

Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

-----XX
STATE OF ARKANSAS, :
 :
 : Plaintiff; :
 :
 : VS. :
 :
 : STATE OF TENNESSEE, :
 :
 : Defendant; :
 :
 :
-----X

Docket No. 33
orig.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE
FEB 5 9 18 AM '70

Duplication or copying of this transcript by photographic, electrostatic or other facsimile means is prohibited under the order form agreement.

Place Washington, D. C.

Date January 19, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORAL ARGUMENT OF:

P A G E

Don Langston, Esq., on behalf of
the Plaintiff

2

Heard H. Sutton, Esq., on behalf of
the Defendant

25

REBUTTAL:

Don Langston, Esq.

65

- - - -

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1969

3 -----X
4 STATE OF ARKANSAS, :

5 Plaintiff; :

6 vs. :

No. 33

7 STATE OF TENNESSEE, :

8 Defendant. :

9 -----X
10 Washington, D. C.

11 January 19, 1969

12 The above-entitled matter came on for argument at

13 10:00 a.m.

14 BEFORE:

15 WARREN BURGER, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
20 POTTER STEWART, Associate Justice
21 BYRON R. WHITE, Associate Justice
22 THURGOOD MARSHALL, Associate Justice

23 APPEARANCES:

24 DON LANGSTON, ESQ.
25 Assistant Attorney General, State of Arkansas
Little Rock, Arkansas

HEARD H. SUTTON, ESQ.
First National Bank Building
Memphis, Tennessee

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We will hear arguments now
3 in the first case, No. 33, invoking the original jurisdiction
4 of the Court, the State of Arkansas against the State of
5 Tennessee.

6 Proceed whenever you are ready, Mr. Langston. We will
7 wait until you have all of your papers assembled.

8 ARGUMENT OF DON LANGSTON, ESQ.

9 ON BEHALF OF PLAINTIFF

10 MR. LANGSTON: May it please the Court?

11 MR. CHIEF JUSTICE BURGER: Mr. Langston?

12 MR. LANGSTON: This is an original action brought by
13 the State of Arkansas against the State of Tennessee under
14 constitutional provision for original action and boundary dis-
15 putes between states.

16 The case reaches here on a Motion for Leave to File
17 a Complaint, Statement in Support of the Complaint, Statement
18 in Support of the Motion and Complaint filed by the State of
19 Arkansas against the State of Tennessee.

20 The Court accepted the case and appointed the Senior
21 District Judge from the State of Minnesota, the Honorable Gunnar
22 Nordbye, to sit as a Special Master in this case.

23 A hearing was held in Memphis, Tennessee, in August
24 and September of 1968. The Master entered his report finding
25 against the interests of the State of Arkansas, and the case

1 now comes before this Court on Exceptions filed by the State
2 of Arkansas to that report and our Brief in support thereof.

3 As a preliminary statement concerning this case, when
4 this case came to the attention of the State of Arkansas we
5 hired a special counsel, George Cracraft of Helena, who is a
6 specialist in this type of field concerning river boundaries.
7 In Arkansas there are few specialists in this and we felt that
8 he was specially qualified to handle this case.

9 However, after the case was tried and it was briefed
10 to the Master, Mr. Cracraft was elected a chancery judge
11 in 1968 and began his term of office in 1969. We felt that Mr.
12 Cracraft would handle this case for us here before this Court,
13 but we discovered a constitutional provision in Arkansas, which
14 is Article 7, Section 25, which prohibits our judges from prac-
15 ticing law in both State and Federal Courts.

16 To move on, the area in controversy between the States
17 of Arkansas and Tennessee comprises some 5,000 acres and it
18 lies physically on the west bank or the Arkansas side of the
19 main channel and, according to all the evidence that was intro-
20 duced before the Master, has been there for at least as long as
21 any witness who was presented could recall.

22 When the matter came to the attention of the State of
23 Arkansas upon the complaint of its citizens who lived in
24 Crittenden County, adjacent to this area, and who had since
25 the memory of any particular witness, these citizens had been

1 in possession and control of it to the full extent of which the
2 land was capable of possession.

3 These people had at various times and places made
4 crops, engaged in husbandry of other sorts of raising cattle,
5 hogs and horses on the property and had from time to time
6 severed, cut and removed valuable timber from the land assess-
7 ing this land and paying severance taxes to the State of
8 Arkansas.

9 Q Any residential buildings on the property, on
10 this land?

11 A No, Your Honor.

12 Q None.

13 A There had been some but they have long since
14 been removed.

15 Q What is its value?

16 A Close to half a million dollars, I believe, Your
17 Honor.

18 Q I mean what are its valuable qualities?

19 A It can be farmed with road crops and it has very
20 much timber on it, Your Honor.

21 Q What kind of timber, pine?

22 A Just hardwood timber and things of that
23 nature that would grow in low-type areas in the alluvial valley
24 of the Mississippi River.

25 Q Anyone been farming it?

 A Parts of it are being farmed as crops and it has

1 been used for cotton and soybeans and that type of thing.

2 Q How far is it from the Arkansas side of the
3 river?

4 A It is attached to the Arkansas side of the
5 river.

6 Q Attached to it?

7 A Yes, sir, Your Honor.

8 Q The island, you said island?

9 A No. There is a marked area along there, but
10 the aerial photograph which is located in the back of the
11 State of Tennessee's Brief, which is on A-11, Appendix A-6,
12 will show that it is a 1929 map and the attachment to the
13 State of Arkansas is even more now than it was at that parti-
14 cular time.

15 Q Sometimes it has been separated from the mainland
16 and sometimes a sandbar builds up and it is connected, isn't
17 that it?

18 A There are trees, willow trees and vegetation and
19 things that do connect it to the State of Arkansas. It has
20 been filled in by sediment, and it is attached to the State of
21 Arkansas.

22 Of course, in high water some of it would be separated
23 from the State of Arkansas, but we contend that it is attached
24 physically to our state.

25 Q Roughly, what is the size of the area?

1 A Close to ---

2 Q Close to what? ;

3 A Five thousand acres.

4 Q Does this record show anywhere the likely or
5 probable tax that either of the states would ---

6 A I don't believe it does, Your Honor.

7 Q Of course, somebody has been paying taxes on it
8 to some state, have they not?

9 A We contended that they had been paid to the
10 State of Arkansas, Your Honor, and that the private citizens
11 had conveyed it consistent with the State of Arkansas and that
12 no one from the State of Tennessee had ever been on it and
13 that our people had been on it, had farmed it, paid taxes on it,
14 and conveyed it in accordance with the laws of Arkansas.

15 Q When you say our people, I am not sure just what
16 you mean.

17 A The State of Arkansas' citizens, Your Honor.

18 Q Or people who thought they were Arkansas' citi-
19 zens. Did they live on, was there residence there? I couldn't
20 get that out of the record.

21 A There was at one time, I think, a man by the
22 name of Paget who lived out there, but most of all it was mostly
23 people who had adjoining lands on Arkansas that extended their
24 lines on out into this particular area.

25 Q What did the Master find about that?

1 A On the part of the acquiescence of our people
2 being out there, he found against the State of Arkansas.

3 We also placed evidence in the record that Crittenden
4 County, Arkansas, built roads and that our Game and Fish
5 Commission patrolled the area for game laws, and that our offi-
6 cers, police officers, policed the area.

7 As early as 1933, according to the record in this
8 case, some litigation was conducted with regard to this land
9 in the courts of Tennessee and various claims were made by the
10 citizens of Tennessee to the lands from that date.

11 However, the record, we think, clearly reflects that
12 no claimant of the State of Tennessee has ever put foot on this
13 ground and not tilled or cut and removed any timber from the
14 land.

15 We believe that if counsel for Tennessee would be
16 completely candid with the Court they would admit such claims of
17 citizens of Tennessee have ever made to the property to the date
18 of this hearing have been paper claims only and that the only
19 actual physical occupation of the area has been accomplished by
20 citizens of the State of Arkansas.

21 We believe that the record is also silent to anything
22 that the State of Tennessee as a sovereign has ever done to
23 improve either the value or the use of this area.

24 So, with this background in mind, the officials of
25 Crittenden County, the county judge, the tax assessor and other

1 officials over in Crittenden County prevailed upon the attorney
2 general and prevailed upon the governor of Arkansas to request
3 the attorney general to bring this suit in the name of the State
4 of Arkansas to determine who owned this property.

5 On the whole case, the Master found the fact of
6 acquiescence, which is the citizens of Arkansas being on the
7 land, he found this in favor of the State of Tennessee, and as
8 we understand the function of the Master who was appointed by
9 this Court, these findings are not to be set aside lightly or
10 if there is any basis, any evidence at all this court will
11 sustain them.

12 We cannot seriously urge that in these exceptions to
13 this Court to set aside those findings.

14 Now, the State of Arkansas' second prone of position
15 is that even though we have not acquired the ownership of all
16 this area by acquiescence power, the exercise of complete domin-
17 ion and control over it for a long period of time, that certainly
18 a smaller portion of the area than that claimed by the State of
19 Tennessee was actually part of its domain originally.

20 The exception which we do urge is not a factual one
21 but is one of law, and the position of the State of Arkansas in
22 these exceptions is that even if the basic facts as found by
23 the Master are true he applied the incorrect rule of law to the
24 facts in the location of the state line.

25 That brings us to the first argued point in our brief

1 which is that the Master erred in concluding that the boundary
2 continued to move as long as the abandoned channel flowed dur-
3 ing high water.

4 In this argument on page 8 of our written brief, the
5 rule is adopted by the Master which he felt was controlling,
6 and I think both sides agree, which is based on a decision in
7 Arkansas v. Tennessee to the effect that though the main channel
8 is a movable one in the channel of navigation in a navigable
9 stream that after an avulsion and as a result of an avulsion the
10 change in boundary is effected.

11 The case rules as stated on page 8, the effect of an
12 avulsion is not complete until it stagnates and ceases to run,
13 and as long as the channel remains a running stream, the bound-
14 ary marked by it may be moved by an erosion.

15 But we contend that once stagnation occurs the pro-
16 cess then is at an end, and we quote from that case, "The
17 boundary then becomes fixed in the middle of the channel as
18 this court has defined it and the gradual filling up of the
19 bed that ensues is not to be treated as an accretion to the
20 shores but as an ultimate effect of the avulsion."

