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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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Number 33, Original

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STATE OF ARKANSAS  
Plaintiff

vs.

STATE OF TENNESSEE  
Defendant

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**EXCEPTIONS**

**To Report of Special Master and Plaintiff's Brief  
in Support Thereof**

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**EXCEPTIONS TO MASTER'S REPORT**

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Now comes the State of Arkansas and prays this Honorable Court that the Master's Report filed herein and dated the 29th day of July, 1969, not be approved and that it be permitted to submit the following exceptions to said Court:

1. The Master erred in his conclusion of law that the boundary line between the State of Arkansas and Tennessee did not become fixed in the abandoned "Bendway Channel" after the avulsion of 1916 until no water flowed through it at ordinary high water stage.

2. The Master erred in not concluding that the "Bendway" became fixed in the abandoned channel when same first stagnated and ceased to flow continuously.

3. The Master erred in failure to find when the event in Exception No. 2 occurred.



4. The Master erred in ignoring the only competent evidence as to when the event described in Exception No. 2 occurred.

5. The Master erred in permitting the lands found to be a part of Tennessee severed by the 1916 avulsion to extend lengthwise of the river and exclude the State of Arkansas from access to the river above and below that area.

6. The Master erred in not finding that any claims of the State of Tennessee had been extinguished by acquiescence in dominion and control exercised by the State of Arkansas on the area in controversy.

Respectfully submitted

JOE PURCELL  
Attorney General

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STATE OF ARKANSAS  
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**BRIEF IN SUPPORT OF EXCEPTIONS**

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**STATEMENT**

This is an original action brought by the State of Arkansas to settle a disputed boundary with the State of Tennessee extending six (6) miles laterally along the west (Arkansas side) bank of the Mississippi River and encompassing some five thousand acres. The cause was heard by a Master whose report has been filed herein recommending that all of the area be awarded to the State of Tennessee.

The matter is now here on exceptions to that report.

The Master found, on testimony which varied only as to detail, that the geographic situs of the area in controversy was, for the most part, surveyed as part of Critten-

den County, Arkansas at the time Arkansas was admitted into the Union in 1836.

The area lay adjacent to a bend in the river which is commonly known as "Cow Island Bend". The shore opposite it was in Shelby County, Tennessee and designated as "Islands 47 and 48" and commonly known as "Cow Islands".

The common boundary between these two states has been judicially declared to be the "main channel" or "thalweg" of the Mississippi River. **Arkansas v. Tennessee**, 246 U. S. 158, 38 Sup. Ct. 301.

Between 1836 and 1912, the river in this area continued a northwestwardly migration by erosion into the Arkansas shore and a corresponding accretion to the Tennessee shore of "Cow Island". By the year 1912 the concave bend had grown deep into the Arkansas shore. Extending into this narrow concave bend was the elongated extension of the Tennessee "Cow Island Peninsula". The main channel, and boundary between these two states, continued to run between them in what was referred to throughout the testimony as the "Bendway Channel" (so called because it was the way "through the bend").

The Tennessee "Cow Island Peninsula" had become enlarged, elongated and now extended into the geographic situs originally surveyed as part of the State of Arkansas. There was no conflict in the testimony (and the Master correctly found) that this loss of Arkansas shore and gain to the "Cow Island Peninsula" had been by the slow and imperceptible process of erosion and accretion. The boundary remained in the "Bendway Channel" and "Cow Island Peninsula", as it then existed, was part of the State of Tennessee.

By the year 1912 there developed across the neck of the Tennessee "Cow Island Peninsula" a high water channel



later to be known as the "Pointway Channel" (so called because it is the way "across the point"). The "Pointway Channel" thereafter annually carried a greater quantity of flow. By the year 1915-1916 the "Pointway Channel" became first the predominant and then the only channel. The parties agree (and the Master found) that in 1916, the "Bendway Channel" was abandoned by the river and the "Pointway Channel" then became and remained the main channel of the river. When the channel changed from the "Bendway Channel" to the "Pointway Channel" it did so, not by eroding through and destroying the intervening portion of "Cow Island Peninsula", but leaving it intact and identifiable, separating the abandoned "Bendway Channel" from the new "Pointway Channel".

