. at 13. To be clear, there will be no "sidestepping" by Mississippi. Granting Mississippi leave to amend simply affords Mississippi an opportunity to attempt to obtain the remedy of equitable apportionment while the parties are before the Court. Any amendment offered by Mississippi would, however, still be subject to this Court's pleading requirements, and Defendants can argue against an equitable apportionment amendment if and when Mississippi pleads it. *See id.* at 19 ("And as for Wyoming's argument that any proof

total available drawdown which reduces maximum yield of Mississippi wells, requiring more wells and causing increased power costs; conversion of shallower Mississippi alluvial aquifer from area of discharge into area of recharge which may cause contaminated water to move into the Memphis and Sparta Sands).

of environmental injury that Nebraska will present will be highly speculative, the point is urged prematurely. . . . [A]t this stage we certainly have no basis for judging Nebraska's proof, and no justification for denying Nebraska the chance to prove what it can."). To foreclose this remedy now would be improper.

3. An Equitable Apportionment Remedy Would Not Prejudice Defendants.

Defendants' final argument is that adding equitable apportionment as a remedy would cause some form of unidentified "prejudice" and allow Mississippi "to gain an additional advantage at [Defendants'] expense." Defs.' Br. at 24-26 (quoting *New Hampshire v. Maine*, 532 U.S. 7 (2001)). This argument is also without merit.

Defendants' argument primarily relies on selective quoting about potential harms taken from *New Hampshire v. Maine*, 532 U.S. 742 (2001). The central issue in that case, however, was whether New Hampshire could claim *in an entirely new proceeding* that its coastal border with Maine was different from one it consented to previously. *Id.* at 745. In ruling against New Hampshire, this Court held that the doctrine of judicial estoppel foreclosed its claim. *Id.* at 745. ("Because New Hampshire, in the 1977 proceeding, agreed without reservation that the words 'Middle of the River' mean the middle of the Piscataqua River's main channel of navigation, we conclude that New Hampshire is estopped from asserting now that the boundary runs along the Maine shore."). In contrast, Mississippi has never conceded that

Defendants have any interest, right, or authority under the Constitution, or any other authority to pump groundwater out of Mississippi into Tennessee.

Defendants' reliance on *New Hampshire v. Maine* is misplaced. The current dispute between Mississippi and Tennessee has nothing do to with judicial estoppel.⁵ Judicial estoppel requires a showing that the party to be estopped is taking a clearly inconsistent position from one *under which it has already obtained relief*. Mississippi's position has not changed, and, to date, Mississippi has obtained no relief.

The issues presented here are significant. They implicate state sovereignty and the use of one of nature's most important natural resources. Whatever inconvenience Defendants may encounter from having to address the issue of equitable apportionment is not enough reason to conclude that the Special Master erred in recommending that Mississippi be given an opportunity to amend its complaint if necessary.

⁵ In evaluating whether to apply the doctrine of judicial estoppel, courts generally look for the existence of three factors: (1) that a party's new position is "clearly inconsistent" with its earlier position; (2) that the party seeking to assert this new position previously persuaded a court to accept its earlier position; and (3) that the party "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *See New Hampshire*, 532 U.S. at 750-51. Although the doctrine is flexible and without fixed requirements, *id.* at 749, none of these factors are present here.

CONCLUSION

As outlined in Mississippi's opening brief, the Court should decline to adopt the Special Master's recommendation on the merits of this case. However, in the alternative, should the Court hold that equitable apportionment is Mississippi's sole remedy, then the Court should adopt the Special Master's recommendation that Mississippi be given leave to amend. Furthermore, if the Court does not adopt the Special Master's recommendation that Mississippi be granted leave to amend (or if Mississippi were to choose to not file an amended complaint seeking equitable apportionment in this proceeding) Mississippi's rights to pursue equitable apportionment in a future proceeding must be fully preserved and any dismissal entered by the Court in this proceeding should expressly provide that the dismissal of this proceeding be without prejudice to Mississippi's right to pursue equitable apportionment against Defendants in the future.

Respectfully submitted,

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