

AUG 21 1965

JOHN F. DAVIS, CLERK

No. 14 Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF LOUISIANA,
Plaintiff,

vs.

STATE OF MISSISSIPPI, ET AL.,
Defendants.

**EXCEPTIONS OF THE STATE OF MISSISSIPPI
WITH BRIEF IN SUPPORT THEREOF**

JOE T. PATTERSON

Attorney General
State of Mississippi
Jackson, Mississippi

MARTIN R. McLENDON

Assistant Attorney General
State of Mississippi
Jackson, Mississippi

LANDMAN TELLER

Special Assistant to Attorney General
State of Mississippi
Vicksburg, Mississippi

GEORGE W. ROGERS, JR.

Associate to Special Assistant to
Attorney General of the State of
Mississippi

Vicksburg, Mississippi

INDEX

Mississippi Exceptions	1
Brief in Support of Exception I	2
A. There Is No Present Justiciable Controversy Between the States As to Past Geographical Location of "Live Thalweg"	2
B. The Recommended Thalweg of the Special Master Is Not Supported by Any of the Credible Evidence in the Record, While the Undisputed Record Evidence, and Expert Opinion Based Thereon, Shows That the Deepest and Most Navigable Part, the Mid-Channel of Navigation or Thalweg of the Mississippi River Is Now and Has Been Since Mid-October 1952 Located on the West Side of the Well Location	7
Question Presented	9
Facts	9
Argument	17
C. There Is No Occasion to Undertake a Geographic Description of Live Thalweg	21
Brief in Support of Exception II	23
No Costs Should Be Assessed Against Mississippi and Sanctions May Be Imposed upon Louisiana under the Provisions of Rule 37(c), Federal Rules of Civil Procedure	23
Conclusion	27

Table of Authorities

CASES CITED

<i>Anderson-Tully v. Tingle</i> , 166 F.2d 224	20
<i>First National Bank v. Texas</i> , 20 Wall. 72, 22 L. Ed. 295 ..	18
<i>Iowa v. Illinois</i> , 147 U.S. 1, 37 L. Ed. 55, 13 S. Ct. 239 ..	19

<i>Iowa v. Illinois</i> , 202 U.S. 59, 50 L. Ed. 934	23, 24
<i>Kansas v. Missouri</i> , 322 U.S. 213, 88 L. Ed. 1234	17
<i>Louisiana v. Mississippi</i> , 202 U.S. 1, 50 L. Ed. 913, 26 S. Ct. 408, 571	24
<i>Moore v. Chesapeake & O. R. Co.</i> , 340 U.S. 573, 578, 95 L. Ed. 547	18
<i>Moore v. McGuire</i> , 205 U.S. 214, 27 S. Ct. 483	18
<i>New Jersey v. Delaware</i> , 291 U.S. 361, 78 L. Ed. 847, 54 S. Ct. 407	19
<i>North Dakota v. Minnesota</i> , 263 U.S. 365, 68 L. Ed. 342, 350, 44 S. Ct. 138	18
<i>Oklahoma v. Texas</i> , 260 U.S. 606, 67 L. Ed. 428, 43 S. Ct. 221	17

TEXTS

20 <i>Am. Jur.</i> , "Evidence", Sec. 1206, p. 1057	18
<i>Developments in the Law—Discovery</i> , 74 Harv. L. Rev. 940, 968 (1961)	26
Holtzoff, <i>Instruments of Discovery under Federal Rules of Civil Procedure</i> , 41 Mich. L. Rev. 205, 222 (1942)	26
Holtzoff, <i>A Judge Looks at the Rules After Fifteen Years of Use</i> , 15 F.R.D. 155, 165 (1954)	26

RULES OF COURT

Rule 9, Sub. 2, Supreme Court Rules	24
Rule 36(a), Federal Rules of Civil Procedure	25
Rule 37(c), Federal Rules of Civil Procedure	26
Rule 54(d), Federal Rules of Civil Procedure	24

No. 14 Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF LOUISIANA,
Plaintiff,

vs.

STATE OF MISSISSIPPI, ET AL.,
Defendants.

**EXCEPTIONS OF THE STATE OF MISSISSIPPI
WITH BRIEF IN SUPPORT THEREOF**

MISSISSIPPI EXCEPTIONS

Mississippi agrees with most of the Report of the Special Master, and it particularly agrees with the parts of the Report wherein it was recommended that the Court continue to follow its rules of jurisdiction and property heretofore announced in previous cases and universally followed by Federal and State Courts and the recommendation that the Supreme Court not accept jurisdiction over the non-boundary questions sought to be injected into this proceeding.

Were it not for the inclusion in the report of a moot factual issue concerning which there are inconsistent statements within the Report as to the river's migration and findings of fact and conclusions not supported by the

record, Mississippi would urge the Court to adopt the Report as it was filed.

However, because the Report treats with this non-essential issue and contains such statements and conclusions, Mississippi with the utmost deference and humility excepts to the Report of the Special Master in the following particulars, to-wit:

I. All of the parts of the Report and the Recommended Decree that would have the Court adjudicate that the oil well in question was located in Louisiana at the time it was drilled or any time thereafter.

II. That part of the Recommended Decree that suggests that Mississippi be charged with any portion of the costs of this proceeding.

BRIEF IN SUPPORT OF EXCEPTION I

A. There Is No Present Justiciable Controversy Between the States As to Past Geographical Location of "Live Thalweg"

The Report of the Special Master clearly demonstrates the sound legal and factual basis for his recommendation that the decree to be entered by this Court adjudicate that in the area in controversy: "At all times the *live thalweg* has been the true boundary" (S. M. Rep. p. 36). This single conclusion determines the merits of the controversy between the two states.