It was conceded by both parties, and the Master correctly concluded, that this action of the river carried with it the legal consequences of an avulsion and that the severed portion of the "Cow Island Peninsula", though it now lay on the west of the main channel, retained its identity as part of Tennessee.

After 1915, and until 1925, all agreed (and the Master found) that the "Pointway Channel" eroded northwardly until only a small portion of the originally severed "Cow Island Peninsula" remained.

After 1925 the river (now running only through the "Pointway Channel") reversed its direction and began a migration southeastwardly eroding into the "Tennessee Cow Island" shore and laying down new lands on the west side of the "Pointway Channel". This migration has continued to the present time. The Master found that as these extensions were attached to the remanent of the 1916 "Cow Island Peninsula", they were and became a part of the State of Tennessee.

It was this position of the State of Arkansas that all claims of the State of Tennessee to any of the severed area was lost by acquiescence for many years in the exercise of exclusive dominion over the area by the State of Arkansas. The Master found this issue against the State of Arkansas despite overwhelming evidence to the contrary.

It was the further position of the State of Arkansas, and urged here on exceptions to the Master's Report that:

1.) The line between the two states became fixed in the abandoned channel in the year 1919, when the abandoned channel stagnated and ceased to run continuously as a stream and could not have continued its migration to the present date or to the position found by the Master; and,

2.) In no event could the additions to the avulted Tennessee "Cow Island Bar" so extended themselves lengthwise in the river as to deprive the State of Arkansas of its access to the river for an additional four (4) miles downstream and two (2) miles upstream.

The Master adopted almost verbatim the testimony and legal conclusions of O. S. Rodgers (witness for the State of Tennessee) and his report which appears as Defendant's Exhibit No. 10.

Most of Rodgers' exhibits were prepared from what he called a "composite map", which is one base map upon which have been traced the bank lines of the river for a number of years. By the use of such a device the changes which occurred between given dates can be emphasized by tinting. To point up the exception we make, we attach as an appendix hereto a copy of Rodgers' composite on which that part of the 1913 bank line of the severed "Cow Island Peninsula" which survived the 1925 erosion is emphasized by a dark orange coloring. (There were no maps showing bank lines between these years.) The new

made lands from 1925 to the 1967 bank line are shown in orange tint. The present river is blue. The various land marks shown by the Master on his "Appendix 1" have been added in type.

By reference to this map we note the upstream extension of some two (2) miles by Rodgers' scale and downstream extension of more than four (4) miles by scale, all of which the Master awarded to the State of Tennessee.

It was the Master's conclusion that after the 1916 avulsion the erosion northwestwardly continued until by 1925 it had reached the point shown as the southernmost bank line of the dark orange half moon area. All of the rest of the severed "Cow Island Peninsula" to the south had been eroded away. It was to this small portion of the remaining severed Tennessee land that the Master concluded that the lands which now exist formed by accretion and as part of the State of Tennessee.

## ARGUMENT

### I. The Master Erred in Concluding That the Boundary Continued to Move as Long as the Abandoned Channel Flowed During High Water

The state line as recommended by the Master (the same as surveyed by Rodgers) extends a considerable distance above and below the mouths of the abandoned channel. It extends down through "Ike Chute", "Ninety-Six Chute" and beyond. None of these embayments existed until after 1925.

The rule applicable to avulsive action of the river was declared in **Arkansas v. Tennessee**, *supra*:

"It is settled beyond the possibility of dispute that where a running stream is the boundary between the states, the same rule applies as between private proprietors, namely, that when the bed or channel are changed by natural or gradual processes known as erosion and accretion, the boundary follows the varying course of the stream, while if the stream for any cause, natural or artificial, suddenly leaves its old bed and forms a new one by the process known as avulsion, the resulting change of channel works no change in boundary, which remains in the middle of the old channel although no water may be flowing in it and irrespective of subsequent changes in the new channel.