21 Now the Master in his report, while he did recognize
22 this rule and quoted it in his report, has very clearly erroneous-
23 ly applied the rule in the same manner that Tennessee's principal
24 witness, Mr. Rodgers, misapplied it in the quoted testimony on
25 page 9 of our argument.

1 Mr. Rodgers states that his entire report as to the
2 location of the line between the two states in the matters
3 based upon the application of the rule that I just recited
4 when the water stagnates at ordinary high water and when it
5 ceases to run at ordinary high water instead of at low water.

6 He also admitted in the same quoted testimony that he
7 did not know and made no attempt to establish the line along
8 that area where the water stagnated at low water.

9 Q The Master decided in favor of Tennessee, did he
10 not?

11 A Yes, sir, Your Honor.

12 Q What were his grounds?

13 A We feel that he followed the Tennessee witness
14 Rodgers' testimony to the letter in finding this. We feel that
15 in the old abandoned channel that the Master never did find
16 when the water stagnated at low water which we claim that this
17 Court has said you must do.

18 He did contend that he followed that rule but he
19 couldn't have because he followed the testimony of Rodgers who
20 never did set the time that the water first stagnated and the
21 line became fixed.

22 Mr. Rodgers kept saying that every time high water
23 would come in it would erode away and move the boundary, and it
24 kept creeping into the Arkansas shore.

25 The Master adopted Mr. Rodgers' testimony that the

1 boundary in the old abandoned channel keeps moving every time
2 high water comes in and there is some more erosion.

3 Q If he's correct in that, was his judgment
4 correct?

5 A Yes, Your Honor, if he is correct in saying that
6 the boundary does not become fixed when the water first stag-
7 nates and doesn't move, then the State of Arkansas doesn't have
8 a case.

9 But if the rule is that the water the first time it
10 stagnates, which we contend it did in about 1917 or 1918, then
11 his report is erroneous.

12 Q Well, on your theory it could never change, is
13 that right?

14 A That's correct, Your Honor.

15 Q Never, even if the river by natural ---

16 A Unless the river came back and cut all the way
17 passed the old, dead thalweg.

18 Q Well, after the avulsion, there was a new channel.
19 That's a different location.

20 A That is correct.

21 Q Which was the main channel of the river and the
22 old channel was still, had some water in it?

23 A That's correct.

24 Q You think that when that new channel was acti-
25 vated and the old one became stagnate, as soon as it became

1 you should consider that it was a dead thalweg ---

2 A Right.

3 Q and that should stabilize the boundary at that
4 point?

5 A That's correct, Your Honor.

6 Q And the Special Master found that it didn't,
7 although the new thalweg was active, the new channel was active,
8 there was also, he thought, an old channel that was active still
9 effective to change the boundary of the river?

10 A At high water.

11 Q At high water?

12 A That's correct.

13 Q That as long as the old channel, though dead,
14 had some water in it at high water that water could if it washed
15 away into the shore of Arkansas, the boundary of the state could
16 change?

17 A That's correct, Your Honor. I believe that is
18 the Master's contention and it is our contention that most of
19 the water stagnated the dead thalweg became the fixed boundary.

20 Q What you are saying is that once, as soon as the
21 water stagnates, then if you really do know there has been an
22 avulsion, that there is a new channel active?

23 A That is correct, Your Honor.

24 Q If you fail on that point, that is the end of the
25 case, isn't it?

1 A Tennessee would have an enclave in accordance
2 with our engineer's exhibit, would have an enclave in the
3 State of Arkansas.

4 Q Would we decide that here or wouldn't that have
5 to go back to the Master?

6 A I'm sorry, Your Honor.

7 Q Would we decide that here, or would that have to
8 go back to the Master?

9 A We have talked about this and I am not sure that
10 this Court could enter judgment on it or whether it would have
11 to be sent back for a commissioner or someone to set that, Your
12 Honor.

13 We have discussed that, and in my notes here, I have
14 either this Court should do it or send it back.

15 Q Doesn't there have to be some kind of -- it is
16 only on the premise you prevail on, I'm not suggesting that you
17 will but wouldn't there have to be some kind of engineering sur-
18 vey to do that?

19 A Our engineer, Mr. Smith, did plan out the pro-
20 perty by geodetic positions on one of our exhibits, Your Honor.

21 Q I suppose your evidence did show what your claim
22 was; namely, that at a certain time the old channel was dead
23 and at that moment the boundary line was fixed?

24 A That's correct.

25 Q And the Master, I take it, thought that that old
channel didn't really die until what, 1950?

1 A Well, it couldn't be until after 1955.

2 Q Well, until after 1955 although from 1915 or
3 1916 or 1917 ---

4 A A couple of years after 1915 or 1916.

5 Q Although from clear back from 1916 the main
6 channel that has been used for navigation and what not has been
7 the new channel?

8 A That's correct. That is exactly our position
9 that he should have found that the old channel died.

10 It is our position that Mr. Rodgers also admitted in
11 the same quoted testimony that he did not know and made no
12 attempt to establish a line along the area where the water
13 stagnated at low water.

14 The Master in adopting the Rodgers' report completely
15 erred in fixing the state line in exactly the same place Rodgers
16 did. He has applied the same rule; that is, that the line be-
17 comes fixed only if the water does not run through the old
18 channel at ordinary high-water stages.

19 This is the ruling that even though it might
20 stagnate and not run and even sustain vegetation at low-water
21 time when the water is high the water comes up again to ordi-
22 nary high water the line again becomes fluid and it moves with the
23 scouring effect of high-water flow. That is more along the
24 line of what Mr. Justice White was asking.

25 We insist here that this cannot be what this Court

1 intended in its prior decisions or that it intended for these
2 old avulsions or cutoffs should remain in dispute and fluid for
3 many years.

4 The only other witness who testified as to these
5 matters was Austin Smith whose qualifications were set forth
6 in the transcript of the record on page 40 through 47 who has
7 testified in many matters involving state lines, over 100 in
8 number.

9 I think he has participated in some-16 of these cut-
10 offs such as this and whose opinion has been accepted by this
11 Court on at least two recent occasions which are referred to
12 in our brief.

13 It was the testimony of our witness, the State of
14 Arkansas' witness, that his training and experience indicated clear
15 that in a cutoff of this kind stagnation would occur immediately
16 and within two or three years.

17 There are no maps or data available as to when stag-
18 nation occurred, but his experience in these cutoffs and he call-
19 ed upon his training being with the Mississippi River Commission
20 for 35 years in charge of navigation and dredging, that stagna-
21 tion would occur within two years from 1915 to 1916 when the
22 cutoff became complete.

23 In quotations from the record set forth on page 12 of
24 our argument, Mr. Smith indicates that within a couple of years
25 the land would stagnate and become sedimented and at low water

1 would have no flow.

2 The State of Tennessee has criticized or has taken
3 the State of Arkansas to task in its brief concerning that we
4 say that Austin Smith gave the only competent testimony in
5 this case.

6 What we mean by competent evidence is that Rodgers based
7 his entire report on an improper premise. That is what makes
8 his testimony incompetent that he didn't find when the water
9 first stagnated but that he said the line remained fluid when
10 water flowed through there at ordinary high water.

11 That is the reason why we contend that his testimony
12 concerning that is incompetent because he based it on a false
13 premise.

14 As for our second argument, ---

15 Q How about an improper legal premise? You think
16 the test should be when the channel stagnates at low water, and
17 your opponents think the test should be when the channel stag-
18 nates at high water?

19 A Now, the State of Tennessee says that the Master
20 never did find that, but I think from the conclusions from that
21 you have got to say that that he did, by not saying that, he did
22 say that because the map that he attaches to his report follows
23 the line by Rodgers and that was Rodgers' testimony and there
24 couldn't have been any other way he could have reached it.

25 Q Which is that map? Is it attached your ---

1 A The Exceptions.

2 Q To the Exceptions, where?

3 A Excuse me. It is attached to the Master's Report,
4 I am sorry.

5 Q Well, he must have determined it one way or the
6 other either at low water or high water. He had to pick a time
7 at which the boundary line became fixed, didn't he?

8 A That is our position, Your Honor.

9 Q And was there any dispute that there was stagna-
10 tion at low water long before the time that the Master picked?

11 A Rodgers said he didn't know. Our witness said
12 it occurred two years after 1915, 1916, and Rodgers' only testi-
13 mony was ---

14 Q Well, what was the testimony then that the Master
15 based his report on?

16 A It was on Rodgers' testimony.

17 Q What did Rodgers say?

18 A He said that he had seen a foot of water there
19 even after 1955. That means that he never did actually -- in
20 other words I think the Master's Report is still going to allow
21 this line to move at ordinary high water if it moves into the
22 State of Arkansas. It is still fluid in the Master's conclu-
23 sion.

24 Q Do you think Master would let it move if it was
25 only at flood water?

7
1 A That is the only conclusion you can come to,
2 Your Honor.

3 Q Is there any difference between flood water and
4 high water?

5 A There is a difference, yes, Your Honor.

6 We feel that he would let the line move at ordinary
7 high water and also that the flood water would also be involved
8 too. So, we think that he never actually -- of course, he
9 has fixed it but still under his theory it is still fluid.

10 Q Well, is there any doubt in the evidence, in
11 Rodgers' evidence, or in any other evidence that stagnation
12 at low water occurred long before 1955?

13 A Rodgers said he didn't know. That is quoted in
14 our brief, Your Honor.

15 Q I know, but when he says he saw a foot of water
16 there as late as -- after 1955 a foot of water when?

17 A At ordinary high water. So, he is saying that
18 the water never has stagnated.

19 Q Well at high water, but what about at low water?

20 A He never says. That is the reason why we say
21 his testimony is incompetent.

22 Q Well a foot of high water isn't much of a channel,
23 is it?

24 A That is right, Your Honor.

25 Q But it is effective to cause some accretion, I

1 gather.

2 A If it caused some accretion, it would still be
3 making the boundary fluid.

4 Q Well, does this record show at what depth in that
5 part of it the water would cease to be moving water and become
6 stagnate?

7 A I believe the State of Tennessee sayd at 3.1 feet
8 on the Memphis Guage. It was our contention that it would be at
9 zero on the Memphis Guage that it would stagnate, but we will
10 accept the State of Tennessee's contention.