Since the boundary dispute will be effectively determined by this Court decreeing in this original action that the varying thalweg of the Mississippi River has always been and now remains the true dividing line in the area in controversy and since it is unquestioned (stipulated) that the oil well bottomed beneath the bed of the

river is located substantially to the east of that dividing line and within the territory of Mississippi, we submit that there is no justiciable controversy between the two states requiring or justifying an adjudication by this Court of the geographical location of that line in the past. Therefore Mississippi's Exception I is directed to all parts of the Master's Report dealing with this historical, factual matter. In this connection we particularly refer to the section of the Report entitled "The Boundary in 1954", pp. 22-30, those kindred portions of the "Recommended Decree", pp. 36-39, and Items 30 to 41 inclusive, pp. 51 to 56 of "Additional Findings of Fact".

On November 27, 1962, as shown Section XII of Louisiana's Complaint herein, a private tort suit was instituted in the United States District Court by Joseph S. Zuccaro, et al., against the Humble Oil & Refining Company to require that Company to respond in damages for a subsurface trespass and the taking of oil from beneath their lands. The Zuccaros, riparian landowners on the Mississippi side of the river, alleged that their ownership extended to the line dividing Mississippi and Louisiana and that the thalweg of the Mississippi River marked that line.

Taking up the cudgel with and for its lessee, Humble, Louisiana on May 13, 1963, sought leave to file this Original Action against the State of Mississippi, listing also as respondents the members of the Zuccaro family and Louisiana's ally, Humble. After hearing opposition from Mississippi, this Court on December 16, 1963, entered the following order: "Motion for leave to file a complaint is granted and the State of Mississippi is allowed ninety days to answer."¹

1. No process was directed to be issued by the Court for the private litigants and, so far as we know, none was issued and served.

The controversy between the two sovereign states involves a boundary dispute. On June 25, 1964, the parties entered into an "Agreed Statement of Facts", R. 57-59. They likewise submitted "Suggested Issues for Solution" (R. 60-61).²

Finally, on October 26, 1964, Louisiana submitted both a map showing and a description of "the line in the area involved which Louisiana contends to be the *permanent boundary line* between the States of Louisiana and Mississippi south of the lower end or foot of Glass Cock Cut Off"—quote being from Section 4 of Stipulation, R. 65. It was agreed that this so-called "permanent boundary line" was substantially at the geographical "location of the 'thalweg' as it existed in the Mississippi River in that area in 1932-33" (R. 65).³

At Section 5 of this Stipulation (Exhibit "C" thereto) the parties substantially agreed on the geographical location of the "thalweg" in the area as of April, 1964 (R. 66). The live thalweg may be ascertained at any time (Item 6 to "Agreed Statement of Facts", R. 56) by a current survey—by traverse soundings. The date of April, 1964, was utilized only because an official governmental survey was made of that entire reach of the river in that point of time.⁴

2. These agreements were expressly referred to, confirmed and reconfirmed by Stipulation of August 19, 1964 (R. 61-64), and October 26, 1964 (R. 64-67).

3. This very Section 4 of the Stipulation of 10/26/64 concludes with the understanding that "Mississippi does not agree with Louisiana's contentions nor that the boundary is other than the present and varying 'thalweg' of the Mississippi River in that area", R. 65-66.

4. We would assume that the Special Master utilized, or requested some engineer to make, scalings from this survey as the basis for the description appearing in "Recommended Decree" as the "live thalweg" of April 10, 1964—S. M. Rep. p. 39.

At Section 3 of the Stipulation of October 26, 1964, the parties agreed upon the bottom hole and producing zone location of the oil well bottomed beneath the river bed in the area (R. 65). Therefore, if Louisiana is correct and the location of the thalweg as it existed in 1932-33 is the permanent boundary line, then the oil well, being west of that line, is within the State of Louisiana; however, if the thalweg has continued to be and remains the dividing line as the Master concluded, then the oil well is admittedly to the east thereof and within the State of Mississippi.

Louisiana recognized that it must stand or fall on the theory which it elected to advance that the line became fixed and permanent as of the 1932-33 location of the thalweg; and Louisiana's counsel at the outset of the trial emphasized that this is "Louisiana's *unqualified* position" (R. 40). Once the *current* boundary dispute is adjudicated, what further controversy is there between the two sovereign states? A sheer factual determination as to the exact whereabouts of the thalweg at any past time could be, as between the two states, of aught more than academic concern. Whatever sovereignty they both had to exercise in times past has already been exercised. Louisiana seeks no relief and none is obtainable by it, against Mississippi dependent upon a historical factual finding. Mississippi is here seeking no relief other than the proper determination of its present boundary (see prayer at page 4 of Mississippi's Answer).

The Report of the Special Master cites the constitutional and statutory provision showing that this Court's jurisdiction is here limited to the controversy between the two states—to the boundary dispute. The Master points out: "Mississippi and the Zuccaros take the position that the Supreme Court should not take jurisdiction

in a suit between private parties; and that in no event should it go beyond determining the boundary between the two states in the problem area." The Special Master expressly recommended that this Court should confine its decision to settling the boundary dispute.⁵ From the Master's Report we quote the following excerpts:

"Mississippi and the Zuccaros contend that the only issue involved is the boundary question; that it is the only question over which the Supreme Court has exclusive jurisdiction; that there are regular judicial facilities available for determining ownership and that the Supreme Court should not extend its original but nonexclusive jurisdiction to cover these private party matters.

"As Special Master, it is my recommendation that the Supreme Court not accept jurisdiction over the nonboundary questions in this proceeding. This will avoid the possible establishment of a burdensome and perhaps an undesirable precedent for other State-private party litigants. Rather, it is recommended that the Court confine its determination to the boundary between the two States in the disputed area and leave the related issues of oil ownership to be decided by the appropriate judicial tribunals.