\* \* \* \* \*

An avulsion has this effect whether it results in the drying up of the old channel or not, **so long as that channel remains a running stream**, the boundary marked by it is still subject to be changed by erosion and accretion, but **when the water becomes stagnate**

the effect of these processes is at an end. The boundary then becomes fixed in the middle of the channel as we have defined it and the gradual filling up of the bed that ensues is not to be treated as accretion to the shores but an ultimate effect of the avulsion.”

Though they were aware of this rule, it was the application of this rule that lead both Rodgers and the Master into error. Rodgers’ interpretation of the rule (on which his whole theory was premised) was that an abandoned channel remained a running stream and did not stagnate so long as water flowed through it at **ordinary high water stage**. He interpreted the quoted rule to mean that **if** the old channel became dry, stagnated and sustained vegetation during the summer or low water months, it had not ceased to be a “running stream” and had not “stagnated” if during the **highwater** or **flood water** seasons the river’s flow again reentered the old abandoned channel. The Master in his ultimate conclusion adopted that same premise.

The testimony of the witness Rodgers containing the basic error of both he and the Master, is found on page 960 of the Transcript as follows:

“Q. So it is your position that in determining the state line here, that the stagnation of the abandoned channel had no effect whatever on the state line?

A. It did when the water ceased to flow ‘**at ordinary high water**’.

Q. Then my question, your answer to my question is ‘yes’, that when the water went down you have dry land and stagnant water, but when it came back up over the years at high stages the water flowed through there. **Your interpretation as to the time of fixing the state line is when the water does not flow through at a stage of ordinary high water?**

A. Yes, sir.

Q. Now, you have based your determination of the location of the state line on that premise?

A. That's right, sir.

Q. Do you know when the 'Bendway Channel' stagnated at low water?

A. No, sir, I do not." (Transcript, page 962.)

Following this rule it was Mr. Rodgers' opinion (adopted by the Master) that stagnation did not occur until after 1955 because during that year he had "seen" a foot of water flowing through there at **18 feet on the Memphis Gauge**" (T. 964). It was their interpretation that stagnation occurred only after no water flowed through the old channel at any time. It had not stagnated and was still a running stream if any water ran through it at flood stage, even though no water might flow during low water seasons of the year.

The Master, as did Rodgers, relied upon the 1917-1918 and 1921 maps which showed water in the "Bendway" (Master's Report, Page 5). They were not controlled surveys, and did not show what stage of the river they depicted or reflect the appearance of the area at low water stage.

He was further impressed by the testimony of Mr. Hurley about his ride through this area on a boat in 1930 (Master's Report, Page 6). The Master commented on Mr. Hurley's assertion as to the extreme high stage of the river at the time that trip was made, even though Mr. Hurley had stated that at low stages he could have walked where the boat was then floating and that his purpose in making the trip in high stage was to locate a route from the river to the levee for use by the Corps of Engineers in event of floods in the area. Further reliance was placed by the Master on the 1929 charts even though they showed at least three places where the chute adopted by him as

the still fluid state line was dry and no water could or did flow through it at the stage at which that chart was made.

The Master then followed the Rodgers' error to its ultimate conclusion, i. e. the formation of "Ike Chute," "Ninety-Six Chute" and the extensions still building downstream prevented the line from becoming fixed as they still flowed during high water stages. If this conclusion be adopted as the law, the entire Arkansas shore line for miles downstream may yet be deprived of access to the channel and areas rightfully belonging to her or her inhabitants awarded to Tennessee.

The State of Arkansas submits that stagnation and sedimentation occurred rapidly in the bed of the abandoned bend and the state line became fixed in the abandoned "Bendway Channel" at the time of **first stagnation**. Thereafter the state line could not move but had become fixed, no longer subject to the caprice of the river. The only competent evidence as to when this occurred was given by Austin B. Smith (an expert witness who testified on behalf of Arkansas). Mr. Smith is without question the foremost authority in this country on the river's behavior and especially avulsions and cut-off problems. His qualifications to properly draw expert conclusions are set forth on pages 44-47 of the record. In the only two (2) original actions involving water boundaries this Court has resolved in recent years, it has followed Smith's analysis. **Mississippi v. Louisiana**, 360 U. S. 5; **Louisiana v. Mississippi**, 384 U. S. 24, 86 Sup. Ct. 1250.