11 Q Well, I should think there would be considerable
12 difference if they said three feet plus was the minimum and
13 the evidence is that at this crucial point there was one foot of
14 water which, as Justice White suggested, doesn't sound like much
15 of a channel.

16 A But it would be enough probably to cause some
17 accretions.

18 Q Does the evidence show it could do that at one-
19 foot depth? That it would carry silt?

20 A I don't think there is any testimony on that, Your
21 Honor. I don't recall.

22 Q Well, this whole process comes from the water carry-
23 ing silt in suspension, doesn't it?

24 A That is correct.

25 Q And you say the record does not show any expert
testimony whether it will carry any substantial silt at a one-

1 foot channel?

2 A I just don't remember on that point, Your Honor.

3 The next point that we attempt to make in our Excep-
4 tions is really based on our first contention that if the Court
5 does not hold for the State of Arkansas on its first contention
6 then the second contention is also out.

7 Then the second contention is that the Master erred
8 in extending the Tennessee lands laterally downstream so as to
9 deny Arkansas access to the navigable channel.

10 The idea that the State of Arkansas is attempting to
11 develop here is that the state lines are supposed to be perma-
12 nent and supposed to be fixed and supposed to be known and that
13 this Court didn't intend for them to remain fluid and movable
14 after one of these avulsions indefinitely.

15 We are saying that this Court wants after an avulsion --
16 it wants the state line to be set and not be moving and be
17 fluid indefinitely. When this Court indicated that it was
18 to become fixed at stagnation, it meant as soon as stagnation,
19 but here we are dealing with an exception to the rule rather
20 than the rule and these exceptions should not be permitted to
21 override the rule itself.

22 We think the whole idea is to fix the boundary and to
23 get it fixed as soon as possible while at the same time preserve
24 whatever rights either party might have and might have lost as
25 a result of the avulsion.

0
1 It is not a cure-all but simply something to preserve
2 as near as possible the rights of either party. On this point,
3 we simply take the position that the Master's Findings of Fact
4 kept the old channel open too long should have sedimented it
5 in Smith's Scour as our witness Smith did it.

6 Within a few years thereafter it was low-water time,
7 and movement that it made after that period would have no effect
8 on the boundary because the boundary became fixed. We emphasis
9 that when stagnation occurred the old thalweg no longer existed,
10 it was dead. The new channel of the river was then the live
11 thalweg and above and below its point of intersection with the
12 dead thalweg, the live thalweg became movable.

13 We also emphasis the point that this Court should not
14 permit the dead thalweg which is not alive, which has no life,
15 to override and control a live one. This is all tied in with
16 our argument which is beginning on page 14 of our brief.

17 The cases seem to hold very clearly that you can't
18 extend these formations upstream and downstream so far as to
19 cut off access and navigation. This is historical and has
20 always run through our law as the right of access that seems
21 to give rise to this rule.

22 We don't want this Court to allow the State of
23 Tennessee to cut off the State of Arkansas' access to the river
24 for some-two miles upstream and four miles downstream from
25 the dead thalweg.

1 Q I could not get very clearly in mind the signi-
2 ficance of access for port facilities, docks, wharves?

3 A Your Honor, of course, the Federal government has
4 pretty much taken over navigation on these rivers but we feel
5 that the only answer I can give you is that we thought this out
6 when we were studying this case that it is sort of historical
7 that the access to the river is a right of property and should
8 not be dealt with lightly. It should be ---

9 Q Then you did not necessarily mean the state's
10 access but the private owner's access, is that it?

11 A We think that the state has access there too,
12 Your Honor. We don't have any plans to develop any port or
13 anything there, if that would answer your question.

14 Q The only access the state would have if it was
15 privately owned would be by right of eminent domain, wouldn't
16 it?

17 A Well, the State of Arkansas owns to the bed of
18 the stream, Your Honor, and it could ---

19 Q You have indicated that people have been farming
20 this over a period of years and that private owners assert title,
21 at least I so understood you.

22 A In Arkansas, Your Honor, the private owners own
23 only to the high-water mark and the State of Arkansas owns from
24 the high-water mark to the bed of the stream.

25 Q Did you make this argument before the Special

1 Master because he doesn't refer to it in any way in his report?

2 A What argument is that, Your Honor?

3 Q The one you are making now.

4 A Yes, Your Honor.

5 Q You did?

6 A Yes, Your Honor, that was the gist of the cross-
7 examination of the witness Rodgers that is set forth in our brief
8 is that he never did fix the time when the -- are you talk-
9 ing about the access?

10 Q No. I am talking about your access argument.

11 A Yes, Your Honor, we said that the land should
12 not be extended downstream from the dead thalweg or upstream from
13 it. We did make this argument.

14 Q Does he deal with your contention in his report?

15 A Yes, he gave it to the State of Tennessee.

16 Q I knew that, I knew the result, but does he talk
17 about your argument, and does he deal with it?

18 A I don't know whether he did or not, but he gives
19 it to the State of Tennessee on the basis of Rodgers' testimony.
20 I am advised by associate counsel that he did not.

21 Q I didn't think he had. The point of my question
22 was whether this is a point that has emerged since the Master's
23 Report, that is the real legal point.

24 A I really don't know, Your Honor. I think that we
25 did advance it but maybe not as vehemently as we have here. I

1 believe that would be my position.

2 Q I wonder if perhaps I misunderstood something you
3 said earlier. Did you say th-t if you lose out on the first
4 point you also lose on the second?

5 A I belive it would, Your Honor, because the thal-
6 weg would have been moving each time under the Master's theory.
7 It would have been moving downstream and upstream. You see,
8 the Master found that the old thalweg had not died or it is
9 still fluid and moves at ordinary high water. That is our
10 contention.

11 So, every time there is an erosion or something, well,
12 that moves what we call the dead thalweg.

13 Q So, your point then is to prevail on your
14 second point you must prevail on the first.

15 A We say the thalweg cut off here and all this
16 downstream is ours and all this upstream is ours but the Master

17 Q I would think the Master could be right on the first
18 point and you could still win on the second point. If you have
19 a sound legal position that you were entitled to maintin your
20 same river frontage that you had at the moment the avulsion
21 occurred and that future accretions to Cow Island, that fragment
22 of Cow Island, those accretions downstream can't belong to
23 Tennessee because they must belong to Arkansas so that Arkansas
24 can maintain its river frontage. Isn't that an independent
25 point? I thought it was in your brief.

1 A We sort of had it tied in with our first point,
2 but I do see what you are talking about, I believe, and maybe
3 it is not tied in as much with the first point as I thought it
4 was.

5 We were mostly relying on the Rutz case on this parti-
6 cular argument, but we will take the land any way we can get it.

7 If the Court has no further questions, concludes
8 my argument.

9 MR. CHIEF JUSTICE BURGER: Very well, thank you.

10 Mr. Sutton?

11 ARGUMENT OF HEARD H. SUTTON, ESQ.

12 ON BEHALF OF DEFENDANT

13 MR. SUTTON: Mr. Chief Justice, Mr. Associate Justices,
14 the State of Tennessee urges that you overrule the Exceptions of
15 the State of Arkansas, that you approve and confirm the Report
16 of the Master and enter a decree in this Court as he recommends.

17 The case that we have before you involves the mighty
18 Mississippi River, and you are going to now, I believe, change
19 your positions and become engineers, and judicial engineers are
20 the final say. We hope to present to you now a picture so that
21 you can determine that position.

22 Q Will you draw that easel up a little bit nearer
23 to us and still leave room for yourself, of course.

24 A Now, Your Honor, ---

25 Q Just one moment. Can you see it?

1 A These drawings are in the exhibits We have simply
2 made copies of them because they will present to you in a sort
3 of pictorial way what we would like to tell you this afternoon.

4 Q Now, will you get us oriented with where north
5 is, is north in the conventional top-of-the-map position here?

6 A Your Honor, ordinarily the top of the map is
7 north ---

8 Q It doesn't look like it now, does it?

9 A and it will be so on all of these drawings. There
10 are only about three drawings where that rule is not used. In
11 other words, most all the maps that you see in this case, the top
12 is north.

13 Q Would you alert us when you are dealing with any
14 exceptions.

15 A This case began, or the history of it, when
16 Arkansas was admitted to the Union in 1836. At that time the
17 United States Government made a survey of the Arkansas land as
18 it came up to the river bank and this would be the line of
19 Arkansas in 1836.

20 Q The outer side of the blue?

21 A Yes, sir, the blue is the water, the white is
22 Arkansas and this pink color is the Tennessee lands on which
23 titles were traced to these accretions.

24 Q Is that map reproduced in any of the documents
25 here?

1 A No, sir, not in the briefs, but there is a
2 report by Mr. Rodgers. It is Tennessee's Exhibit 10, and in
3 that report, he places these maps in reduced form so that you
4 have the complete set of them there.

5 Q That would be in the original record, I suppose?

6 A That would be in the original record.

7 Q But not in anything that has been submitted to
8 us in writing?

9 A No, sir.

10 Now, what I would like to do is take these by steps.
11 In 1825 the State of Tennessee was also surveyed by the General
12 Land Office of the United States and that is the line that they
13 established. So that by those two original land surveys in that
14 period of time you can get the general position of the Mississ-
15 ippi River at the time Arkansas was admitted to the Union.

16 Both states agree that at this time that the state
17 line between Arkansas and Tennessee was in what is known as the
18 thalweg or the valley way, the deepest part of the river where
19 the boats run as it goes downstream.

20 The next one we have here was a survey by the Mississ-
21 ippi River Commission in the year 1877. At that time, the white,
22 again, is Arkansas, the blue is the Mississippi River, and the
23 orange color is the added lands known as accretions. In other
24 words, this Court has described the addition as accretions.

1 Now, may we stop a moment and explain about the
2 erosion and accretion that is occurring at this time?

3 Q Before you go on, does the orange-colored area
4 represent or tell us what proportion of the total area in dis-
5 pute is represented by the orange-colored area here?

6 A Well, the orange-colored area is the land added
7 by accretions to the original Tennessee lands only because the
8 river is moving this way.

9 Q Is the orange part all of the land that is in
10 dispute?

11 A None at this time. It will show up later, yes,
12 sir, and it will be colored orange so that you will be able to
13 distinguish it.