"For this Court to go beyond a determination of the boundary dispute will require an involvement in several questions which are not within its exclusive jurisdiction. Some of these issues are as follows: The Zuccaros claim the value of all the oil that has been produced since April 1954."⁶ (S. M. Rep. pp. 33-34).

With respect it is submitted that the Master did not confine his Report to a determination of the current bound-

5. The effect of this is to uphold and sustain the "Third Defense" incorporated in Mississippi's Answer.

6. The claim of the Zuccaros is against Humble alone.

ary dispute.⁷ We sincerely request this Court not only to follow but to actually enforce the recommendation of the Special Master that this be done, and leave the issues in the private litigation for decision, as the Master suggests, by the appropriate judicial tribunals. When this is done, the Court will sustain Mississippi's Exception by declining to consider, as being beyond the scope of the present controversy between the states, any timetable of past events or any historical, geographical location of the "live thalweg".

If the Court should find that the present controversy makes it necessary to adjudicate the location of the thalweg (state boundary) with respect to the well location at the time it was drilled and thereafter, it is submitted that an examination of the record will show that the well was bottomed on the Mississippi side when drilled and has so remained within the jurisdiction of Mississippi.

B. The Recommended Thalweg of the Special Master Is Not Supported by Any of the Credible Evidence in the Record, While the Undisputed Record Evidence, and Expert Opinion Based Thereon, Shows That the Deepest and Most Navigable Part, the Mid-Channel of Navigation or Thalweg of the Mississippi River Is Now and Has Been Since Mid-October, 1952, Located on the West Side of the Well Location

The Special Master's "recommended thalweg" is a "compromise thalweg" approximately equal distance between the October 1952 thalwegs suggested by Louisiana and Mississippi. He found neither of the lines offered by

7. It was over Mississippi's strenuous and consistent objections that Humble, through attorneys, was permitted to actively participate in the proceedings and, we submit, to clutter the record with matters extraneous to the controversy between the states.

the respective States acceptable (S. M. Rep. p. 55, Sec. 40).

With the Report in this status it will be necessary for the Court to either (1) accept the "compromise thalweg" drawn by an unknown engineer who was not cross-examined by either party, or (2) determine for itself from the evidence presented, both oral and documentary, and contained in the record, the true location of the thalweg relative to the oil well in question from mid-October 1952 to the stipulated location of 1964.

For the reasons that: (1) the location of the "compromise thalweg" recommended by the Special Master is not supported by any of the evidence; (2) its location is contrary to the undisputed proof that Deadman's Bend Crossing was discontinued on October 3, 1952; (3) its use would not have taken advantage of the deepest and swiftest water available; (4) its use would have required vessels to travel a greater distance and make two sharp turns instead of just one; and (5) any vessel using that course would have passed over a shallow shoal just before reaching the deep water on the Mississippi side, Mississippi submits that it would be improper for the Court to adopt the recommended 1952 thalweg.

It is submitted the uncontradicted evidence, and expert opinion based thereon, in the record presently before the Court, shows beyond doubt that the deepest and most navigable part, the mid-channel of navigation or thalweg was west of the well location at the time the well was drilled and at all times thereafter.

Question Presented

Where was the deepest and most navigable part, the true main channel of navigation or thalweg located in October 1952, after the intensified river action of the previous two years had ceased and after the navigational dredging, in relation to the oil well?

Facts

It is undisputed that, at the time the crossing situation above the future well location was discontinued (Miss. Ex. 11, Smith 4-8, R. 656-657), the deepest water (30 feet or more in depth) was west of the future well location near the right descending bank of the river and this deepest water extended a considerable distance south of the well location (La. Ex. 8-C, R. 505), and (Miss. Ex. 10).

Mississippi has had reproduced its Exhibit #10 (Smith Ex. 5) as it was introduced and in addition to the evidence shown on this exhibit, as it was introduced, there has been placed thereon: (1) the Special Master's recommended 1952 thalweg; and (2) thalweg (Oct.-1952) per Miss. Exhibit #9 (Miss. 14 to Stip. Oct. 16, 1964). A copy of that exhibit, with additions, is attached hereto and incorporated in this brief for the convenience of the Court. This exhibit shows clearly that the recommended thalweg does not follow the deepest and most navigable course and actually makes a crossing that had been discontinued at the time.

The Special Master found, according to the uncontradicted evidence, that during the period of low water in October 1952, vessels used this deep channel west of the future well location south through the area where the navigation dredging was conducted and then across to the left descending or Mississippi side (S. M. Rep. p. 26).

The Special Master then designates this course as a "temporary course" and "... the one the vessels were to use during periods of extremely low water; ..." and found that "... (6) some vessels continued to use this course after the return of normal water in December 1952; (7) the navigation bulletins continued to mark this course for some time after 1952." (S. M. Rep. p. 27).

We point out at this juncture that no navigational bulletins were introduced to show a course down river materially different from that followed during the period of low water, and consequently it must be presumed that none existed.

Notwithstanding this total lack of authoritative evidence that any course other than that designated by the Special Master as the "temporary course" was used, the Special Master surmised that after the water level rose, "... most of the river traffic had returned to a course similar to the original and deeper course that crossed east of the latitude of the future well location." (S. M. Rep. p. 54).

Instead of there being conflicting evidence on this point, the findings of the Special Master that the course west of the future well location was temporary and that vessels returned to any course east of the well are simply not supported by any credible evidence contained in this record.⁸

Louisiana witness Osanik did not testify concerning the location of the 1952 thalweg, which he and the witness Latimer are given credit for having located. Mr. Latimer

8. The Special Master expressed wonder at why experts form widely differing opinions when looking at the same basic facts (S. M. Rep. p. 23). A close examination of the record will reveal that the experts did not express substantially different opinions on any material issue.

admitted that the line which he and Mr. Osanik placed on the 1952 survey "... was done (placed) without consideration being given to the dredging which took place after the survey was made." (R. 494)

The lawyer prepared testimony (R. 514-515) of Louisiana witness Latimer concedes that "... vessels navigated down the deep water channel hard against the Louisiana bank and crossed over rather sharply to the Mississippi side through the area in which the dredging had taken place." (R. 493).