Smith testified that one could rely only upon training and experience to determine what part of "Cow Island Point Bar" remained after the development of the "Pointway Channel" (R-112). There were no maps made during the period 1912-1925, to accurately show it. It was only those references in the Notices to Masters and Pilots that lead to the conclusion that it survived at all.



It was his expert opinion that as the old "Bendway Channel" had been a sharp bend it would be expected to fill in rapidly and stagnate within a couple of years:

"A. I base that on observation and action of the river in a great many locations and particularly in experience with some 16 Mississippi River cut-offs and a number of point bar cut-offs. So, I think we have enough background to make a reasonable judgment that we could expect this channel to be abandoned and **the boundary to become fixed after a couple of years after it was no longer used for navigation.**

Q. You say it would die within a couple of years, by dying, do you mean become stagnated and fully sedimented?

A. It would no longer be navigable and **at low water there would be no flow**" (Transcript, 114 and 117).

There were no controlled maps or charts from 1915-1925, from which the witness could accurately document the date of stagnation or the location of the "Bendway" at the time it ceased to flow. It was necessary to draw on expert knowledge and experience, which peculiarly belonged to the witness, Smith. His ability and reputation in such matters is not unknown to this Court. Based upon his vast experience in similar matters and his knowledge of the river's actions he located **where** and **when** that stagnation occurred and plotted it by geodedic positions, a method of location given approval by this Court in those prior cases. In this case he furnished to the Master an accurate description of that location and plotted it in his Exhibit No. 12. The location of the state line between the two States by Austin B. Smith is correct, and based upon proper application of the law as this Court has declared it.

An analysis of the cases in this connection discloses that this must be so. In the **Arkansas v. Tennessee**, *supra*,

the Court declared that when the water became stagnate and the old channel ceased to be a running stream, the process was at an end and the line became fixed in the middle of the old channel. This rule has never been departed from and has been consistently applied by the Court since that date in all cases of avulsion.

Stagnate has a clear meaning, i. e., “when the water has no motion and does not flow or become foul for lack of motion”; “ceasing to run” would have a similar meaning, i. e., “that the water no longer flows and is not in motion”. There is nothing in this Court’s declaration of the rule which could be interpreted as meaning “stagnation at ordinary high water” or “ceases to flow during high stages”.

It is clear that the Court meant that the line became fixed in the abandoned channel **“the first time the water stagnates”** and when it **“ceases to run continuously”**. To hold otherwise is to declare that the state line is subject to continuous change each time the river rises out of its banks. This would destroy for all practical purposes the very declaration itself. There are no areas between the levees in the Mississippi River Valley on which water does not flow at high water and flood stage. There are no abandoned river channels within that area which do not carry water or which is stagnant during those stages. If high water stages is to be the criteria, the boundary could never become fixed—a result we submit this Court did not contemplate.

The declared legal consequence of the avulsive change of channel are exceptions of the “Rule of the thalweg”—that the main channel of commerce is the boundary between states. To adopt the rule sought by the State of Tennessee here, would permit the exception to override the rule for an indefinite period. The ultimate effect of an avulsion (the fixing of the boundary), cannot be so postponed.

The words "so long as the channel marked by it remains a running stream", must mean just what they say. When the old channel ceases to run, the line becomes fixed. The first time sedimentation in the bed of the abandoned channel reaches the water's edge and blocks its flow, stagnation occurs. The next rise of the river does not revive it; the line has become fixed.

The State of Arkansas submits that the Master erred by failing to find the date on which the abandoned channel became stagnant and ceased to flow at ordinary low water and locating the line between the States as of that time. By extending the date of stagnation from each annual rise the location of that line made by him is based on a totally false premise.

The only competent evidence offered on this point was that quoted herein as given by Austin B. Smith. His location of the line was based upon stagnation at low water stage or date of first stagnation and on which the river stopped its continuous flow. This is the date at which that line became fixed in the OxBow, and the line between these States should be as shown on his Exhibit No. 12, and by his plotting of same by Geodetic positions.