14 What I wanted to explain is that the Mississippi River
15 originally in ancient times flowed straight south from the Great
16 Lakes to the Gulf. As it did, certain things occurred in the
17 bed of the river. You would have a rise or you would have a
18 hard place or you would have a log or something that would
19 impede that flow and that would force the water either to one
20 side or the other.

21 As it did it would scour the bank and as it scoured
22 the bank then, of course, the water would move along with it.
23 As time progressed, it would develop what is known as a bend in
24 the river.

25 Around this bend the best way to understand this it

1 is more like the rim of a wheel, this is the rim of the
2 wheel and this is the hub. The water flowing around the rim
3 of the wheel is moving faster than the water around the hub and
4 the movement of the erosions and the accretions that are formed
5 by the movement of that swift water occurs around this outer
6 rim.

7 That is where the fast water cuts the bank and carries
8 the water in suspension downstream until it is slowed and that
9 is why accretions form on the inner side because the water is
10 flowing slower.

11 Let us proceed. This was a survey by the United
12 States Engineers. At that time, they were known as the Mississippi
13 River Commission and it is a survey. So that we know that in
14 1877 this is the way that the river in this area looked.

15 The next time we were able to find a survey or map was
16 in the year 1904, 1877 to 1904. Here again we show the original
17 Tennessee lands and now the additional forming of the accretions
18 to the Tennessee shore. The Mississippi River is again cutting
19 further into the State of Arkansas and washing away its lands.

20 Now, I have drawn a red line here to indicate where
21 this Arkansas shore was in 1877 so you can see how far between
22 those two years the Mississippi River actually eroded, is the
23 word we use, into Arkansas.

24 Q Now, as of the date of that map to which you are
25 now addressing yourself, just for purposes of clarification,

1 where do you say the boundary between the two states is, in
2 the center of the channel?

3 A It is still in the thalweg of the channel of
4 the river as it goes around that bend.

5 Q The deepest channel. It may not be the center
6 of the channel?

7 A It may not be the center.

8 Q It is presently in a bend?

9 A Your Honor, it was a case from this Court that
10 it remains in the thalweg which is generally the deepest part
11 of the river, not always, but it is where the boats go.

12 Q Might not very well a bend like that be closer
13 to the Arkansas bank?

14 A According to the measurements, now, on these maps
15 of 1904 and the later one 1912, the engineers actually measured
16 the depth of the water that is colored blue here. By examining
17 those maps carefully, you can see how deep the water is.

18 Those measurements in most cases would be like one
19 foot here, two feet, five feet, 10 feet, 30 feet, 50 feet, and
20 within two feet of the bank, it would be 30 feet deep on the outer
21 rim of the wheel.

22 In other words, the water there is what they call a
23 bluff bank. It would very sharply drop right down to a very
24 deep depth, and the boats actually run in close to the shore
25 as they go around this bend.

1 The next year, and this is the question that Your
2 Honor asked, is the year 1912, 1915. That was the survey again
3 by the United States Engineers in which they surveyed this
4 whole area and this is the drawing that matches exactly the
5 map made by the United States Engineers.

6 In this case you will see that the river has moved
7 considerably again into Arkansas and that there is the beginning
8 of the avulsion, that we speak of, that occurred in 1913.

9 Now, according to this question about the river stag-
10 nating at low water or high water, which we will get to in a
11 few minutes, at this time the river was at 11 feet, and at 11
12 feet this depth through here was some seven or eight feet. So,
13 that if we follow this low water or zero water, then at that
14 time we had no channel through here. We had no avulsion because
15 at zero water this was all dry land from right here to right
16 here.

17 Q What do you mean zero water?

18 A I am going to explain that in detail later, I
19 might as well do it now.

20 The engineers designate the elevation of the land,
21 including the river by feet or numbers. For instance, it is
22 279 feet on this shore from sea level at the Gulf of Mexico.
23 In other words, the land rises a total of 279 feet.

24 All right. At these locations, for the sake of
25 navigation, they tell the pilots of the boats how deep the

1 river is. They have established an arbitrary zero as they call
2 it at some 260 feet above the Gulf level and that is the lowest
3 point to which the river will ordinarily go during its ups and
4 downs during the season.

5 Q That is low water?

6 A No, sir, the low water is 3.2 feet above zero.

7 Now, the point is that it is an arbitrary figure for
8 the purpose of these men on the river to know whether the river
9 is shallow or whether they have got a lot of water because as
10 it gets shallow, every time they come to a crossing in the river
11 it will be five or six feet deep or maybe eight feet deep, and
12 they have got to be very careful in getting across or they will
13 run aground going around the bend ---

14 Q Low water is ordinarily 3.2 feet where? At
15 Memphis Guage?

16 A At Memphis. Now that is established at that
17 place. You can go all up and down the river and they will have
18 different heights of gauges. Like the guage at Helena, Arkansas
19 is different than the one at Cairo, Illinois, is different. But
20 only 14 or 15 miles from this point, is a guage at Memphis
21 that they have established for that area.

22 The 3.2 feet is what they call ordinary low water,
23 That is when the water sinks to in the dry season.

24 Q But that does not mean that up here when it is
25 3.2 feet at the Memphis Guage that there is 3.2 feet of water

1 up where we are talking about in either one of these areas.

2 A It will only give you a comparison.

3 Q It just is the point of low water and there is
4 nothing underneath.

5 A That is right, in the middle.

6 Now, to understand this low and high water, the point
7 that the State of Arkansas has confused here is they speak of high
8 water and they do not distinguish between ordinary high water
9 and high water.

10 Ordinary high water that was spoken of by Mr. Rodgers
11 is 18 feet on this Memphis Guage. That is known as mid-bank
12 stages. There the river is just up good above this low stage.

13 High water or flood water is around 40 feet on the
14 Memphis Guage.

15 Q Isn't there a difference between high water and
16 flood water?

17 A The flood waters as we speak of them are when
18 they get above that figure. In other words, the 40 feet would
19 be the measurement at the top of the bank and above that the
20 water will flow over into the lowlands.

21 Now, it is still confined within the levees until
22 it gets above 50 and 55 feet, but it is over its own banks at
23 40 feet.

24 To this point in time, this is 1912, 1915, the State
25 of Arkansas has conceded and agreed with Tennessee that these

1 accretions moved over into this position and that the Arkansas
2 shore was eroded to that position, that the approximate state
3 line is shown by this black line. Now, they have a map that they
4 have in here on which they have placed the state line on it, and
5 we have one where we have placed the state line.

6 For most cases in accord, there might be some varia-
7 tion a little bit about where the depth was shown in two places
8 and one of them would take one side and one the other. But
9 this would be the state line in 1912 just before the avulsion
10 occurred.

11 Now, Your Honors, when this case first began in 1968,
12 the State of Arkansas said there was no avulsion. That is what
13 they plead in the case, there was no avulsion. They said that
14 the river migrated. Now, migration is by erosion and accretion,
15 erode on one side and accretions form on the other.

16 They said that the river migrated up to this position
17 in 1912. Then they say that it reversed itself and migrated
18 back down so that today where it has migrated is the same river
19 we had here and there was no avulsion, and that is the statement
20 of their expert witness.

21 Q It would help me, counsel, if I could see that
22 comparison again, the one showed us before.

23 A Well, I was going to go on down, yes.

24 Q A flash, just turn it up for a moment so we can
25 ~~make a~~ comparison.

1 A This is as it is today. Now, we have attached
2 hereto a copy of the aerial photograph which is the exhibit.
3 There was a picture from an airplane made of this land, and
4 we took that picture and layed it over here so that you could
5 see just how they compare.

6 Q Where is the river?

7 A The river is at this point.

8 Q Taking the island which is on the former picture,
9 the last previous exhibit, identify that on the second one for
10 me at least it would help.

11 A That would be this area right here.

12 Now, we have, I have one of these maps set here but
13 it is not in color to show the comparison, but the reason we
14 wanted to do that was for this area here.

15 Q You better go ahead now.

16 A Yes, Your Honor, we will go through from beginning
17 to end.

18 Q I am sorry, Mr. Sutton, I should have been pay-
19 ~~ing~~ attention, and I wasn't.

20 What is the overlay?

21 A The overlay is also a copy of the aerial photo-
22 graph of 1965.

23 Q Yes, I see.

24 A In a few minutes, I will explain why it is here.

25 What I am trying to get at that when they first began

1 this case, the State of Arkansas said there was no avulsion,
2 that the river migrated up to the position it is here then it
3 migrated back down, that is by erosion and accretion and that
4 no avulsion ever occurred and that the river did not stagnate.

5 This is by Mr. Smith, their own witness, who says,
6 "No, it didn't stagnate. It moved up and it moved back." Until
7 they got into the trial of the case before the Master, and either
8 I think it was the second day that they were there, they changed

9 their position. and they said "Yes, we admit now there was an
10 avulsion, that this channel did form and that the river did not
11 migrate back out as we claim."

12 You see, they first said that it migrated up this
13 way and then came back east to where it is today. In the middle
14 of the hearing before the Master, they admitted that this avul-
15 sion occurred and said that the river instead of migrating back
16 to where it did today it migrated on farther westward to a posi-
17 tion about like that where it stagnated at low water. That is
18 the argument of Arkansas.

19 But on that point their witness on whom they are
20 relying made this statement, and it is in the record that "the
21 stage of the river has nothing to do with its stagnation," that
22 is his own testimony in this case. He says that, "Whether the
23 river is at low water or high water or whatever stage it is, it
24 has nothing to do with its stagnation."

25 Mr. Rodgers says that, "It is possible for the river

6
1 to be moved by erosion and accretions when it gets up to about
2 ordinary high water," because he says, "that is the line where
3 the vegetation ceases." He says, "It is possible."

4 Now, he didn't say that that is when it stagnates, nor
5 did the Master say that is when it stagnates. The Master's
6 statement to me is one that this Court could follow and never
7 have to worry about its being out of line.

8 Q What statement is it?

9 A Your Honor, on page 7 of the Master's Report, in
10 the second paragraph, let's see, it is line 20, beginning at
11 line 23, that would be about two-thirds of the way down.

12 The Master says this, "And when the water becomes
13 stagnate and erosion and accretion no longer occur, the boundary
14 becomes fixed in the middle of the old channel."

15 Q He is really saying if erosion and accretion can
16 take place at high water or at extraordinary high water, he is
17 saying as long as that can happen the boundary can change.