Again, it was stated by or for this witness, "It is quite likely that for some period of time, immediately after the 1952 dredging, vessels continued down the narrow deep water pool hard against the Louisiana side, and then made their cross over to the Mississippi side." After making these two concessions, this testimony continued "It is also quite probably that when the water rose they discontinued this course." (R. 494).

Please note that even though this testimony stated that vessels proceeding down stream "quite probably" discontinued this course, there was no evidence of what course they may have taken when they "quite probably" discontinued the course west of the well location.

To the credit of this witness, he testified:

"Q. Was it the best course for them in the crossing areas?

"A. At that particular time, I don't remember when it was, I guess it was.

"Q. You thought it was if you drew it there, didn't you?

"A. Yes, that is right. Next week it might not have been right. Every time the water popped up and you get a five-foot rise, you may have a dredged cut and

have 12 or 15 feet of water here. It pops up four or five feet and starts sands moving up above, and then starts to fall about five feet in two days." (R. 510).

After speculating regarding the course that some boats may or may not have taken thereafter, referring to intervals of high water and the like, Mr. Latimer stated that he gave consideration to a request of Louisiana and Humble to place a thalweg on the map as of May, 1954. Mr. Latimer testified: "*I have no doubt but what the line connecting the deepest and safest part of the main channel of navigation in 1954 was West of its 1952 location*" (R. 497). Then Mr. Latimer concludes by showing that he came to no conclusion. He says: "... I do not believe that any accurate opinion may be given with respect to the location of the line connecting the deepest and safest part of the main navigable channel in May, 1954. My opinion is that it was probably very close to the bottom hole location." (R. 497-498).

Mr. Latimer summarizes on this score: "Therefore, I must conclude that, after a consideration of physical factors, and from a factual standpoint, no determination can be made of the location of this line with respect to the bottom hole location in May, 1954." (R. 498).

Thus, it is clearly shown that the only evidence tending to support a crossing situation above the future well location after October 3, 1952, is the statement prepared for witness Latimer that vessels "quite probably" discontinued the course west of the future well location without attempting to give the Court the benefit of what course the vessels may "quite probably" have taken. This incompetent speculation is weakened by his expressing no doubt that the main channel of navigation in 1954 was west of its 1952 location (R. 497) and the further testimony that no determination can be made of the location of this (State) line

with respect to the bottom hole location in May 1954 (R. 498).

Contrary to this vague, indefinite and wholly incompetent testimony is the undisputed proof that the crossing situation above the future well location was discontinued on October 3, 1952, and the positive and uncontradicted testimony of Mississippi witnesses Smith and Geddes supported by hydrographic surveys, dredging surveys and navigation bulletins that the thalweg was west of the future well location from the time the Deadman Bend crossing was discontinued until the time of the 1964 survey.

From the official navigation bulletin No. 70, dated October 6, 1952 (Miss. Ex. 11, Smith 4-A):

"NOTE: Deadman Bend Crossing has been discontinued. Black Hills Crossing has been established. Deadman Bend Light and Daymark, mile 336.4 AHP has been discontinued. Fairview Light has been established, mile 336.6 AHP, right bank. Black Hills Light has been moved downstream .4 mile to mile 334.9 AHP, left bank.

"BLACK HILLS—10 FEET (CHANGE IN CHANNEL)

(1) From Glasscock Island Foot Light to Black Hills Light 11 feet, to right of 4 red buoys and left of 3 black buoys set in 9 feet. This is passing Fairview Light 200 yards off." (Smith Ex. 4-A, R. 656-673).

According to the navigation bulletins, hydrographic surveys, dredging report and the experience and study of Mississippi witness Smith, the mid-channel of navigation or thalweg was 500 feet to the west of the future well location by mid-October 1952 (R. 673).

A review of the testimony of this witness shows that he meticulously studied all of the documentary informa-

tion available and applied his wealth of experience to the facts as he found them to arrive at the conclusion stated above.

Now here is the positive testimony of Mr. Geddes on this score:

"Q. Are you in a position to tell the Court both from your knowledge of the soundings and personal knowledge of the river there and the navigation course of the river there that the thalweg as it existed at the end of 1952 has continued to the west since that time in the location of the well?

"A. Yes, sir.

"Q. You can do that?

"A. Yes, sir." (R. 815).

* * *

"Q. As shown by Humble's Exhibit 10, on March 13, 1953, in part, Mr. A. Osanik wrote to Dr. Taylor as follows: 'The location of the State line downstream from the lower end of Glasscock Cutoff would, of course, be determined by the position of the thalweg, according to present hydrographic conditions,' referring to this area below Glasscock Cutoff. Can you tell us whether or not the then hydrographic conditions which he refers to as the present hydrographic conditions, as of March 31, 1953, didn't show that the thalweg was west of this bottom hole well location?

"A. Yes, sir. It showed it was west of the well location.

"Q. So had anybody made a 'present' hydrographic survey they would have found it, that is, as of March 31, 1953?

"A. Yes, sir.

"Q. Can you also tell us whether the navigation course at that time in that area was not to the west of the bottom hole of the well location?

"A. Yes, sir.

"Q. Can you tell the Court whether since March 31, 1953, both the thalweg, that is, the deepest channel and the navigation course have been to the west of the bottom hole of this well location?

"A. Yes, sir, it has." (R. 816-817).