## **II. The Master Erred in Extending the Tennessee Lands Laterally Downstream So as to Deny Arkansas Access to the Navigable Channel**

The State of Arkansas further urges that even this long established rule is, and must be limited in its scope. It is and must apply only to those lands which are contiguous to both the old and new channels, i. e., the lands within and fronting on the "Bendway Channel". It cannot as the Master ruled, extend above or below those points where the two channels meet. Above and below those points the State of Arkansas has again become riparian on its side of the river and the owner of the bed of the stream and all deposits which form thereon.

The flow, or the absence of it, in the old channel can not now affect the right of access to the new channel below their points of juncture.

Why this must be so is disclosed by the judicial history of disputes concerning the boundary line between sister states having navigable streams as their common boundary. Emphasis has always been placed on the right of each state to **demand** and receive its right of access, not only to the river itself, but to the channel of navigation. In **Iowa v. Illinois**, 147 U. S. 1, 13 Sup. Ct. 239, the Court reviewed the authorities on International Law and declared that where navigable streams constitute boundaries between independent states "the interest of each in the navigation on the river requires that the middle of the channel be the boundary to which each state exercise jurisdiction." The reasons giving rise to the rule, and the adoption of it by this Honorable Court, was the vital interest which each state has in access to the navigable channel. The necessity of access to the channel is declared to be the basic rationale for the rule. This Court declared that it is the free navigation of the river, that part on which boats can go and do pass, sometimes called "the Nation's Passway" that "states **demand** shall be secured to them." **Arkansas v. Tennessee**, *supra*.

Emphasis has always been placed by this Court upon that access and it is most succinctly stated in the later case between these two states in **Arkansas v. Tennessee**, 60 Sup. Ct. 1020, 310 U. S. 563:

"The rule of the thalweg rest on the equitable consideration and is intended to safeguard each state **equality of access and right of navigation.**"

The Court has held that as a result of unusual actions of the river in avulsive processes a state might lose a portion of its vested interest in access to the navigable channel along that portion of an abandoned channel to

which it was riparian but which ceases to be a channel after the avulsion. This loss, however, is and must be limited. It is an exception to the rule and cannot override the rule itself.

We submit that **above** and **below** those points at which an abandoned channel meets and intersects the new and active channel, the same right to access remain and no action of the river can deny a sister state its riparian rights in that area.

At these points we have a “live” thalweg (or channel) and a “dead” one. The state line within the “dead” channel remains a fluid one until stagnation but it cannot be permitted to override or push back the riparian rights of the states on the “live” channel.

The ultimate effects of the avulsion cannot extend beyond the avulsion area.

To permit an island or other formation in the river to extend downstream past the extended line of a coterminous owner would permit the denial of that access which the basic rule seeks to preserve.

This is the holding of this Court in **St. Louis Land Company v. Rutz**, 138 U. S. 228, 11 Sup. Ct. 336. There an island appeared on the Missouri side of the thalweg of the Mississippi River. In the course of time, however, the area was moved from the Missouri side to the Illinois side of the channel and began to build by accretion downstream. The Court found that at one time the area lay east of the main channel but after the bar was formed the main and navigable channel of the river was and has since then always run to the east of the bar. “Since they have been formed boats navigating the river have not run between the bar and the bank of the Illinois shore.” Such facts would invoke all consequences of an avulsion such as we have here.

The bar then built lengthwise down the river by accretion. A Missouri owner attempted to follow the building down stream, claiming title to it as accretion to the island as against the owners of the Illinois shore.

There this Honorable Court held that under the common law (which was applicable there as here) a riparian owner held title in fee to the bed of the river to the middle of the stream or as far as the boundary of that state extended and was therefore entitled to all islands or other lands which were formed from the bed of the river east of the thalweg.