18 A He says that if erosion and accretion occur ---

19 Q No matter whether if it is high water, low water
20 or any other kind of water.

21 A That is right. You stated it just like Mr. Smith
22 said. It is not the stage of the river that causes it. If the
23 river bed moves, then you have, and it moves by erosion and
24 accretion, then it is not stagnated.

25 But when the bed does not move which is the same thing

1 that the Master has said, as long as erosion and accretion does
2 not occur.

3 Q Well, I suppose that this channel, that Bendway
4 Channel, the old channel, that north and westerly one, I suppose
5 it could be absolutely dry six months of the year or nine months
6 of the year, and then at very high water there could be water
7 running through it which would erode the banks.

8 A Well, Your Honor, that would depend on a myriad
9 of things. It is possible, yes. As a matter of fact, the lower
10 end did that.

11 Q And in the Master's rule the state line would
12 change then?

13 A Yes, sir. If it erodes, this Court has said it-
14 self that so long as the old channel can be moved by erosion
15 and accretion ---

16 Q Even if it is no longer an active channel for
17 navigation or for anything else?

18 A That is the point, Your Honor. If there is
19 enough water in there to cause it to erode, it is an active
20 channel. It could not be otherwise.

21 Q Then all it is is just a little sort of a --
22 it is not really the arm, it is just a sort of an inactive arm
23 of the Mississippi River.

24 A Yes. Now, Your Honor, like the ---

25 Q Although that inactive arm is sufficient, it is

1 still effective to change the boundary.

2 A I don't think so, no, sir, it has not moved
3 since 1929.

4 Q I know, but if suddenly there was a large flood
5 and water ran through that channel and it eroded, the boundary
6 would change.

7 A Your Honor, there have been two very high extreme-
8 ly bad floods, the one of 1937 is the one that caused Congress
9 to reenact the Flood Control Bill in that case in 1937 and 1947
10 neither of which had any effect on this situation here.

11 It is not the fact that the height of the water. It
12 is the question of whether it again becomes an active channel.
13 Now, if you are ---

14 Q Active in what sense? Active in the sense of
15 objectively being used?

16 A That you have erosion and accretion there.

17 Q No, used for navigation or just capable of being
18 used for navigation?

19 A Well, Your Honor, now let me answer that in this
20 fashion.

21 In 1932 a river boat 125 feet long and 15 feet wide
22 went through this channel here but only during the stage of
23 the river when the water was above 20 feet, is what the man
24 said, it was about 20 feet, a little above mid-stage. He went
25 through there on a boat because he went through for a purpose.

1 But the river boats would not have gone through
2 there at all because even though water was flowing in there at
3 that time it was not an active channel and there was no way
4 for the regular boats to go in there.

5 You see, if it is an active channel, it will scour out
6 its bed and move its bed some, if it moves its bed, and that is
7 the only time that it would effect a state line is when it be-
8 comes active ---

9 Q I suppose you would agree that if there are
10 these various stages of the river, which I take it everyone
11 agrees there are, that that channel could be stagnate in the
12 sense that there would be no erosion or accretion at the
13 lowest stages of the river.

14 Yet, at other times of the year at higher water there
15 would be a lot more water flowing through that old channel and
16 might it on those occasions erode, and the Master would say
17 as long as that is so the boundary changes?

18 A No, sir, Your Honor, let me explain where, and
19 let's take this particular situation as an example.

20 In 1929, this channel had already closed. Now, there
21 is a peculiar phenomena that goes on when a channel is abandoned,
22 and this you will find in the reports of both Mr. Smith ---

23 Q You mean the channel was closed to navigation?

24 A The channel closes itself.

25 Q It wasn't physically closed?

1 A Yes, sir, that is what I wanted to explain. You
2 will find it in both of these reports.

3 When this new channel becomes active, as you see, it
4 goes by this place here it tends to leave sediment right there.

5 Q Sure.

6 A And the front end or the head of it as they call
7 it will silt up, and at almost any stage except real high water
8 you will not have sufficient flow. It will be some but not
9 sufficient flow to effect anything.

10 Now, that is what Mr. Rodgers was explaining that he
11 saw in 1955 at 18 feet on the guage a foot of water flowing through
12 there.

13 You could walk across it and it certainly didn't
14 effect anything.

15 Q When do you think stagnation occurred and erosion
16 stopped?

17 A Well, we have the map to back s up, Your Honor.

18 Here is the map of 1912. The next map that we will
19 show you is 1929, both survey maps. On this 1929 map, it shows
20 right here how much it eroded between 1912 and 1929. You have
21 got a picture of it.

22 Q Are we going to look at it?

23 A Yes, sir.

24 We might as well -- well, I wanted to get one other
25 thing before I go forward to that, is to give you a general

1 picture.

2 All of this that we are arguing about about when did
3 it stagnate and what was the stage of the river involves this
4 point right here. You have the agreed state line at 1912, 1915.
5 Here is where the State of Tennessee claimed it went by 1929.
6 We have made a little red line.

7 So that we say the river moved just that far and just
8 this part of it, that's all. This has never moved but just
9 this little part.

10 So, when we talk about stagnation and Arkansas says
11 that the Master held it wrong and that we used the wrong theory
12 he is talking only about this little piece right here.

13 But, by the same token, he says that it moved over to
14 here. It is just argument which way did it go. It did move
15 for a short while after that and wound up because you have an
16 aerial photograph in 1929, and that is in the Reply Brief of the
17 State of Tennessee showing an aerial photograph of 1929 and
18 there it is. That is the picture of it, of the river as it
19 was. That is the abandoned channel, and here is the new.

20 So, we are not theorizing. We are going by a record.

21 Q Do you think in 1929 the river was stagnate?

22 A Yes, sir.

23 Q I mean that old channel was stagnate?

24 A Yes, sir. It has not moved since that time at
25 all. You have all the pictures here to show you. That was the

1 reason that I had this situation here. I put the map as it is
2 today. This is the one that the Master had as Appendix 1 to
3 his Report. We simply enlarged it and laid it over the 1912
4 map here for you to see. Here is where the Master says that
5 the state line would be.

6 Q Now, when you have that overlay, where is the
7 main channel of the river?

8 A Right here, Your Honor.

9 Q The boats use that?

10 A That is the avulsive or new channel. This is
11 the old channel right here.

12 Q Approximately what is the width of that channel?
13 It, of course, looks very narrow on this map.

14 A Are you talking about as it is today?

15 Q As it is today.

16 Q You mean the main river?

17 Q The main river, yes.

18 A Here it is today.

19 Q And what is the distance across the center?

20 A Well, it varies. Now at this point, it is
21 about ---

22 Q Take the center of your map. I am trying to
23 get the relationship, if you can.

24 A By here, this would be about a mile and a half.

25 Q That's what I want to get.

1 A Here it is about three quarters of a mile.

2 But what I am trying to get at is that from 1912, now
3 remember in 1912 we are in accord as to the condition of things.
4 From 1912 to 1965, the only movement of the state line has been
5 this area right here and this area right here, that is all. We
6 will explain this one later, but as to the stagnation that the
7 State of Arkansas has raised with you, the only question con-
8 cerning that stagnation is whether it stagnated here or stag-
9 nated here. All of us agree that it stagnated.

10 Q You mean from 1912 ---

11 A To 1929.

12 Q To 1929.

13 A There was a movement of the old channel.

14 Q Yes, but now let's take on the lower part of the
15 map there, there. Now, the state line is that dark line?

16 A Is the dark line.

17 Q Everybody agrees that was in 1912.

18 A Yes, sir.

19 Q And since that time until 1929 or even until to-
20 day, that line has moved no farther west, is that right?

21 A The red line, well, then moves to there in 1929
22 which we will show you by how it moved and show you the maps
23 that shows the movement of it, but that is all.

24 Now, the State of Arkansas does not argue about this
25 movement here. They say the stagnation, they argue only about

1 this point right here. And they want to move it to what they
2 call Smith's Scour.

3 Q You mean they still agree that in the lower part
4 of that channel it was still active enough to be considered an
5 active channel for the purposes of moving the state line?

6 A Yes, sir, they get on to a theory that we will
7 explain later on concerning that.

8 Q Mr. Sutton, is that below the intersection of the
9 avulsion in the old channel?

10 A That would be these two points right here.

11 Q But I mean this red line, that is quite below,
12 isn't it?

13 A The red line over here is where the state line
14 moves from here to here.

15 Q Yes, but that is below the intersection of the
16 avulsion, isn't it?

17 A As it was at that time.

18 Q Now, how about to the west end of the island
19 itself?

20 A To here?

21 Q Yes, now the state line there.

22 A It is all the same as it was in 1912.

23 Q So, you must agree then that that -- would you
24 agree that the lower part of the channel -- when do you say that
25 the channel became stagnate in the area running by the island?

1 A It became stagnated between 1916 and 1925.

2 Q 1916 to 1925.

3 A 1929, excuse me.

4 Q Well, if the lower part of the channel became
5 stagnate how could the upper part of the channel have been active?

6 A This occurred long before. You see, all of
7 this movement occurred prior to 1929. Since 1929, there has
8 been no movement. Between 1913, which is this map right here,
9 and the next survey, which is 1929, there was a movement of
10 channel to this slight degree.

11 Neither one of them moved very much, but the maps
12 show that they did move. Now, we are arguing against a man
13 that was on the ground. He had an instrument and he was look-
14 ing through it and he was measuring and he said, "Now, that is
15 where the river went to."

16 Now, the presumption of the law is between these two
17 periods of time where you do not have any actual evidence the
18 presumption of law of this in the state courts is that that
19 movement was effected by erosion and accretion.

20 Now, we have two maps to show our position. Mr. Smith
21 does not have any maps to show how he arrived at Smith's Scour
22 and he did not use these other maps. He did not use the map of
23 1929. He did not use the map of 1918. He did not use the
24 Arkansas map itself of 1921 which supports this position right
25 here.

1 So, I am saying that Mr. Smith arrived at his opinion
2 by his -- only by his experiences he says, but in using his
3 experience he did not refer to the maps that were available to
4 him at that time.