Then Mr. Geddes meticulously went through the cross-sections and demonstrated beyond cavil that the thalweg by the end of the year of 1952 and continuously thereafter, as it is stipulated to now be, was and has been to the west of the bottom hole and producing zone of the oil well location. And Mr. Geddes positively swore:

"The state boundary migrated westward past the well between 16 March 1951 and 3 October 1952 and has been westward of the well since that time. On April 25, 1954 it was approximately 580 feet westward of the well and on April 10, 1964, it was approximately 950 feet westward." (R. 829-830).

Accepting the navigation bulletins (La. Exs. 37-A through 37-M), which were introduced without explanation, most favorable to Louisiana would place the thalweg 200 feet west of the well location on October 3, 1952, according to the positive and uncontradicted witness Smith (R. 673) and 280 feet west of the well location on April 25, 1954, according to the equally positive and uncontradicted witness Geddes (R. 829-830).

The truth of the matter is Fairview Light was located a considerable distance below the well location, and La. Ex. 8-C and Miss. Ex. 10 both show that the deep water at that point was tending toward the middle of the river, away from the Louisiana bank in 1952, and those bulletins serve only to show a continuation of that trend. That this trend continued to develop as accretions built on the Louisiana side is shown further by the position of the 1964 thalweg in that location.

The navigation bulletins do serve to rebut the high rate of constant migration applied by the Special Master. They do not serve to support Louisiana's position that the well was located west of the thalweg when it was drilled or at any time thereafter. They do not serve to conflict with the positive testimony of the witnesses based upon record evidence.

The extremely high rate of westward migration of the thalweg applied by the Special Master from the location of his "compromise thalweg" to the stipulated location of the thalweg in 1964 is further rebutted by witness Geddes, who made an exhaustive study and report of the erosion and accretion of the bed of the river according to all of the hydrographic surveys and other documentary evidence available.

Mr. Geddes is the witness who testified that the average eastward migration of the river from 1817 until 1933 was only 72 feet per year at the latitude of the well (R. 788), and that the average annual westward migration of the low water bank lines at the latitude of the well was about 70 feet between approximately 1940 and 1964.

This witness explained that the eastward migration of the river and its thalweg were fairly constant and uniform, while the westward migration of the thalweg at the well location occurred at a more rapid rate between 1940 and 1951, and that that westward migration during that period was approximately 100 feet per year (R. 856).

Although the Special Master seeks to justify his constant rate of migration of 96 feet per year from the "compromise thalweg" to the stipulated thalweg of 1964 by the fact that the Louisiana bank was less resistive to erosion than the Mississippi bank, this high rate of westward migration, assigned by the Special Master, fails to

take into account the facts that: (1) according to the positive and uncontradicted testimony the greater part of the westward migration of the thalweg had occurred before the 1952 survey was conducted; and (2) the river in the area of the well was fairly straight and was only beginning to develop into a bend-type section (R. 855).

Argument

The burden of proof was on Louisiana to show that the thalweg was east of the well location at the time it was drilled and thereafter. *Kansas v. Missouri*, 322 U.S. 213, 88 L. Ed. 1234, held:

“In a suit between states the common boundary between which is a river the channel of which has shifted from time to time, the burden of proof as to the true boundary is on the complainants, *particularly where the disputed location formerly was, and at present is, on the opposite side of the existing main channel.*”

On the burden of proof, the Kansas case followed *Oklahoma v. Texas*, 260 U.S. 606, 67 L. Ed. 428, 43 S. Ct. 221, wherein this Court announced that the rule that the burden of proof was on the complainant was to be applied with equal force in river boundary suits.

Louisiana, as the complainant in this case, failed wholly to meet the burden of proof on the issue of the location of the thalweg east of the well location at the time it was drilled or at any time thereafter. Its evidence on that issue was vague, indefinite, negative and wholly incompetent to establish any facts that would show that the well was west of the thalweg when drilled or at any time thereafter. Louisiana witnesses sought to bolster their position by taking isolated bits of documentary evidence to show a distorted picture of the facts. The evi-

dence in this regard is speculative opinion only and based upon uncertain data not sufficient to raise a doubt.

The Court held in *Moore v. Chesapeake & O. R. Co.*, 340 U.S. 573, 578, 95 L. Ed. 547: "Speculation cannot supply the place of proof."

In *First National Bank v. Texas*, 20 Wall. 72, 22 L. Ed. 295, the Court said: "Testimony which is an opinion only based on uncertain data is wholly incompetent to establish a fact."

Moore v. McGuire, 205 U.S. 214, 27 S. Ct. 483, held that "... evidence which goes no further than to raise a doubt ... will not support a finding ..." when it is opposed by positive evidence.

Contrary to the negative, speculative and uncertain evidence offered by Louisiana, Mississippi witnesses Smith and Geddes used all of the documentary evidence available to them and applied their wealth of experience to it and presented their conclusions based thereon cogently and with reasoned logic. They both concluded and positively testified that the thalweg passed over the future well location on its westward migration before October, 1952, and that it has remained west of that geographic location since that time.

When expert opinions differ the care and accuracy with which the experts have determined the data upon which they base their conclusions are to be considered. 20 *Am. Jur.*, Evidence, Sec. 1206, p. 1057. The Supreme Court, in *North Dakota v. Minnesota*, 263 U.S. 365, 68 L. Ed. 342, 350, 44 S. Ct. 138, said:

"The Court is also aided by its judgment of the care and accuracy with which the contrasted experts respectively have determined the data upon which they base their conclusions."

The recommended thalweg has no support in fact and does not comply with the rules heretofore laid down by this Court for determining the location of a state boundary.

Iowa v. Illinois, 147 U.S. 1, 37 L.Ed. 55, 13 S. Ct. 239, extensively reviewed the authorities on the subject and held ". . . that the true line in navigable rivers between the state of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each state extends to the thread of the stream, that is, to the 'mid-channel', and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed."