“That being so, it is impossible that the owner of an island which is situated on the west side of the Mississippi River and in the State of Missouri, to extend his ownership by mere accretion to lands situated in the State of Illinois. Title in fee to it is vested by the law of Illinois in the riparian owner of the land in that State. We must not be understood as implying that if an island in the Mississippi River remained stable in position while the main channel of the river changed from one side of the island to the other, title to the island would change because it might at one time be on one side and at another time on the other side of the boundary between two states. **The right of accretion to an island in the river cannot be extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river as riparian proprietors.** *Mulry v. Norton*, 100 New York 424, at 436, 3 North-eastern 581.

It appears from the map that the so called Arsenal Island extended as far down the river as is shown on that map which is made from surveys in 1873 and 1884, and if the Plaintiff thereby has lost such newly formed lands and been deprived of access to the river in front of his property, **then all of the riparian**

proprietors down the river as far as the bar have formed or may hereafter form in front of their lands must lose their title and surrender them to the City of St. Louis as part of Arsenal Island.” **St. Louis v. Rutz**, 138 U. S. 228, 11 Sup. Ct. 336.

That the case involved private owners is of no consequence. It was necessary to that decision that the Court declare the boundary between Missouri and Illinois. The rule announced there is equally applicable here.

The controversy now before this Court is identical with that presented in the **Rutz** decision. In both cases we find a small portion of one state cut off by avulsive process and set upon the opposite side of the channel. Though the avulted portion does not lose its identity, the question presented here is the same as in **Rutz**, i. e., how far up stream and downstream may the after effects of the avulsion be continued. In the **Rutz** case this Court held that it would not extend in either direction beyond the lateral extension of the property line of a conterminous owner.

In the case before this Court the facts were not disputed and the Master found as a fact that at the time the river reached its northernmost recession in 1925, the area in front of which both “Ike Chute” and “Ninety-Six Chute” subsequently formed, were part of the domain of Arkansas. Arkansas was the conterminous owner of not only the riparian shore but the bed of the river on both sides of this severed portion of Tennessee.

We submit that the report of the Master and his recommendation to this Court as to the location of the line between these two States is at variance with the rules as heretofore declared by this Court and ignores and does violence to the rights of the State of Arkansas as riparian owner on a navigable stream. As may be observed by the map attached as Appendix, the Master has extended this area some four (4) miles downstream. If his report is ap-



proved Arkansas will thereby lose access to the river to that extent.

All judicial history of such disputes show a resolution by this Court to preserve to each state its right to access to the navigable channel of streams which form its boundaries. In the early years of the Union this right was held dear by all the states. In more recent years the importance of navigation on the stream here involved has increased many hundred fold.

Through the years it has been the rule that because of this interest in navigation the boundary of navigable streams would be the middle of the main channel of commerce. Each state should have an equal right to reach it from her shores. As the channel of commerce moved, the lines between the states moved with it.

Where the channel moved by violent action, as in avulsion, an exception arose to preserve to the owner his lands severed by that process. This exception is fair and equitable as it protects a vested interest which has been severed, not by fault or inattention, but by the violent caprice of a mighty river. It is only fair and just that this be so.

However, as an exception to the general and basic rule it should be limited in its scope to the area actually affected. To permit the State of Tennessee not only to retain what is hers but allow her to deprive Arkansas of her vested rights beyond the actual area of the avulsion is to extend the avulsion rule unduly and does violence to the rule itself.

## CONCLUSION

The State of Arkansas urges that the recommendation of the Master as to the location of the state line should not be approved by this Court.

It is submitted that by interpreting the decisions of this Court to extend the effects of an avulsion to that time

when no water flows in an abandoned channel at any stage, he has unduly extended the time at which the line between the states became fixed. This lead into error in his location of the abandoned thalweg and hence the state line at both termini.

The Master further erred in so extending the accretions to the Tennessee portion lengthwise of the river as to deprive the State of Arkansas of its access to the river for some four (4) miles downstream as shown on the Appendix to this brief.

There was competent evidence before him as to the time and accurately described place the line between these two States became permanently fixed according to the proper rules set forth by this Court. The witness Smith's background qualifies him to make such a determination and his evidence shows that in locating the line he followed the rules this Court has prescribed. His location of that boundary was correct and should have been accepted.

The line adopted by the Master was established by misapplication of those rules and led him into error.