5 Now, before I leave this map I wanted to sort of say
6 this ---

7 Q Mr. Sutton, was the cross-examination of Mr.
8 Smith based on what you just said?

9 A Yes, sir, we cross-examined him.

10 Q And he conceded, did he, that he had not referred
11 to the maps?

12 A Your Honor, Mr. Smith never conceded anything
13 and we had considerable difficulty getting him to answer a
14 question, and that is why you will find the record is some-
15 1,300 pages, and the Master had to comment on that more than
16 once.

17 He made this statement in the course of his discussions.
18 That he first said that there was no avulsion here. That was
19 his statement, that the river moved up to this place and then
20 it moved back. Then he says, "Well, I just couldn't get over
21 that island so I had to admit there was an avulsion there, but
22 I'm not sure today."

23 Now, this is their expert witness in the Arkansas
24 testimony. "I am not sure today, 1965, but that my first
25 theory was the better one." That is the testimony of the man

1 who is an expert witness. He doesn't know whether there is an
2 avulsion or migration and so testified in this case.

3 So that we are faced with the testimony of a man who
4 says now that the river stagnated at Smith's Scour when he
5 first said it didn't stagnate at all.

6 So, I can understand why the Master did not accept
7 his theory. Let me say this, the Master didn't accept Mr.
8 Rodgers' theory about the ordinary high water, he just said when
9 it ceases to flow or have erosion and accretion then it stag-
10 nated and he says this river stagnated.

11 Q I don't know how much difference it would make
12 in this case, but if the Master were wrong about saying that
13 as long as there is accretion or erosion at any stage of the
14 river through the old channel ----

15 A He doesn't say that.

16 Q Well that is what you said a moment ago. As
17 long as there is erosion or accretion in that old channel, the
18 boundary changes. If he is wrong in that, it may not make much
19 difference in this case, but if he is wrong in that, why that
20 perhaps is the issue, one of the issues here.

21 A Your Honor, he didn't say at any stage. He
22 said that the water becomes stagnate, that is his first state-
23 ment, and erosion and accretion no longer occur the boundary
24 becomes fixed.

25 Q Well, I asked you a while ago if that statement

1 would cover a situation where erosion and accretion take place
2 at some times of the year but not at others if it takes place
3 at high water or at ordinary high water at about 18 feet it
4 takes place but at ordinary low water it doesn't. I would
5 suppose that statement of the Master would include that kind of
6 erosion.

7 A I don't think that is what he meant by it. I
8 don't think that is what he said.

9 He said here that the river did become fixed, that
10 the river ultimately became fixed and stagnated and the abandoned
11 channel as a result of the avulsion of 1913, 1915 is now clearly
12 visible and impressed on the earth's surface.

13 This question of the stage of the river is a false
14 question. Every technical man who has been here says the stage
15 of the river doesn't have anything to do with it that it is
16 whether the bed of the river can be moved.

17 Q I agree with that.

18 A All right.

19 In this case the upper end of this channel that is
20 closed out so that there was no water in the upper end at all.
21 So we have no active channel even though water may flow in there
22 when the river is up, certainly, but let me say this.

23 Q Even though erosion occurs when it does?

24 A How much erosion could occur? You don't have
25 the volume of water nor the velocity of water where the upper

1 end is closed in. That is simply the fact that you have water
2 flowing over the top of that, I think they call it river dam,
3 into this lower bed. You have water flowing in there but you
4 don't have anything that is active. And you don't have any
5 current in there that would create erosion.

6 That has been the case here from sometime prior to
7 1929, and prior to 1929 when it did finally move up there and
8 stop, it has remained in that same position since 1929. There
9 has been no change in the old abandoned channel.

10 Before I go further, I would say this that in trying
11 to describe what is going on from now on, I would like to use
12 the face of a clock and say that the beginning point of this
13 Cow Island Bend would be at three o'clock on the face of a clock,
14 that the top of it would be at 12 o'clock would be where the
15 channel begins and get in close to the Arkansas shore and re-
16 mains there on around and goes on around from 12, 11, 10, 9, 8,
17 and 6 which is the bottom of the area in dispute.

18 Now, Your Honor, the State of Arkansas has made a
19 statement and furnished you in their brief the area that they
20 claim is from which they measured this two miles downstream and
21 three miles upstream and so on. That is incorrect.

22 What they have done, in 1913 there was a flood which
23 started this avulsion across here and the purpose there was a
24 man who went out and made a freehand sketch on an old map show-
25 ing this channel cut through here during that high water.

1 At the same time, he made a general triangular area
2 which he said was the remaining land of Tennessee that was cut
3 off. That was during flood water which was 54 feet at that
4 time, and this was the amount of land, all of this pink area,
5 was the amount of land that was visible above those flood waters
6 in 1913.

7 The State of Arkansas has taken the extreme north
8 part of that 1913 high water. Now remember this that this land
9 at that moment in 1913 was much larger than this picture shows.
10 As the river comes up, it covers more of the edge of the shore.
11 So, naturally you don't have as much land sticking out of the
12 water, but when the river went back down all of this land appear-
13 ed again.

14 But the State of Arkansas takes a line of the river in
15 1925. Now remember this is 1913, and they draw across this 1925
16 land and color that and say that's all the land that Tennessee
17 had in this case. That is incorrect.

18 In 1913 the land was there like it shows in 1912, ex-
19 cept that this area is becoming large. They have taken a free-
20 hand sketch and tried to use that as a survey. They tried to
21 tell us that was the land that we had in 1925 because in 1925
22 the new channel, and this is the new channel in 1925, had eroded
23 away the bottom part of those Tennessee accretions up to this
24 line.

25 Now, of course, at the same time this river is moving

1 up these accretions are filling in here and they just forget
2 all about the fact that there are accretions here and say that
3 this original piece of land in other words his two miles down-
4 stream and his two miles over this way is from that little piece
5 of land that he took off of a flood map in 1913 and then used
6 the 1925 map to try to limit the boundaries of it.

7 In 1925, the river -- the new channel only remember
8 the abandoned channel is showing here has stagnated. It is
9 still in this position and shows on the 1929 map, but in 1925
10 the new channel did come up and erode away so that the lower
11 part became reactivated, that is the lower part.

12 Now, there you have the difference between what we
13 have described as the channel of the river where water comes
14 up in it at high water and it is subject to movement. Well it
15 is only if it becomes active as a channel and here it did become
16 active.

17 Now, what happened because of that active point --
18 the river, coming around here, actually ate just a little bit
19 more into Arkansas, just a little bit.

20 Now, it is their position, and this is the point, that
21 when the river became active to this point and then reversed it-
22 self and started back down, which we will show you later, that
23 the state line left the active channel. It left out at a 90-
24 degree angle to this shoreline of the new channel, that it left it
25 and went out across like that.

1 T This Court has said that the state line remains in
2 the old channel unless it has moved.

3 Q Yes, but the old channel suddenly became part of
4 the new channel.

5 A That is right, Your Honor.

6 Q Part of it did?

7 A Yes, sir.

8 Q Now, that is 1925, is it?

9 A Yes, sir.

10 Q Where was the state line between Arkansas and
11 Tennessee?

12 A It is admitted by the State of Arkansas, and we
13 have attached an exhibit to our Reply Brief, in which they show,
14 that the state line came out and still followed right along down
15 here.

16 A Now they also on their exhibit ---

17 Q Even though the river had come back and had
18 joined with the old abandoned channel to some extent, the state
19 line still remained in the old place?

20 A It went just a little further into Arkansas be-
21 cause the active channel was eroding away. In other words, the
22 two combined channels as they went south from this point remained
23 up against the bank.

24 Now the reason for that -- let's go back to our origi-
25 nal picture -- and you have the rim of a wheel and around the
rim of that wheel the keepest part was in close to the bank
and the channel remained there although it became active, that

1 is in 1925.

2 The next period of time in which there is a survey,
3 now remember there were maps between 1913 and 1929 but they were
4 not full survey maps, there was a map in 1917 and 1918 and there
5 was another map in 1921. Then we have this partial survey of 1925,
6 but the next full one is in 1929 at which time, now here is this
7 1925 line and the river -- the new channel only has reversed
8 itself and started back south building accretions and here is
9 the aerial photograph showing that and here are the accretions
10 it is just sand you can see it that it was built but you can
11 see that this channel has not moved. It is still there.

12 These accretions built only to this part that is in
13 Tennessee and that the water remained between the Tennessee
14 lands and the Arkansas lands at all times.

15 As the land built down, it simply separated the new
16 channel from the old one because it always remained up against
17 that bank. Between 1925 and 1929 it eroded this bank just very
18 slightly

19 After 1929, nothing has moved. In other words, the
20 position of the old abandoned channel has been the same from 1929
21 to today even though it was active for a time between 1915 and
22 1925.

23 Q Who owned it at that time?

24 A At that time, it was still in the State of Tennessee

25 Only the Tennessee lands were activated, I mean eroded or

1 added to.

2 The point I am trying to get at, only the new channel
3 moved during that time. The old channel never moved. It be-
4 came active but it stayed right where it was. The new channel
5 is the one that moved up and down and this Court has held very
6 plainly that irrespective of the movement of the new channel the
7 state line remains in the old channel unless the old channel
8 moves by erosion and accretion.

9 Q May I ask you if the record shows that any pri-
10 vate owner ever claimed this property?

11 A There is a record of a Tennessee land owner claim-
12 ing it and he traces his deeds and titles from a U. S. patent
13 in 1828.

14 Q That was before Arkansas was a state.

15 A Yes, sir.

16 Q Is there any later than that? Is there any
17 evidence that any private owner has claimed it?

18 A I say he traces his title down to the present
19 owner. There is one man that owns this land in Tennessee. He
20 has his deeds from the present time this suit began clear on back
21 to the patents that were originally issued. In other words, he
22 can trace his title clear on back.

23 Q How much of the area, approximately?

24 A Well the entire area is, let me say this ---

25 Q No, how much does he claim?

1 A He claims all of it. I have to explain some-
2 thing to the Court here.

3 As you will notice in 1929 how big that area has
4 gotten, well in 1967 a great deal of that has been cut off so
5 that now it is back up.

6 I might say this. If this case goes long enough, we
7 won't have any land left, the river may go back up there and
8 wash it all away.

9 The area has increased and decreased during the last
10 15 to 20 years. It originally started out as 1,400 acres and the
11 highest it got to is, the State of Arkansas claims, is 5,000.
12 We don't think it is quite that much. We think it is now about
13 3,900 or 4,000. That would only be developed by a survey.