Incorporated in the stipulation of June 24, 1964, was an agreement that the thalweg was the point within the river that marked the boundary between the states, and that that thalweg could be located by traverse soundings.

In *Iowa v. Illinois*, *supra*, the following rule for establishing the location of the thalweg is quoted:

"If there be more than one channel of a river, the deepest channel is regarded as the navigable mid-channel for the purpose of territorial demarcation; *and the boundary line will be the line drawn along the surface of the stream corresponding to the line of deepest depression of its bed.*"

In *New Jersey v. Delaware*, 291 U.S. 361, 78 L.Ed. 847, 54 S. Ct. 407, the following definition is given:

"The Thalweg, or downway, is the track taken by boats in their course down the stream, which is that of the strongest current."

That there is no real conflict in the two definitions is demonstrated by the able discussion of the subject by Judge Sibley of the U. S. Circuit Court of Appeals in the case

of *Anderson-Tully v. Tingle*, 166 F.2d 224, wherein it was stated:

"It appears that the older cases speak of the 'center of the stream' or 'the thread of the current' as the boundary. The center of the stream is assumed to be the same as the thread of the current if it is not shown otherwise. In *Iowa v. Illinois*, 147 U.S. 1, the term 'thalweg' of the stream was used, and the later cases in Mississippi use that term, as did the district court. The word is German for 'valleyway' and means the lowest part of the river bed in the direction of its flow, or the deep channel of the river. It can be, and in making charts is, accurately located by transverse soundings. The thalweg and the thread of the stream are related as cause and effect. If the bed is hard, as rock, the thalweg will direct the thread of the stream. If the bed is sand and mud, the thread of the current will control the thalweg, shifting it by erosion as the current shifts. As boundaries the two signify the same thing, the thalweg being more accurately ascertainable. We will use that term."

The only evidence available shows that the deepest and swiftest water was west of the well location at the time it was drilled and has remained on the west side thereof since that time. This being the deepest water, it is also the swiftest water. Although there has been expressed some doubt concerning the course of navigation, that doubt cannot sustain the location of the course across shallow water in a river crossing that has been discontinued and which is longer and less straight than the course along the deepest, swiftest most navigable part of the river. Had the Special Master applied the rules for determining the location of the thalweg, quoted above, to the undisputed facts contained in this record, he would not have drawn the "compromise thalweg."

We submit that all of the credible evidence, both oral and documentary, shows clearly that the deepest most navigable part of the Mississippi River and the channel marked by navigation bulletins was west of the well location at the time it was drilled and has remained on that side of the well location continuously since that time.

We submit further that this Court should write its Order in this case so holding.

C. There Is No Occasion to Undertake a Geographic Description of Live Thalweg

We refer to the "Agreed Statement of Facts" (R. 57-59). As recited at Section 2 thereof: "In the Acts of Congress admitting Louisiana and Mississippi as states into the Union, 'down the river' was the term used in Louisiana's Act of Admission and 'up the same' was used in Mississippi's Act of Admission, reference being made to the Mississippi River." (R. 58)

In this Agreed Statement the two sovereigns recognized that the term "thalweg" is generally used to denote the place in the river "which separates one state of the union from another" and that "above the 31st degree of north Latitude (in the area in controversy), the 'thalweg' of the Mississippi River was the dividing line between the States of Louisiana and Mississippi in the Mississippi River in 1817 when Mississippi, the last of the two states named, acquired statehood" (R. 58). They then stipulated at Item 6 of this Agreement (R. 58-59) that "the 'thalweg' of the Mississippi River which separates Louisiana from Mississippi is capable of being found and ascertained at various locations, *including the area at and below the foot of Glasscock Cutoff* * * *".

We have shown in Subdivision A of Brief on this Exception that there is no reason, essential to solving the

controversy between the two states, for the Court to factually find where the live thalweg was within the Mississippi River on October 3, 1962; and at Subdivision B we have demonstrated that there is no dependable evidence of record to support the 1952 line *selected* by the Special Master, with a geodetic description unsupported by any survey of record (Master's Report, page 38).⁹

Additionally, we submit that this Court's decree should not contain geodetic positions of the "live thalweg" as of April 10, 1964, as recommended by the Special Master for "Recommended Decree", page 39 of Master's Report. The Special Master, elsewhere in his report, states the thalweg on that date was 850 feet west of the well.¹⁰ Assumedly the recommended geodetic positions were obtained (supplied by the unknown engineer contacted by the Special Master) from the official governmental surveys. The Court will necessarily take judicial cognizance of the fact that the varying and mobile line, being the live thalweg, is at a somewhat different position today than it was on April 10, 1964. It is this same line, the thalweg, which divides the states in other reaches where the Mississippi River is, as here, the boundary stream (R. 58-59). It is elementary that this thalweg continues as the dividing line south of the point where the Master elected to stop his description. We submit that it is all sufficient for the Decree to recite: "At all times the live thalweg has been the true boundary" (Master's Report, p. 36).

9. The Special Master at page 28 of his Report revealed: "I have had *an* engineer draw *my* thalweg line on the survey of Deadman's Bend for October 3, 1952."

10. This finding is recommended for decree in the table of footages contained at page 37 of the Special Master's Report. This measurement was evidently obtained by scaling. The sworn testimony of Mr. Geddes was that "on April 10, 1964, it (the thalweg) was approximately 950 feet westward" (R. 829-830); and the testimony of Mr. Smith disclosed that distance to be about 900 feet west of the well location (R. 705-706).

In *Iowa v. Illinois*, 202 U.S. 59, 50 L. Ed. 934, it was recognized that in light of this Court's decision, 147 U.S. 1, 37 L. Ed. 55, 13 Sup. Ct. Rep. 239 holding the "thalweg" to be the boundary line, that a former order appointing commissioners should be vacated and that this Court need and should merely decree, as the Court did:

" * * * that the boundary line between the state of Iowa and the state of Illinois is the middle of the main navigable channel of the Mississippi river, at the places where the nine bridges mentioned in the pleadings cross said river."