The Master's recommendations should not be approved. The line between these states should be established along a line set forth by Smith and his Exhibit No. 12.

Respectfully submitted

JOE PURCELL

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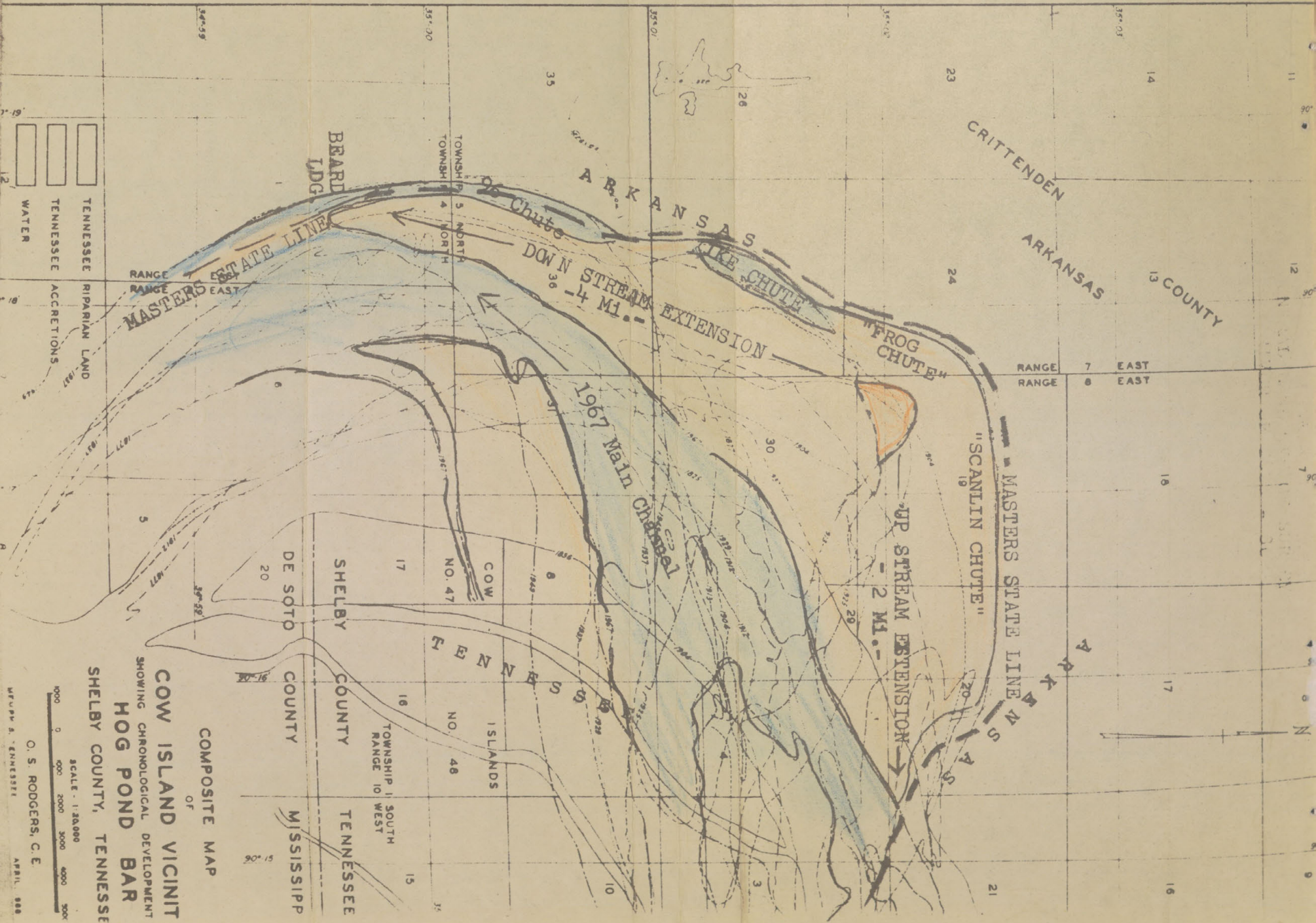
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## **APPENDIX**