14 It has increased and decreased because this new
15 channel keeps hopping back and forth and the United States
16 Engineers are this day trying to, what they call, stabilize
17 that new channel. They are down there putting in new dikes,
18 putting in revetments and a whole lot of things trying to stop
19 this river from eating away which it shows right here today.

20 It was beginning to eat back up this way again. In
21 other words, this new channel just keeps going up and down like
22 that. The old channel has remained silent ever since then.

23 Of course, Your Honor says could it ever be changed.
24 If that river ever got in its notion it wanted to go back through
25 that place up there, it would. And I would say this, the

1 engineers are fine people, but when the river gets mad at you,
2 it just goes on and does it anyway.

3 Q You might be back here in 30 or 40 years again.

4 A Well, it may be this that it will go back up
5 there and start accreting to Arkansas and they will own it. It
6 doesn't look like it. The engineers are doing a wonderful job
7 of stabilizing this cut that has established here lately.

8 I wanted to get ---

9 I would judge from what you say that neither
10 state would suffer an irreparable loss however we decided the case

11 A Well, Judge Black, this case originally started
12 in 1949 in the State of Tennessee in which the title to the
13 Tennessee owner was put in question. They said that his title
14 did not include this land. That case went to the Supreme Court
15 of Tennessee and it was held by that Court that he did have the
16 title to this land.

17 Then he turned around and filed a suit against ---

18 Q Did anything appear in the Court to show what its
19 value was, market value?

20 A At that time, Your Honor, the value was \$15,000
21 and you have heard my opponent here today say it is worth
22 \$500,000. I wish it was, but what I wanted to say was ---

23 Q It was never sold?

24 A No, sir, it is held pending the ---

25 Q Has any part of it ever been sold or has it

1 passed on down just to the same owners.

2 A No, sir. In 1954 the Tennessee owner filed a
3 suit against the Arkansas owners who were over there claiming
4 the land and that case went to the Tennessee Supreme Court on
5 the question of jurisdiction, a plea in abatement as to whether
6 it was in Arkansas or in Tennessee.

7 Then it came back to the state courts and was tried
8 under the question of acquiescence and that went back to the
9 Supreme Court where it is now so it has been in litigation since
10 1949 and it is still -- all that litigation is pending now while
11 the question of whether it is in Arkansas or Tennessee is
12 settled.

13 As far as ownership, it has been tied up for ---

14 Q When does the Arkansas owner claim his title
15 started?

16 A They took theirs from what they call a tax title.

17 Q In Arkansas, a tax title?

18 A In Arkansas if the taxes aren't paid, it goes
19 to the state and the state can sell it to you.

20 CHIEF JUSTICE BURGER: We will pause now for lunch,
21 counsel.

22 (Whereupon, at 12:00 Noon the argument in the above-
23 entitled matter recessed, to reconvene at 12:30 p.m. the same
24 day.)

1 (The argument in the above-entitled matter resumed
2 at 12:30 p.m.)

3 MR. CHIEF JUSTICE BURGER: You may proceed, Mr.
4 Sutton.

5 MR. SUTTON: Thank you, Your Honor.

6 MR. CHIEF JUSTICE BURGER: You have got about eight
7 minutes left.

8 MR. SUTTON: Yes, sir, I will have to hurry.

XXXXXX 9 FURTHER ARGUMENT OF HEARD H. SUTTON

10 ON BEHALF OF DEFENDANT

11 MR. SUTTON: Your Honors, before I get away from this
12 early period of time, in our brief I have put a very small
13 picture here of a 1921 map. This is at Appendix A-5.

14 Q This is in your Reply Brief or in your Main Brief?

15 A Yes, the Reply Brief.

16 Q Is this the State of Tennessee's brief?

17 A Yes, sir, this is the State of Tennessee's --
18 it is the last one, the thick one.

19 Q How wide is the river there, please?

20 A It is about one mile at its average width. At
21 the crossing -- now the crossing is where it goes from one
22 circle to another -- sometimes it gets much wider.

23 Q How far is it from the Tennessee side?

24 A About one mile.

25 Q How far is it from the Arkansas side?

1 A The width of the river.

2 Q How far is the island?

3 A The island is now the only thing separating it
4 from the Arkansas shore is this old abandoned channel.

5 Q How wide is that?

6 A That is about 50 feet wide on the average.

7 Q It is about a mile over to Tennessee?

8 A Yes, sir.

9 The reason I wanted to point out this map, this is a
10 map that was prepared by the official county engineer for
11 Crittenden County, Arkansas. This is for the year 1921 ---

12 Q Excuse me, is this Appendix A-3?

13 A Yes, sir.

14 The purpose of putting this map in here is this island
15 or this piece of land that belongs to Tennessee is drawn in
16 this particular map by the man from Arkansas and he shows the old
17 abandoned channel in between it and the Arkansas shore.

18 That is in 1921 and is at a time when the State of
19 Arkansas says there were no maps. They did not present this map
20 to the Court. They did not use it in any of their deliberations
21 at all. It had to come out by the State of Tennessee.

22 Because of the limited time, I would like to proceed
23 on rather quickly with the presentation of the picture from
24 these maps.

25 After 1929, the next official map that had a survey on

1 it was 1937, and as you can see, some of the lower channel, the
2 active channel or the avulsive channel, had again cut back here
3 a little bit. It had put a little tail down here.

4 If you will notice that that land adds only to
5 Tennessee. It does not touch Arkansas at any place. It was
6 never formed in any part of Arkansas nor on this side of the
7 old Bendway Channel that has again become inactive as the new
8 channel moved away from it.

9 The next year on which there was a survey was 1949.
10 In this one you will notice that the land here has increased
11 in size greatly because the avulsive channel has moved south
12 and washed away a great deal of the original Tennessee lands,
13 put it here.

14 That is where it gets to that approximately 4,000 or
15 5,000 acres, but, again, in the next period of time which is 1965
16 and the survey in 1967, you will notice that a great deal of
17 that has again been washed away by the new channel. This is
18 the situation as it is today.

19 The only change with this land between 1929, which was
20 to right here, is the addition of this little piece right there,
21 always with the river between it and the Arkansas shore. At
22 all times this land had remained there. It has never moved.
23 It had never come out.

24 This land simply added on to the Tennessee shore. That
25 is what he is talking about tailing down the river. Of course,

1 at this time here is the river and the new channel is the thing
2 it has moved. The point of law is that irrespective of the move-
3 ment of the new channel the state line remains in that old
4 channel unless it becomes active again.

5 I would like to wind this up by making some state-
6 ments, first about the claim of prescription. There is no
7 evidence in this case that Tennessee ever acquiesced in the
8 State of Arkansas' claim of sovereignty over this particular
9 land.

10 Note that the Master found to that effect no evidence
11 that they ever acquiesced, and as far as prescription is con-
12 cerned, they can, of course, obtain the control of this land if
13 Tennessee acquiesced in their control of the land.

14 The record is replete here with law suits from 1932.
15 In 1932, there was a suit in the Federal District Court at Mem-
16 phis to determine if this part of the same area of land right
17 here was either in Tennessee or Arkansas. It was so held it
18 was in Tennessee in 1932. That was a suit between a person in
19 Arkansas and one in Tennessee.

20 Then we have a series of suits beginning in 1949 com-
21 ing clear to date all in the Tennessee courts where Citizens
22 of Tennessee are recognized by the courts of Tennessee as being
23 the owners of that land. Remember this question ---

24 Q You say it is a mile from the coast of Tennessee
25 over to the island?

1 A How many miles from the ---

2 Q Did you say it was one mile?

3 A About one mile, yes, sir. Now I was measur-
4 ing ---

5 Q Is there any evidence that any farmer ever went
6 that mile to do farming from the State of Tennessee?

7 A Yes, sir, they farmed it in 1932.

8 I must say this about this land. It is overflow
9 land and by that it is not protected by a levee. It is not
10 good generally for farming except in little, small spots. There
11 is a spot here and one here where somebody had at different times

12 Q How did the farmer get over there from Tennessee?

13 A He would have to cross the river.

14 Q How?

15 A They used a boat.

16 Q A boat?

17 A This was a Negroe man that went over there and
18 farmed for a while and I think the high water came along and
19 wiped him out.

20 Q Just an ordinary boat with oars?

21 A Yes, sir. In those days they used a horse and
22 mule. I want to clear up something about ---

23 Q A horse and mule? Not to get across the river.

24 A I don't know how they got him over there but
25 they were supposed to have had a mule and farmed over there in

1 1932.

2 Q Where was the mule?

3 A I don't know where they kept it, but he stayed
4 over on that side of the river.

5 Q Over to the ---

6 A Over in this area up here, Your Honors, at that
7 time.

8 Q Yes. A mile away from Tennessee?

9 A Yes, sir.

10 One point I want to get at is no one has ever lived on
11 this land. There has been a statement by opposing counsel for
12 Arkansas that a Mr. Paget once lived there. He did not.

13 Q I hope you have not given your case away with that
14 answer to Justice Black. Your position must be that the mule
15 was in Tennessee.

16 A Oh, yes, sir, he was.

17 Q Not a mile away from Tennessee?

18 A Oh, no. This mile from here to here is what I
19 am talking about. That is all Tennessee.

20 Q Well you say that is Tennessee but how far is it
21 from the Tennessee ---

22 A From this side of the river?

23 Q Yes.

24 A Well it is just the width of the river because
25 they lived on this side of it.

1 Q A mile?

2 A It would be that mile across the river to this
3 land, yes, sir, but they are always in Tennessee.

4 Q Is there any evidence in the record that this
5 man owned a mule and kept it over there on the island a mile
6 away?

7 A I don't believe so, Your Honor.

8 Q That would have been pretty hard farming,
9 wouldn't it?

10 A That is why he abandoned it, it was. The farm-
11 ing has been spasmodic all the time.

12 CHIEF JUSTICE BURGER: I think your time is up,
13 Counsel, except if there is a question pending you can respond
14 to it.

15 A Your Honor, before I leave, if it is permissible
16 with opposing counsel, I would like to leave these for the
17 Court's use.

18 CHIEF JUSTICE BURGER: We will treat them as visual
19 aids to the Court and consider them to the extent they are
20 consistent with the matters in evidence.