BRIEF IN SUPPORT OF EXCEPTION II

No Costs Should Be Assessed Against Mississippi and Sanctions May Be Imposed upon Louisiana under the Provisions of Rule 37(c), Federal Rules of Civil Procedure

Mississippi submits that it should not be called upon to pay any of the costs that have or will accrue as a result of the filing of this proceeding even though an equal division was recommended by the Special Master.

The Order appointing the Special Master, dated April 20, 1964, incorporated therein provisions for expenses and allowances, and provided that such expenses "... shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct."

Louisiana instituted this action contending that there was a permanent and fixed boundary line in the area in question. Mississippi's defense was based upon the contention that the varying thalweg of the Mississippi River, as fixed by the acts of Congress admitting both states to the union, continued to be the boundary. The report of the Special Master fully sustains the position of Mississippi on this issue. The decision of this issue by the Court will be determinative of the entire controversy.

Therefore, under the provisions of Rule 9, subdivision 2, of the rules of this Court, Rule 54(d) of the Federal Rules of Civil Procedure is applicable. The latter rule states: "Costs should be allowed as of course to the prevailing party unless the Court otherwise directs."

The previous decision of this Court in the case of *Louisiana v. Mississippi*, 202 U.S. 1, 50 L. Ed. 913, 26 S. Ct. 408, 571, furnishes apt precedent for the application of this principle. In that case this Court found that Mississippi failed to sustain its claim to a disputed boundary under the established rules of jurisdiction and property. In disposing of the case adversely to the claims of Mississippi, this Court held:

"... that the costs of this Suit be borne by the State of Mississippi."—(202 U.S. 59)

It is submitted that the position taken by Louisiana here is even more untenable than that taken by Mississippi proved to be in the above cited case. Here both Louisiana and its lessee and ally in this case, Humble, had previously recognized by official acts that the thalweg of the river constituted the boundary in the area in question.¹¹ It is

11. In its lease to Humble's predecessor oil company Louisiana had described the area covered by the lease as being the bed of the Mississippi River bounded on the east "downstream along the boundary between the States of Louisiana and Mississippi following the meanderings thereof." (Louisiana's Complaint, Paragraph VII, p. 10). In a formal document executed by Humble it was stated with respect to the area in controversy: "WHEREAS Humble and Carter recognize that the boundary between the State of Mississippi and the State of Louisiana, which is the community boundary between the leases owned by Humble above described and the lease of Carter above described, is the thalweg or thread of the stream of the Mississippi, which thalweg or thread of the stream is subject to change from time to time pursuant to the natural action of the river and the accretion or erosion resulting therefrom, in consequence whereof the boundary aforesaid separating said leasehold ownerships will be subject to change;" (Exhibit C-4 to Complaint, p. 3). See also Humble Exhibits 10 and 11, adopted by Louisiana, R. 577.

manifestly in accord with recognized principles of equity and justice that the party which precipitated this action through a complete reversal of its previous position should be required to bear the costs when it fails to sustain its contentions.

In Mississippi's Answer there was a "Request for Admissions" made of Louisiana. Louisiana was requested by Mississippi to admit:

(1) That in the problem area "there had been no avulsion of the Mississippi River itself"; and

(2) That the change which Louisiana alleged to be avulsive was "an alleged change in the location of the main channel of navigation, often referred to by the term 'thalweg' * * * *within* the Mississippi River * * *".

Louisiana was called upon to admit simply that there was no avulsion of the river itself (clearly meaning that the river did not leave its former bed and adopt a new one) and that the change which it contended to be an avulsive one was *within the river*. Then, pursuant to Rule 36(a), the Request concluded:

"Should Louisiana not concede the substantial correctness of the two foregoing statements or either of them, then Mississippi requests that Louisiana shall, as said Rule 36 requires, set forth in detail why it cannot, and to the extent that it cannot, so truthfully admit."

As shown by the Master's Report, page 5 thereof, when the Court on April 20, 1964, referred this matter to the Special Master its order provided: "The request for the State of Mississippi for admissions is referred to the Special Master for consideration and determination." As shown by the record in this case, Vol. One, R. 56-57, the State of Louisiana, through its Attorney General, unqualifiedly denied both statements saying that each was denied "because it is

not true". Therefore Mississippi had to proceed through its experts to be prepared to and to prove the correctness of both statements.

Persisting in its efforts to lessen the record before this Court and reduce the controversy to the purely legal questions which were the real issue involved, Mississippi filed a motion for Summary Judgment.

Upon this motion being overruled, Mississippi, at the very outset, offered to stipulate the fundamental and uncontrovertible facts which Louisiana proposed to prove in its pre-trial offerings (R. 33-37). Louisiana, however, refused to make any of the proffered stipulations (R. 38). Later in the proceedings Mississippi renewed its offer to stipulate, but Louisiana refused once more (R. 279-280). Now that all of the evidence has been taken, one can search each of the 922 pages of the record and find not a scintilla of evidence which would support or justify a denial of Mississippi's request for admissions.

While Mississippi's primary concern is that no costs be assessed against it and Mississippi is not in the attitude of insisting upon sanctions being imposed, it is respectfully submitted that the instant case affords this Court a rare opportunity to order the imposition of the sanctions provided for by Rule 37(c) of the Federal Rules of Civil Procedure on its own motion and thus set a nationwide example for the entire Federal Judiciary. If Section 36 of the Rules is to be an effective instrument of justice, the sanctions provided for its enforcement must be applied in all cases in which they are justified.¹²

12. Some authorities have suggested that Rule 36 is ineffective because of lack of adequate sanctions—See: "Holtzoff, *A Judge Looks at the Rules After Fifteen Years of Use*, 15 F.R.D. 155, 165 (1954); Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 Mich. L. Rev. 205, 222 (1942); *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 968 (1961).

Whether such sanctions are imposed or not, it is clear that Louisiana and its ally, Humble Oil & Refining Company, are solely responsible for the length of the hearing and therefore for the largest item of costs, the taking and transcribing of the record. We reiterate that the rules of the Court, its prior decision and the principles of equity and justice require these costs to be taxed solely against Louisiana.

According to the suggestion of the Clerk, Mississippi has deposited \$4,000.00 with the Special Master so that all costs could be paid as they accrued. We submit that the final Order of this Court should incorporate therein appropriate provisions for the recovery of costs and the return of these funds to the State of Mississippi.

CONCLUSION

Mississippi is indeed aware of the excellency of the Report of the Special Master on the basic and fundamental issue involved, and Mississippi submits the wisdom and soundness of the decision of the Special Master continuing as the boundary line the "live thalweg" which since the admission of the two states has always been the true dividing line.

We have felt constrained to file these exceptions and, for the reasons heretofore shown, submit:

1. That there is no controversy between the two states which justifies the fixing of any past geographical location of the live thalweg;
2. That the credible and positive evidence, both oral and documentary, shows that the deepest and most navigable part of the Mississippi River, the true thalweg, was west of the well location at the time it was drilled in April, 1954,

with the consequence that said well when drilled and continuously since has been in Mississippi; and

3. That all costs should be imposed against Louisiana and/or Humble and, in the discretion of this Court under the circumstances of record, sanctions imposed under Federal Rules of Civil Procedure 37(c).

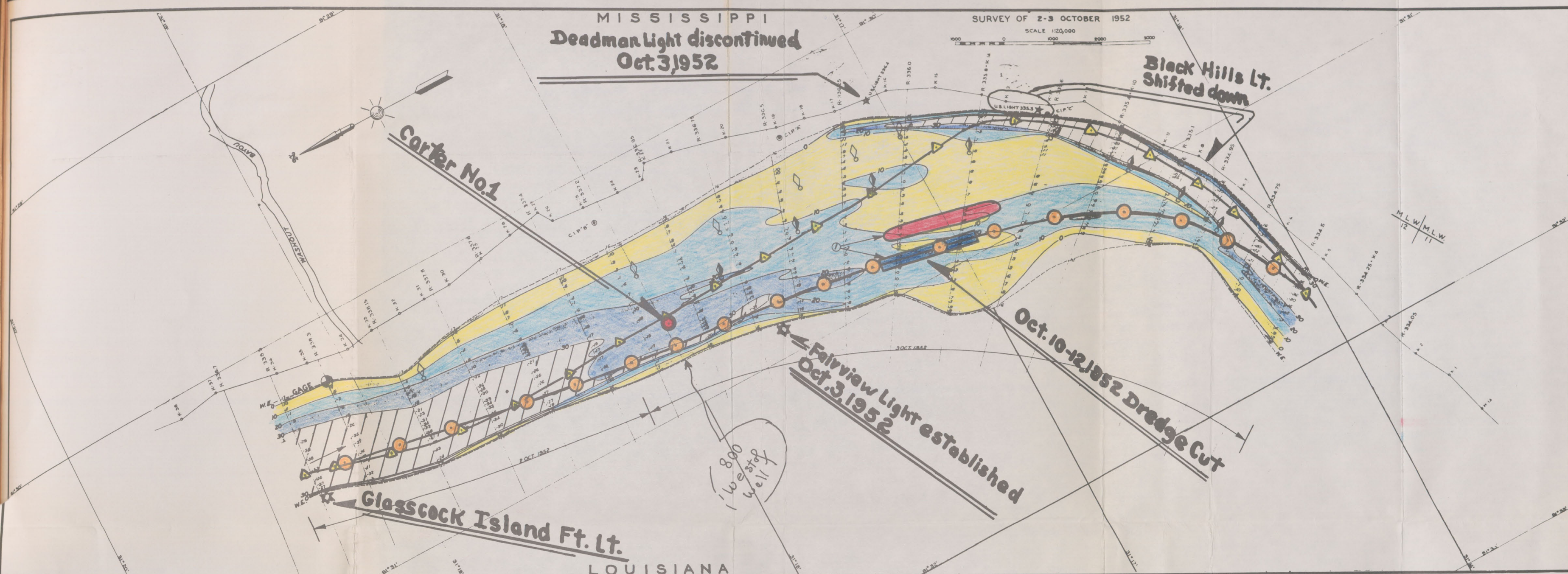
Respectfully submitted,

JOE T. PATTERSON
Attorney General
State of Mississippi
Jackson, Mississippi

MARTIN R. McLENDON
Assistant Attorney General
State of Mississippi
Jackson, Mississippi

LANDMAN TELLER
Special Assistant to Attorney General
State of Mississippi
Vicksburg, Mississippi

GEORGE W. ROGERS, JR.
Associate to Special Assistant to Attorney General of the State of Mississippi
Vicksburg, Mississippi



Map reproduction of Smith Ex. 5 (Miss. Ex. 10) with addition:
 (1) Master's recommended 1952 thalweg: —▲—▲—
 (2) Thalweg (Oct-1952) per Miss. Ex. 9
 (Miss. 14 to Stip. Oct. 26, 1964) : —●—●—
 Comment: Mississippi's 1952 thalweg shown by map, plus positive
 and uncontradicted testimony and navigation bulletins is deepest
 part of main channel of navigation at oil well latitude.

DREDGING OPERATIONS
 VICKSBURG DISTRICT
BLACK HILLS
1952

LEGEND
 —▲— CUT
 —●— FILL
 ○ → CUT IDENTIFICATION