21 Mr. Langston?

22 REBUTTAL ARGUMENT OF DON LANGSTON, ESQ.

23 MR. LANGSTON: Thank you, Your Honor.

24 I suppose that the man from Tennessee probably got
25 the mule over there by crossing the Memphis-Arkansas bridge and

1 came through Arkansas and Crittenden County and came down through
2 the property from there.

3 Q Was there a bridge from Arkansas to the island?

4 A This would have been the Memphis-Arkansas bridge
5 on up the river.

6 Q But was there any bridge from Arkansas where you
7 say Arkansas had it, was there any bridge from it to the island?
8 The 50 feet?

9 A No, Your Honor, we claim it was passable just on
10 foot that the channel -- most of the channel ---

11 Q Passable on what, on land?

12 A Yes, Your Honor, the channel dried up. Parts of
13 the channel dried up and trees and sediment filled in there
14 where you could cross it by foot or any way, by vehicle, wagon
15 or anything.

16 I think that the exhibit ---

17 Q Were there any houses on it?

18 A At one time there was a house on it, Your Honor.
19 I think in the early part ---

20 Q What kind of houses?

21 A Pretty primitive, if I remember.

22 Q Evidence show?

23 A It is in the record, Your Honor. I think that
24 this 1929 map which is Appendix A-6 to their brief shows that
25 there is, as far back as 1929, I don't know what stage of the

1 river this was, but there is sediment in this end of the old
2 channel, some along in here and some up in here. You can cross
3 from Arkansas onto this by foot or by vehicle.

4 Q Safely with a mule?

5 A You can go by mule and wagon.

6 The State of Tennessee in their brief and in their
7 argument here has taken Arkansas to task because of its plead-
8 ings in this particular case.

9 When we did draft our pleadings, we did allege that
10 there was no avulsion. This was based on testimony. This was
11 based on what we felt was the case but when our engineer got
12 into it we found out that we could not take the position that
13 there had not been some sort of an avulsion here.

14 They say that Smith, our expert, changed his testimony.
15 I think I can explain to the Court why his testimony was changed.
16 When he first started testifying, concerning this in private liti-
17 gation, he took the position that there had been no avulsion. The
18 reason why he did this was that at that time the law in this
19 particular area had not become definite or crystallized and was
20 not certain.

21 Smith took the position that around 15 years ago that
22 this, what they call a middle bar or mud bar that became this
23 part, did not have any vegetation on it and at low water was
24 the only time at it came up as sand and mud.

25 He took the position and the law was not clear that

1 changes on each side of that particular thing would not be an
2 avulsion or would not move the thalweg of the river.

3 A case from the Eighth Circuit Court of Appeals was --
4 certiorari was denied up here which was Uhlhorn v. U. S. Gypsum
5 Co., 366 F.2nd 211, certiorari denied here 385 U.S. 1026, said
6 that, yes, when the avulsive part was, you could see it at low
7 water, that changes on each side of that would result in an
8 avulsion.

9 That is the reason why his testimony was changed from
10 the time we pled and at the time of the trial. We do not think
11 his position is inconsistent. He was just instructed to take
12 this case into consideration, by the state's attorneys, when
13 he formed his report and he had to follow the Uhlhorn decision
14 in saying, "Yes, there was an avulsion."

15 He did say that he wasn't sure that there really was,
16 but he was going to give the State of Tennessee the benefit of
17 the doubt and say, "Yes, there was a small avulsion still re-
18 maining there due to the Master's and Pilot's Report due to a
19 middle bar or mud bar."

20 Q How much tax is Arkansas getting out of this
21 property now?

22 A Your Honor, I do not know.

23 Q Is it getting any?

24 A I think severance taxes may be off of timber and
25 a few things like that but I don't think the taxes would be

1 very much, but it has sold these as the record reflects -- has
2 sold these lands for taxes over there in Arkansas. That is how
3 ---

4 Q That is what?

5 A The land has sold in Arkansas.

6 Q That island?

7 A Yes, it has been forfeited for taxes and it
8 forfeits to the state and the state, through its land commission-
9 er, gives tax deeds. So, it has derived some revenue from it.

10 Q How much did they pay for it exactly?

11 A I don't know, Your Honor.

12 I am advised ~~that~~ someone asked how much farming land
13 there was on it. There is approximately 500 acres that can be
14 farmed there now.

15 Q Out of 5,000?

16 A Out of 5,000. Most of it is timber land.

17 Q Could a farmer keep his home and his place for
18 his mules, tools and everything over in Arkansas and farm over
19 on that island?

20 A Yes, Your Honor, that is what they are doing.

21 Q That is what they are doing?

22 A That is what our citizens are doing.

23 Q Is there any evidence in the record that the
24 farmers are doing that?

25 A Yes, Your Honor.

1 Q There is?

2 A We have farmed it all along, our citizens have.

3 Q And that is in the record?

4 A Yes, Your Honor.

5 Q Well, I suppose it is not uncommon on land
6 boundaries for a farmer to have a farm that has got a couple
7 of hundred acres in one state and some spill over into the
8 next state. There is nothing unique about that, is there?

9 A I wouldn't think so. Of course, here the river
10 wouldn't make it too feasible but you could own some on both
11 sides.

12 I think Mr. Sutton, when he was being questioned by
13 Mr. Justice White, clearly shows that the Arkansas position is
14 the one that should be accepted by this Court.

15 The prior case of Arkansas v. Tennessee says that
16 when the stream stagnates and ceases to flow and it smells bad
17 then that is when the line is set, that any erosion or accre-
18 tion is a natural result of that avulsion.

19 Mr. Sutton wants these accretions and erosions to
20 keep moving this line even though it is not the channel any
21 more. The case of Tennessee v. Arkansas says that these ero-
22 sions and accretions and sedimentations is a natural result of
23 the dying of the old thalweg.

24 That is why this Court has to decide when and where
25 the old thalweg died because if it keeps eroding and keeps

1 accreting, it is really not dead. It keeps moving and it is fluid
2 which is what this Court doesn't in its prior decisions seemes to
3 say it doesn't want to do. It wants to have the old dead
4 thalweg inactive and then let the new one control the lands.

5 Q What do you mean not fluid?

6 Q I gather Tennessee concedes that the old channel
7 died some years ago and is now dead and that the boundary won't
8 change any more.

9 A He says that, but the accretions that are attached to
10 it and the erosions that are attached to it will move the state
11 line. His position is that it hasn't done it, though.

12 Q Not up in the north and westerly end of that
13 territory. It doesn't seem to me that even if you have some
14 difference about what the test ought to be when the old channel
15 dies, if you both agree that that state line in 1912 was where
16 that map showed it was.

17 A We don't agree where it was, Your Honor.

18 Q In 1912?

19 A That is right.

20 The State of Tennessee claims that these accretions
21 and erosions have moved -- we claim it is in what they term is
22 Smith's Scour.

23 Q Well, if the state line is where he says it was
24 in 1912 to the north and the west of Cow Island or that segment
25 of Cow Island, if the state line is where he said it was, the

1 accretions were on the Tennessee side of that line.

2 A That is not our position, Your Honor. Our
3 position is that the accretions built down from the Arkansas
4 shore and attached to this avulsion there.

5 Q Yes, that is your second point, isn't it?

6 A Correct, yes.

7 Q Not your first one. I am talking about the first
8 one. Well how about the first point?

9 A We claim that the thalweg died in around 1918 in
10 that particular point and it could not move any further.

11 Q Let's assume you are right on that, what is the
12 consequence of that?

13 A Any movement of it ---

14 Q Well there wouldn't be any more on your position.

15 A That is correct.

16 Q I didn't know that he indicates that to the west
17 and the north of that island -- he doesn't claim that the state
18 line changed any.

19 A Your Honor, it is our position that this avulsive
20 area kept eroding away and got to where Smith's Scour was when
21 the thalweg died.

22 The important thing here, we think, for the Court to
23 decide is when and where this thalweg died, set the boundary
24 line there in a definite place and apportion these lands in
25 accordance therewith.

1 We either ask the Court to reverse the conclusions
2 of the Master and enter findings in consistency with our posi-
3 tion or to send the matter back for further proceedings.

4 Q Is there anything in the record that shows why
5 Arkansas filed this law suit?

6 A Your Honor, we filed this law suit on the basis
7 of requests from officials of Crittenden County who were pre-
8 vailed upon by private citizens who were involved there.

9 Q Is that shown in the record?

10 A I think it is, Your Honor. The county officials
11 prevailed upon the Governor to request the Attorney General to
12 file the law suit. It originates from these private persons
13 who were involved in litigation in Tennessee -- private Arkansas
14 persons who claimed the land.

15 Q Mr. Langston, I was about to ask you a question
16 which has nothing to do with the merits of the case but per-
17 haps you could answer, if you know. Is there any jurisdictional
18 constitutional reason why your state, the State of Arkansas,
19 could not agree with another state, the State of Tennessee, for
20 example, by legislative action to submit this kind of a dispute
21 to a joint commission established by the two states? Would you
22 be legally permitted to do it? Now, that may be a large legal
23 question but if you know, I would be interested in your answer.

24 A We have taken the position that the Tennessee
25 litigation which decided the issue in favor of the Tennessee

1 people would preclude our Arkansas residents of filing anything
2 in the State Courts of Arkansas.

3 Q I didn't mean in the courts. I mean a joint
4 commission established by the legislatures of two contending
5 states with an agreement to submit it to final and binding
6 arbitration instead of bringing it under the constitutional
7 provisions here.

8 A Your Honor, I don't know, but since we have
9 been losing this case, we would probably be happy to do that.

10 Q Wouldn't that be perhaps a compact that would
11 have to be approved by the Congress, any such interstate agree-
12 ment as that? Not that there would be probably any problem in
13 getting Congressional approval.

14 A I suppose it would, Your Honor, I really don't
15 know.

16 Q This has been done on the Bi-State Water Commi-
17 ssion in New York, New Jersey, but that is perhaps a little bit
18 different area. It is a matter, I think, of some interest to
19 us. You might be able to do it less expensively elsewhere than
20 here.

21 CHIEF JUSTICE BURGER: Thank you very much for your
22 submission, Mr. Lanston. Thank you, Mr. Sutton.

23 The case is submitted.

24 (Whereupon, at 12:55 p.m. the argument in the above-
25 entitled matter was concluded.)